**Appeal Number: TC/2013/02313,**

**01973, 03616, 02548 and 02535**

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

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**CHRISTIANUYI LIMITED** **Appellants**
**FANNING SOCIAL CARE LIMITED**
**HADDASSAH LIMITED**
**DR JACEK TRZASKI LIMITED**
**JONNY TOOZE PHYSIOTHERAPY SERVICES LIMITED**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE GUY BRANNAN**
**JOHN WOODMAN**

**Sitting in public at The Royal Courts of Justice, Strand, London on 15 – 18 September 2015 and 7 December 2015**

**Patrick Way QC instructed by Mazars LLP, accountants, for the Appellants**

**Akash Nawbatt and Kate Balmer, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

**Introduction**

1. These appeals are against determinations to income tax under regulation 80 Income Tax (PAYE) Regulations 2003 SI 2003/2682 and notices of decision as to liability to National Insurance Contributions (NICs) under s 8 Social Security Contributions (Transfer of Functions, etc) Act 1999. The determinations and notices of decision were made for the tax years 2007/2008 to 2009/2010.

2. In short, the owners and sole directors of the appellant companies each provided their professional services to third parties via a personal service company. The question in these appeals is whether the appellant companies were managed service companies within the meaning of the Managed Service Company ("MSC") legislation contained in Chapter 9, Part 2 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"). If the MSC legislation applies to payments that have been received directly or indirectly by the individuals who were the sole directors of the appellants, liabilities to income tax and NICs will arise in respect of which the determinations and notices have been made.

3. We understand that these are the first appeals in which the MSC legislation has been considered. We also understand that there are a number of other appeals concerning this legislation which are pending before the First-tier Tribunal.

4. In addition, if liabilities to tax and NICs arise under the MSC legislation, these tax debts can, in certain circumstances, be "transferred" to third parties, including the so-called MSC provider. In this case the alleged MSC provider is a company called Costelloe Business Services Limited ("CBS"). We understand that in separate proceedings HMRC are seeking to transfer the debt in respect of income tax and NICs to CBS. The initial question, however, in these appeals is whether the appellants are MSCs and, specifically, whether CBS, as an MSC provider, is "involved" with the appellants for the purposes of s 61B(2) ITEPA.

5. In more detail, the appeals are as follows:

(1) Christianuyi Limited ("CL") against regulation 80 determinations totalling £43,818.74 and s 8 notices totalling £27,923.67;

(2) Fanning Social Care Limited ("FSCL") against regulation 80 determinations totalling £17,951.26 and s 8 notices totalling £16,492.52;

(3) Haddassah Limited ("HL") against regulation 80 determinations totalling £10,972.61 and s 8 notices totalling £12,568.13;

(4) Dr Jacek Trzaski Limited ("DJT") against regulation 80 determinations totalling £2,672.13 and s 8 notices totalling £4,400.37; and

(5) Jonny Tooze Physiotherapy Services Limited ("JTPSL") against regulation 80 determinations totalling £10,095.33 and s 8 notices totalling £12,126.62.

6. On 2 October 2013, Judge Poole directed that the five appeals be heard together.

## Evidence

7. We were provided with a number of ring-binders of documents. In addition, Dr Trzaski (owner of DJT), Dr Osamwonyi (owner of CL) and Mr Tooze (owner of JTPSL) produced witness statements, gave oral evidence and were cross-examined. Mr Nick Stevenson and Mr Brendan Walton also produced witness statements, gave oral evidence for the appellants and were cross-examined. For HMRC, Mr Mark Dootson and Ms Leslie Manning produced witness statements and were cross-examined. Mr Robin Wythes, an HMRC officer, produced a witness statement in relation to the legislative background to the MSC legislation, but, because his evidence was not in dispute, he did not give oral evidence.

8. Ms Fanning (owner of FSCL) and Ms Ayodele (owner of HL) did not give evidence.

9. At the outset of the hearing on 15 September 2015, Mr Patrick Way QC, who appeared for all five appellants, made an application to admit witness statements of Dr Trzaski, Dr Osamwonyi and Mr Tooze and supplementary witness statements of Mr Stevenson and Mr Walton into evidence. These witness statements were sent to HMRC on 12 August 2015. The witness statements were provided late, contrary to the directions of this Tribunal. Mr Nawbatt, who with Ms Balmer, appeared for HMRC, noted that there was prejudice to HMRC but adopted a broadly neutral position as regards the admission of the late witness statements.

10. We considered the matter and decided that it was in the interests of dealing with these appeals fairly and justly that the sole owners and directors of three of the appellants should be able to give evidence in relation to their appeals. Moreover since the position of CBS was relevant to the question whether the appellants were managed service companies we considered that the supplementary witness statements of Mr Stevenson and Mr Walton should also be admitted. Nonetheless, we regarded the late filing of these three witness statements as a significant failure on the part of the appellants. We noted that there might be costs implications if it became clear that significant additional costs were to be incurred because of the late admission of this evidence.

## The statutory provisions and issues in dispute

11. The definition of a "managed service company" is contained in s 61B of ITEPA (inserted by the Finance Act 2007). The provisions took effect from 6 April 2007. Section 61B of ITEPA provides as follows:

"**61B "Meaning of "managed service company"**

(1) A company is a "managed service company" if—

(a) its business consists wholly or mainly of providing (directly or indirectly) the services of an individual to other persons,

(b) payments are made (directly or indirectly) to the individual (or associates of the individual) of an amount equal to the greater part or all of the consideration for the provision of the services,

(c) the way in which those payments are made would result in the individual (or associates) receiving payments of an amount (net of tax and national insurance) exceeding that which would be received (net of tax and national insurance) if every payment in respect of the services were employment income of the individual, and

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

(2) An MSC provider is "involved with the company" if the MSC provider or an associate of the MSC provider—

(a) benefits financially on an ongoing basis from the provision of the services of the individual,

(b) influences or controls the provision of those services,

(c) influences or controls the way in which payments to the individual (or associates of the individual) are made,

(d) influences or controls the company's finances or any of its activities, or

(e) gives or promotes an undertaking to make good any tax loss.

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

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

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

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

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

12. In these appeals, the appellants conceded (before the hearing on 7 December 2015, but after the hearing on 15-18 September 2015, where they had contested the issue) that CBS was an MSC provider for the purposes of s 61B(1)(d), but maintained that CBS was not "involved with" the appellant companies. It was common ground that the other requirements of s 61B(1) were satisfied. Therefore, the issue before us was whether CBS was "involved with" the appellants within the meaning of s 61B(2).

13. As regards s 61B(2), HMRC accepted that CBS did not influence or control the provision of the services within the meaning of s 61B(2) (b) and did not give or promote an undertaking to make good any tax loss within s 61B(2) (b). Accordingly, the argument before us resolved into a dispute as to whether any of s 61B(2) (a), (c) and (d) were satisfied, in which case CBS would be "involved with" the appellants with the result that they would then be MSCs.

14. A by-product of issues before us and the way in which s 61B is drafted was that the determinations and notices under appeal, which would be liabilities of the five appellants, turned to a significant extent (but by no means exclusively) on the role played by CBS.

15. This, and the debt transfer litigation, explained why CBS (and in particular, Mr Walton and Mr Stevenson) were concerned with the outcome of these appeals. We understood that CBS or i4 was, at least in part, funding these appeals.

## The facts

16. We summarise our findings of fact as follows.

*CBS and i4 Group Ltd*

17. As we have said, the activities of CBS play an important part in the factual background to this appeal. Messrs Walton and Stevenson were extensively cross-examined in relation to CBS and its associated company i4 Group Ltd ("i4 IoM") and the i4 group of companies generally.

18. The relationship between CBS and i4 group of companies was somewhat opaque. We considered the evidence of Mr Stevenson and Mr Walton in this regard to be evasive and unhelpful.

19. Nonetheless, from the evidence before us we find the following facts.

20. i4 IoM was incorporated in the Isle of Man on 25 February 2005. Its four directors at all material times were Mr Walton, Mr Stevenson, Mr David Pittard and Mr Richard Turnbull, and each owned 25% of i4 IoM's shares.

21. Between approximately 2005 and 2007, i4 IoM offered its clients what was described as an "offshore product" which was aimed at UK-based contractors providing medical services e.g. doctors and other healthcare workers. i4 IoM acted as an intermediary, billing the end-user for the contractor's services in order to minimise UK PAYE and NICs. All of i4 IoM 's employees were based on the Isle of Man.

22. An English company called i4 Group (UK) Ltd ("i4 UK") was incorporated on 25 September 2006 with Messrs Walton, Stevenson, Pittard and Turnbull as its directors and owning, between them, 100% of the share capital. We note that in cross-examination Mr Stevenson, contradicting the evidence of Mr Walton, indicated that

he owned 100% of i4 UK, but we think it more likely that it was owned between the four directors as Mr Walton stated.

23. There was a considerable overlap between i4 IoM and i4 UK (and indeed with CBS) as regards personnel, functions, telephone numbers etc so that it was not always clear which company was carrying out which activity. We refer to i4 IoM and i4 UK collectively as the "i4 group" and where it is not clear which i4 group company was involved we refer simply to "i4".

24. Mr Pittard was the i4 group's Operations Director, whereas Mr Turnbull and Mr Walton were responsible for sales. Mr Stevenson's responsibilities related to IT.

25. The purpose of i4 UK was to promote i4 IoM's offshore product. i4 UK had only two employees in the early stages, both of whom were salesmen based in Tavistock Street, London.

26. There were a number of other companies related to the i4 group, including:

(1) Leinster House Holdings Ltd ("LHH"), a British Virgin Islands company of which Messrs Walton, Stevenson, Pittard and Turnbull were the beneficial shareholders;

(2) Costelloe Directors Ltd ("CDL"), a company which acted as a corporate director for a number of other group companies. The director of CDL was LHH.

(3) Costelloe Management Ltd ("CML"), which was set up to manage the i4 group's "composite company" product (see below).

(4) Costelloe Secretaries Limited ("CSL"), a company which acted as the company secretary for various i4 group and client service companies.

(5) i4 Pay Partners ("IPP"), a company set up to provide what was known as an "umbrella" product and which was run out of the Isle of Man. Mr Stevenson ran the day-to-day operations of IPP.

*The Composite Company product – pre-July 2007*

27. Prior to July 2007, the i4 group offered what was described as the "composite company" product, initially through i4 UK and then through CML. The composite company product was offered and run from i4 IoM's offices in the Isle of Man.

28. The product involved individuals providing their services to third parties (e.g. the NHS) through the same "composite" company. The individuals were shareholders of this company which was controlled by a "managed service company provider". i4 UK operated approximately 30 of these composite companies each of which had between 20 to 30 individuals providing their services.

29. CML also owned shares in the composite companies although the majority of the shares were held by the individual clients. CML ran the composite companies with the individuals having no involvement in the day-to-day running of the companies.

*The Managed Service Company legislation*

30. The proposed MSC legislation, with which these appeals are concerned, was announced on 6 December 2006 and was intended, *inter alia*, to counteract composite companies. The MSC legislation was introduced with effect from 6 April 2007. If the MSC legislation had not been introduced, the i4 group would have continued to use their composite company model.

31. The proposed MSC legislation, however, prompted the i4 group to develop a new product which would be put in place by April 2007 to enable existing composite company clients to switch over onto the new product which, it was intended, would not be caught by the new rules. This new product became known as the Gold Business Service ("GBS") and was intended to be used by personal service companies i.e. companies that were solely owned each individual client (who had previously been composite company clients) and who would also act as the director of their own personal service company.

32. The GBS was developed by Messrs Walton, Stevenson, Turnbull and Pittard between late 2006 and April 2007.

*CredEcard and development of the Gold Business Service Product*

33. In January 2007, the i4 group approached a company called CredEcard, a company which provided online banking facilities, and which was backed by the Newcastle Building Society. The i4 group had had a relationship with CredEcard since 2006.

34. CredEcard was told that the i4 group intended to convert its existing clients from composite companies to personal service companies. The i4 group asked CredEcard to create a new banking facility tailored to the new personal service company product. At a meeting with HMRC on 10 August 2010, CredEcard described the products it provided to i4 group's clients as being very different from the accounts which it ordinarily provided to clients.

35. Mr Stevenson's evidence was that CredEcard offered the ability for clients to open up accounts quickly without having to wait three weeks for a high street bank account to be opened. We were, however, provided with no evidence concerning the length of time it took to open an account with a conventional bank and make no finding as to whether Mr Stevenson's evidence was correct.

36. The i4 group told CredEcard that it wished to receive an "automatically generated email… noting the payment" when the individual contractor's income was received by CredEcard. Initially it was envisaged that money received by CredEcard would be transferred in three different ways: (1) a transfer of funds to a "reserve" account held by i4 group with CredEcard to cover tax liabilities of the personal service company; (2) a transfer to i4 group's account with CredEcard in respect of i4 group's fees; and (3) the balance of the funds would be transferred to the contractor's personal account.

37. CredEcard set up a number of accounts, including an i4 group "fee account" (for the payment of fees charged by i4 group to the personal service companies), a "tax account" (an i4 group account in which it would hold amounts in respect of the personal service companies' tax liabilities pending payment to HMRC). In addition, CredEcard set up a large number of accounts for each individual personal service company ("PSC accounts"). These accounts had generic login details. CBS would gather all the necessary information from the client (including the application form for the CredEcard account) and submit it to CredEcard electronically, thereby opening the account.

38. The i4 group took legal advice from a firm of solicitors, Blake Lapthorn, in relation to the GBS. There was some uncertainty as to the exact date on which the advice was taken but we consider that it was taken at some time in January or February 2007 (rather than March 2007 as Mr Walton recollected). Blake Lapthorn's advice was that the GBS should be run by an entity separate from the i4 group. It was following this advice that CBS became involved.

39. i4 UK wrote to all its existing customers on 26 February 2007 advising them of the new MSC legislation and the withdrawal of the composite company product stating that the MSC legislation would "make the use of this type of structure unattractive.". The clients were offered a choice between moving to a personal service company or an "umbrella company."

40. The letter advised clients that a personal service company would be independently owned and controlled by the client but that i4 UK had "developed a service that will allow you to have your own company and outsource the complex administration and accounting function to us." The umbrella company was described as: "a service where full tax and national insurance is deducted from earnings, with allowable business expenses offset against your taxable income." In other words, as a vehicle to minimise employment taxes and NICs, an umbrella company was an unattractive option.

41. The letter continued:

> "Over the next few weeks you will need to consider your position and make a choice on how you wish to offer your services in the future. If you choose to use a PSC it is important to remember that your net income is likely to be very similar to that from your current composite company."

42. Finally, the letter informed clients that all company services would be carried out in the UK by CBS.

43. i4 UK sent a second letter to its clients on 21 March 2007. The letter told clients that i4 group had finalised the services which it was intending to offer to its current and future clients. Essentially, the letter offered the same choice of alternative services i.e. the personal service company product now renamed the "Gold Personal Service" (and later to be called the GBS) or, alternatively, an umbrella company. Mr Stevenson accepted that the way in which the letter was written was clearly intended

to persuade clients to accept the personal service company option. This was described as being "very similar" to the composite company model.

44. The clients were mainly professionally qualified practitioners working in the health and social care sectors. There were a number of doctors, health care workers and social workers. Many of them had previously been working directly for the NHS.

45. In line with i4 group's expectations, almost all of its composite company clients moved over to the new personal service company model as a result of the letters in February and March 2007.

*Costelloe Business Services Ltd ("CBS")*

46. CBS was originally a dormant company within the i4 group – its name was changed to Costelloe Business Services Ltd on 5 March 2007.

47. From 1 August 2007 to 25 March 2008, the director of CBS was CDL. From 25 March 2008 1 January 2009, the director was CML. CSL was the company secretary of CBS from 5 September 2006 to 25 September 2008.

48. The ultimate beneficial owners of CBS were Messrs Walton, Stevenson, Turnbull and Pittard, although the exact shareholding relationships remained obscure.

49. CBS had no employees of its own between April 2007 and the end of September 2007. It is unclear how many employees CBS engaged after that time; certainly a number of its functions were run on a day-to-day basis by staff in the Isle of Man. The CBS telephone number was the same as that used by other i4 group companies and CBS appears to have used email addresses interchangeably with i4 group companies. Mr Stevenson's evidence was that CBS had up to 15 members of staff. This, however, appeared to contradict a note of a meeting on 11 February 2009 between CBS and HMRC (attended by Mr Walton and Mr Mian on behalf CBS) at which Mr Mian stated that CBS employed 9 people. We find that CBS employed no more than 9 members of staff.

50. Following the receipt of legal advice by i4 group, Mr Mian was employed in or around September 2007 to work in CBS's business as an accountant. He was a junior accountant with two years' post-qualification experience. In addition, eight other members of staff seem to have worked in CBS's business including an account manager, two assistant account managers, three individuals dealing with payroll and two dealing with customer service.

*The Gold Business Service (GBS)*

51. In respect of the periods under appeal, the GBS was CBS's personal service company product. It was used by the five appellants. All but five of CBS's clients used the GBS. As Mr Stevenson accepted, the GBS was a standardised product and was offered to clients on standard-form documents.

52. CBS's clients were either transferred over in 2007 from the composite company product or they were referred by employment agencies who dealt with individual clients. CBS did not meet the individual clients and any contact was either by letter, email or over the telephone. Any initial contact over the telephone was with a salesperson. Mr Stevenson accepted that there was no evidence that CBS discussed with individual clients whether the GBS was, in fact, suitable for them. Moreover, Mr Walton accepted that Mr Mian did not give clients bespoke advice as to whether the GBS was appropriate for them.

53. Clients wanting to sign up for the GBS were sent a Registration Form

54. We were provided with a two versions of the Registration Form although it was not entirely clear which versions were in use at which periods, but we describe them in the approximate order in which we infer that they were used. The versions of the Registration Form were very similar and we draw attention in the following description of its terms to variations in wording which we consider to be material.

55. The Registration Form asked the client to tick a number of boxes indicating the services that the client required and to complete and sign the appropriate forms. For example, the first box on the Registration Form stated: "I require a new Limited Company to be incorporated, and have completed and signed the enclosed Form 10."

56. The second box asked CBS to supply a CredEcard "Instapay bank account" for their new or existing limited company. The text continued:

> "I understand that this account will be for the sole use of the Limited Company and that I will have complete control of the account. I authorise you to deposit any collected funds directly into this account and that those funds will be cleared and available immediately you deposit them. I will complete and sign the Business CredEcard Application form."

57. The third box contained arrangements for the payment of CBS's "Accounting Services fees". Clients were offered a choice of paying these fees by means of the CredEcard account or paying them by credit/debit cards (in which case there would be a 5% surcharge). As regards payments via the CredEcard account the form stated that there would be no 5% surcharge and:

> "I hereby authorise Costelloe Business Services Ltd to collect the fees automatically via direct debit from this account."

58. A later version of the Registration Form (attached to Mr Stevenson's witness statement) did not contain this wording but simply attached a CredEcard debit mandate form. This version of the Registration Form also contained the 5% surcharge for payment of CBS's fees made otherwise than through a CredEcard account. As regards the payment of taxes, the form stated:

> "We can collect these taxes from your bank account on the date each payroll is processed and pay them as they become due."

59. This later version of the Registration Form offered an option to clients under which CBS could: (1) collect taxes from the client's CredEcard account and pay the taxes to HMRC; or (2) the client, having first been notified by CBS of the taxes which needed to be paid and the due date for payment, could itself pay the taxes directly to HMRC. As regards the former option the form stated:

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

60. It should be noted that the above wording suggests that CBS would hold the client's funds in an interest-bearing "client account". This did not, in fact, happen. Instead, CBS held the money in one of three bank accounts in its own name and did not account to the clients for interest received.

61. The Registration Form required the applicant to fill in details ("Client invoicing details") of the third-party, usually a recruitment agency, to which invoices should be sent on behalf of the personal service company.

62. As regards "Payroll requirements", the form contained the following box:

| Name | Position in company | Salary/wage required | Frequency |
|---|---|---|---|
| | | □ Minimum wage (tick if applicable)<br>□ Specified amount £….. | Weekly/monthly<br>Weekly/monthly |

63. The later version of the Registration Form offered three choices in relation to "Payroll Requirements". These were: 1) "Minimum wage"; 2) "Most tax efficient (ensure you have our advice on this)"; and 3) "Fixed amount of £….."

64. Once the Registration Form had been completed and returned by post, clients were sent a Welcome Letter which enclosed a Letter of Engagement for signature by the client. The Welcome Letter and the Letter of Engagement thanked the client "for appointing us [CBS] as your agent." The Letter of Engagement set out the terms of the contract between CBS and the client.

65. The Letter of Engagement dated 21 March 2007[1] stated:

> "**Your instructions**
>
> I understand that you require us to provide the services as detailed in Appendix A [see below], for which we will charge 5% plus VAT (which equals 4.76% after tax] per invoice transaction….
>
> …
>
> **Factoring services**
>
> You appoint Costelloe Factoring Services Ltd (CFSL) as your invoice factoring agent. CFSL will be assigned the benefit of your account and will collect the amounts payable from your debtors. Upon receipt, the amounts will be paid directly into your company bank account, less any monies advanced on account. The fees for this service are included in your fees as outlined above.
>
> **Billing and Payment**
>
> We will invoice your company for the agreed fees and you agree for these to be collected via a direct debit from your company bank account.
>
> **Statutory payments**
>
> We will calculate your PAYE, National Insurance contributions, Corporation Tax and VAT (if applicable) liabilities and you agree for these to be collected via direct debit from your company bank account and paid to the relevant authority on the due dates. "

66. Attached to the Letter of Engagement was Appendix A was entitled "Nature of Services" which described the services provided by CBS, as follows:

> "A. BUSINESS SERVICES
>
> We will provide the following as requested:
>
> a) A registered office in England and Wales
> b) A Company Secretary
> c) Company email account
> d) Mail forwarding facilities
>
> B. ACCOUNTING SERVICES
>
> As your appointed agent we will:
>
> a) Raise sales invoices on instruction
> b) Reconcile receipts by outstanding invoices
> c) Maintain detailed company accounts as required by the Companies Act

[1] The Letters of Engagement of Mr Tooze (JTPSL), Ms Fanning (FSCL) and Dr Osamwonyi (CL) dated 30 August 2007, 21 March 2007 and 30 July 2007 were in this form. Instead of a percentage of each invoice the fee specified in the letters sent to Mr Tooze and Dr Osamwonyi stated that the fees charged by CBS would be a fixed amount plus VAT "as and when work is done." There was no letter of engagement in respect of Ms Ayodele (HL) produced in evidence.

d) Prepare the annual accounts for approval by you

C. PAYROLL SERVICES

We will provide the following payroll service:

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

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

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

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

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

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

a) PAYE and NI Contributions

b) P 35 Employers Annual Return

c) P 14 End of Year Summary

d) P 60 Employee End of Year Summary/certificate

e) P11D

f) P 45 Employee Leaving Certificate

D. VAT RETURNS

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

E. ANNUAL ACCOUNTS

As your appointed agent we will:

a) Submit the annual accounts to the Registrar of Companies

b) Complete and submit the company's annual return

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

d) Maintain statutory books

e) Compute the Corporation Tax due

f) Prepare the company tax return (CT 600)

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

67. A later version of the Letter of Engagement dated 18 December 2007[2] opened by thanking the client "for appointing us as your accountant." Again, the letter set out the terms of the contract between CBS and the client. The letter stated that CBS would provide the services as detailed in Appendix A (which was in identical form to the Appendix A referred to above). On this version of the Letter of Engagement, however, the fees were set out in Appendix B. The letter stated that the fees would be apportioned over the number of trading periods in the year and that CBS "will invoice your company as and when work is done."

68. Appendix B contained fixed fees for various company filings and secretarial fees (amounting to £95). As regards "Accounting Fees" an "annual" fee of £1,250 was specified for:

- "Raising invoices to clients
- Reconciling receipts to your bank account to invoices
- Processing your payroll and sending you payslips and summary accounts
- Payment of PAYE/NIC (held in reserve) to HMRC **OR** Instruction to you to pay PAYE/NIC (not held in reserve) to HMRC
- Reconciling company bank statements
- Preparing up-to-date financial accounts on an ongoing basis"

69. In addition, the £1,250 fee covered:

(1) "Preparation of Annual accounts to be signed by the Directors";

(2) "Payment of Corporation Tax (held in reserve) to Inland Revenue [sic] **OR** Instruction to you to pay Corporation Tax (not held in reserve) to Inland Revenue;

(3) "Submitting Annual Accounts to Companies House"

(4) "completion and submission of company CT – 600 Tax Return".

70. The annual accounting fee, when added to other fixed fees, amounted to £1,345. Appendix B showed the weekly (48 weeks) apportioned annual charge as £28 and the monthly charge (12 months) as £112, in both cases exclusive of VAT.

71. After signing up with CBS, individual clients received occasional letters or emails, e.g. concerning the filing of their tax returns. Mr Stevenson accepted that there was "very seldom contact." This was confirmed by Dr Trzaski who said that there was "virtually no contact between the two businesses" and by Mr Tooze who said that after the initial telephone conversation he "didn't speak to anyone."

[2] Dr Trzaski's Letter of Engagement dated 10 March 2008 was in this form.

*Operation of the Gold Business Service*

72. CBS bought large quantities of off-the-shelf companies in anticipation of hundreds of clients moving across from the composite company model to the GBS. Between 16 January 2007 and 21 March 2007 approximately 349 companies were incorporated by CBS to be used as personal service companies by clients.

73. As can be seen from Appendix A above, company incorporation was (at least from 21 March 2007) offered as a standard feature of the GBS. Existing composite company clients were told that "in anticipation of you selecting our Gold personal service the company XXXX has been reserved especially for you." As we have seen, new clients were given an option to tick the box on the Registration Form allowing them to choose to have a company set up by CBS or using their existing limited company.

74. In total, CBS incorporated approximately 1,400 new companies (according to Mr Dootson's evidence) of which approximately 1,000 were used by CBS to provide personal service companies to clients in the period 6 April 2007 to 31 March 2010. Only approximately 39 clients used pre-existing personal service companies.

75. Most of these newly-formed companies used CBS's address as the address of their registered office. On the notes accompanying the Registration Form, clients were advised to leave the address section blank if they wanted to use CBS's address for this purpose. There was no evidence of any advice given by CBS to individual clients as regards the different options available to them in respect of choosing a registered office. Most clients used CBS' address as the registered office and many were unaware that they had a choice to use another address. Indeed, Dr Trzaski was unaware that he had a registered office or that he needed one.

76. Similarly, almost all clients used CSL as the company secretary. Again, clients were advised that they should leave the relevant section blank if they wanted to use CSL as their personal service company's company secretary. There was no evidence of any guidance given by CBS to clients about the options available in respect of appointing a company secretary. Dr Trzaski was unaware that he had needed a company secretary or, indeed, that he had one.

*(a) Operation of CreEcard accounts*

77. All GBS clients were offered a CredEcard account. A "Company Handbook" (which the Letter of Engagement purported to enclose)[3] informed clients that CredEcard had been opened for their companies. There was no evidence of any discussion with individual clients about different banking options (although clients were, as we have seen, offered the option of paying CBS's fees by debit or credit cards subject to a 5% surcharge).

[3] There was some doubt whether the Company Handbook had been enclosed; none of the three clients who gave evidence (Dr Trzaski, Mr Tooze and Dr Osamwonyi) recalled receiving it. Nonetheless, it appears to have been sent to Mr Tooze.

78. In its brochure, CBS told clients that a bank account for the personal service company could be set up "within 24 hours." All CBS's clients were sent a CredEcard account application form as part of a Welcome Pack.

79. The process of opening a CredEcard account was automated and was "devolved" by CredEcard to CBS. CBS would do the identification checks on both the individual account holder and the company and would then send the information "in bulk format" electronically to CredEcard to set up the accounts. CBS sent CredEcard an electronic file containing the necessary information to open up the account.

80. Almost all CBS's clients used a CredEcard account. As at August 2010, CBS's clients had approximately 1,000 accounts. CBS's list of clients who had their own pre-existing bank account showed that only 11 clients out of over 1,000 clients used their own bank account.

81. Initially, clients' fees were paid directly to a "factoring arm", Costelloe Factoring Services Limited ("CFSL"), which then paid the sums to the clients' CredEcard accounts. This dealt with the problem that the individual CredEcard accounts did not support sort codes so that the agencies could not pay directly into the CredEcard accounts of the various personal service companies. Mr Stevenson's recollection was that arrangement lasted until "about" September 2007. Mr Dootson's evidence based on information HMRC had received from CredEcard was that CFSL received payments from the agencies (and then on-paid the monies to the individual personal service company CredEcard accounts) until 28 July 2007. We consider that Mr Dootson's information was more likely to be correct. Mr Dootson's information was more precise whereas Mr Stevenson's recollection was somewhat vague. There was, however, no evidence to support Mr Walton's claim that CSFL had been only use for "a few" clients – a claim which appears inconsistent with the sort code problem mentioned by Mr Stevenson which appeared to be general in nature.

82. The Registration Form signed by Dr Trzaski on 28 February 2008 clearly envisaged payments being made to the factoring company. The Registration Form stated:

> "To ensure prompt payment, collection of all invoice amounts will be carried out by Costelloe Factoring Services Limited (CFSL). If you do not require CFSL to factor your invoices, please tick here."

83. It was not clear whether the amounts paid by CSFL to the clients' CredEcard accounts were paid net of CBS's fees and sums in respect of taxes. The Letter of Engagement stated that CFSL would pay on the fees "less any monies advanced on account." A number of the appellants' CredEcard accounts show CBS's fees being withdrawn in the period prior to September 2007 and, therefore, we think it more likely that CFSL paid the fees on to the clients' CredEcard accounts before making a deduction in respect of fees and taxes.

84. The relationship between CSFL and CBS was not explained to us, although we infer from the name and its participation in the payment chain that CSFL was in some way associated with CBS.

85. There was conflicting evidence as to the nature of CBS's access to its clients' CredEcard accounts.

86. CredEcard told HMRC[4] that CBS could withdraw funds from a client's CredEcard account by means of the automated process "Instapay". The relevant paragraph of the note read as follows:

> "13. NH [CredEcard representative] said that CBS had access to the CredEcard accounts to debit funds held to take their fees and statutory taxes. This access was gained by an electronic process known as 'file format'. CredEcard could not validate an amount being withdrawn as they were not aware if it was the correct amount or not. MF [HMRC representative] said in his view CBS could take out whatever funds they wanted to from the account and CredEcard would have no say in the matter. MJD [Mr Dootson of HMRC] observed that CredEcard had no veto of how much the funds that CBS could draw and NH said they could take whatever was present *providing there was a mandate and sufficient funds were present*." (Emphasis added)

87. It seems to us clear from the final sentence that the CredEcard representative was referring to the fact that CBS could withdraw funds from a client's CredEcard account provided there was a mandate in place. We deduce from the context of the discussion that the reference to "a mandate" was a reference to the CredEcard debit mandates introduced from September 2007.

88. The note of the telephone conversation continued:

> "14. [Mr Dootson] referred to a note of a meeting with CBS… [which] suggests to him that CBS or i4 would get warning that the funds had been credited to the client PSC bank account in the form of an email.
>
> 15. [CredEcard representative] explained that they did receive notification via a 'file format' that would be generated and sent to a nominated email address at CBS with a list of all the accounts for which funds had been credited on the day that they were credited. [CredEcard representative] said that this is the way that CBS became aware that funds had been placed into the accounts by the agency.
>
> 16. CredEcard bank account application forms could be lodged electronically by CBS via the 'file format' and the automated process INSTAPAY (functionality to allow agency payroll) was used to enable CBS to withdraw from the accounts. CBS had their own logon and password to enable them to gain access and take funds from each client account as permitted by the debt [*sic*] mandate.

[4] According to a note of a telephone conversation between HMRC and representatives of CredEcard, by then owned by Contis Group Limited, on 15 August 2014.

> 17. CBS did not have view facility to the CredEcard accounts but had access to withdraw funds."

89. Later in the note of the telephone conversation it is recorded:

> "CBS accessed the funds at their own discretion by file format request (a bit like Excel) to withdraw both their own fees and also the statutory taxes."

90. In our view, CredEcard were indicating that CBS could withdraw funds from a client's CredEcard account in accordance with a mandate (we take, as we have said, the reference to a "debt mandate" to be a reference to a "debit mandate"). It is not clear to us that the CredEcard representative was indicating any more than that the logon and password was only a logon and password for CBS's own account which, in accordance with the process described in the note, allowed CBS to withdraw funds from the client's CredEcard account in accordance with the mandate.[5]

91. Mr Stevenson categorically denied that CBS was provided with logon details and passwords to enable them to gain access to the CredEcard accounts of the client personal service companies. He said that the only logon and passwords that CBS had in relation to were in respect of its own accounts.

92. Dr Trzaski and Dr Osamwonyi stated in their witness statements that they alone had access to their respective CredEcard accounts. Those statements were not directly challenged in cross-examination. As regards Dr Trzaski, he was asked in cross-examination:

> "Mr Nawbatt: But if we look at that letter of engagement at…tab 30, you are not given a choice, are you? If you are going to use the Gold business service you have to sign the CredEcard debit mandate form. Correct?
>
> Dr Trzaski: Correct.
>
> Mr Nawbatt: So if you are going to use the Gold business service you had to authorise CBS to access and deduct the funds in your account.
>
> Dr Trzaski: Yes, correct."

93. It seems to us, that Dr Trzaski was being asked about the CredEcard debit mandate form. He was not being asked, in relation to the reference to "access", whether CBS had login details which enable them to directly access his CredEcard account. Moreover, Dr Trzaski subsequently confirmed that he was not aware of money being withdrawn from his CredEcard account outside the terms of the letter of engagement.

94. On balance, we consider that Mr Stevenson's version of the access enjoyed by CBS (taken together with the evidence of Dr Trzaski and Dr Osamwonyi) is more

[5] Although as we have noted, in the period between March 2007 and September 2007 it appears that CBS did not forward to CredEcard the written copies of the application forms which contained an authority from the client to CBS to debit the client's CredEcard account in respect of fees and taxes – albeit that this authority was not addressed to CredEcard.

likely to be correct. Mr Stevenson's evidence was evidence given from his first-hand knowledge. We have some concern about the accuracy of the evidence of Dr Trzaski and Dr Osamwonyi because, although we considered them both to be honest witnesses, neither witness seemed fully conversant with the mechanics of their relationship with CBS. Nonetheless, cumulatively, the evidence of these three witnesses seems to us to outweigh the reported comments attributed to CredEcard the representative in the note of the 15 August 2014 telephone conversation. In any event, the login and password details referred to in paragraph 16 of the note of the telephone conversation could perfectly well refer to the login and password details for CBS's own CredEcard account. In other words, CBS logged into its own CredEcard account and then made the debits from its clients' accounts by file format. Those comments in the note of the telephone conversation are, of course, hearsay evidence and, whilst admissible, it is up to this Tribunal to determine the weight to be given to that evidence as well is to determine their meaning. We have also taken into account the fact that we have concerns about the reliability of Mr Stevenson's evidence. Nonetheless, in this instance, taking all the evidence into account, we consider that Mr Stevenson was correct and that CBS did not log into the client's own account but rather logged into its own account and made withdrawals from the client's account via the Instapay system in accordance with the debit mandate (at least where there was a debit mandate in later periods).

95. Furthermore, we consider that a note of a meeting (prepared by HMRC) between CredEcard and HMRC on 10 August 2010 was consistent with this conclusion. In that note a CredEcard representative stated:

> "22) As regards account numbers and passwords, [the CredEcard representative] was quite categorical that these would only ever be communicated to clients directly by email and are encrypted."

96. We also find that CBS could not physically view a client's CredEcard account – a point made by Mr Dootson in his evidence and confirmed in the 15 August 2014 note of the telephone conversation between HMRC and CredEcard referred to above. It seems to us that this is consistent with the conclusion that CBS could not log into a client's CredEcard account i.e. as if it were the client.

97. Finally, we should add that at the end of each month CBS received from CredEcard a list of the accounts and the sums that had been debited from or credited to those accounts.

98. When CBS became aware that funds were held in a client account it used the "Instapay" system to withdraw from the accounts both its fees and any statutory taxes in the manner we have just discussed. The sums withdrawn were credited to one of two CBS accounts with CredEcard – one for taxes and the other for fees.

*(b) CredEcard mandates*

99. There was also a dispute in relation to the evidence concerning whether,, between April 2007 and 24 September 2007, any mandates were in place between

CBS and its clients in relation to the clients' CredEcard accounts authorising CBS to withdraw funds from those accounts.

100. We have already outlined the terms in which the Registration Form authorised CBS to debit from its clients' CredEcard accounts amounts in respect of fees and taxes.

101. In August 2007, however, CBS took further legal advice from Blake Lapthorn who recommended that CBS should ensure that its clients had complete control over the CredEcard accounts. CBS approached CredEcard asking for a confirmation to this effect. CredEcard, however, were unwilling to give this confirmation, having taken their own legal advice. In an email dated 13 September 2007, CredEcard stated:

> "Our solicitors are very reluctant to confirm we can offer this letter to your contractors/agencies as i4 do have a certain amount of access to these accounts and hence we cannot state categorically that the account holder has complete control over the accounts.
>
> Unless we have a signed authority from the Director of the company giving you this access and can then state the same we have been advised not to include this statement in the letter.
>
> I am happy to continue with the letter stating an account is opened in the company's name but cannot include any further statement regarding complete control."

102. The following day, CBS sent an email to CredEcard indicating that it wanted to "formalise" the access to client CredEcard accounts and suggested that they should introduce:

> "a form which we would like the contractor to sign and send back to us. We would then send this form onto you [CredEcard]… for your records."

103. CBS described the form which it had devised as "a direct debit" mandate form. CredEcard told HMRC that the mandate forms were not, strictly, direct debits, although the reasons for these statements (made on two occasions) were not explained. We expect, however, that one reason why CredEcard may not have regarded the mandate as a direct debit was because the client was not informed in advance of the amount and date of the debit. The evidence was that the clients only found out how much had been debited from their accounts when they received their payslips i.e. after the debits had been made.

104. On 24 September 2007, CBS wrote to all its clients stating: "As you know, you have provided us with instructions to debit your account each time a payroll is processed for your company.…" and requested that the clients now sign the mandate form "for their records." The mandate form was addressed to CredEcard. As we have discussed, until the direct debit mandate was introduced in September 2007, we have seen no evidence that persuades us that there was a mandate given to CredEcard authorising CBS to debit its clients' CredEcard accounts. After September 2007 the mandate form was included in the Welcome Letter to all new clients and existing

clients received a letter requesting them to complete the mandate. Clients failing to return the mandate form received reminders telling them that it was "extremely important" that they should sign and return it. It took 3 to 4 months for all the forms to be collected, during which time CBS continued to debit amounts owed to it from the clients' CredEcard accounts.

105. It is not clear to us on what basis CredEcard permitted CBS to debit amounts from its clients' CredEcard accounts before the debit mandate was received by CredEcard. There was no direct evidence that, before debit mandates were received by CredEcard on or after September 2007, the authorisation by the client to CBS to debit the client's CredEcard account in respect of fees and taxes contained in the Registration Form was communicated by CBS to CredEcard. The note of the meeting between HMRC and CredEcard on 10 August 2010, contained the following information about the applications to open accounts:

> "25) [CredEcard representative] confirmed that all the accounts are held in the company name and she confirmed that CredEcard should hold copies of the applications to open accounts. [Mr Dootson of HMRC] asked in that case, why when he had sent [*sic*] the customer mandates had CredEcard not been able to provide them. [CredEcard representative] said she assumes that when all these accounts were set up (originally with i4) in April 2007 CBS didn't pass the applications over but this was insisted on for subsequent new account applications."

106. It seems clear from this paragraph that the authorisation contained in the Registration Form referred to above, was not initially passed over to CredEcard by CBS.

107. Furthermore, appears that in the early months, possibly until September 2007, CredEcard did not receive copies of the written CredEcard account application forms completed by the clients. In a meeting between representatives of HMRC (including Mr Dootson) and representatives of CredEcard on 10 August 2010, CredEcard confirmed that it should hold copies of the applications to open accounts. The note records the following:

> "[Mr Dootson] then referred to the case of [redacted] and [redacted]. The mandate was signed 28/9/07. Yet the account had been operational since April. The same occurred with [redacted] and to [Mr Dootson] as a layman this looks like CredEcard allowed CBS to move funds without any authority and surely this couldn't accord with banking rules.
>
> [CredEcard representative] said they understood the problem and it all came about because of delays at CBS in getting the paperwork to CredEcard. [CredEcard representative] said they kept pursuing these issues with CBS and in the end if they didn't produce the goods, the account could not be used. [Another CredEcard representative] said that for the later companies it was a requirement to have the mandate before any transactions to CBS could be affected by [*sic*] accepted things drifted a bit in the early days."

108. This seems a clear acceptance by CredEcard that in the early days CredEcard allowed funds to be transferred from a client's account at the instigation of CBS without a mandate from the client. We also infer that the position was only regularised when mandates were introduced from September 2007.

109. The mandate introduced on or after September 2007 permitted CBS to deduct "the Fees and Statutory Taxes as advised on your Pay Advice on the day your Pay Advice is generated and sent to you." CBS could withdraw any amount up to the balance standing to the credit of the account. There was, however, no suggestion that CBS abused this authority by withdrawing amounts which were not owed to it or in respect of which (after September 2007) the clients had authorised in accordance with the direct debit mandate.

110. Mr Way suggested that there was one example of a mandate, relevant to one of the appellants in these appeals, which predated 24 September 2007. This example consisted of a letter from CBS to Mr Tooze dated 12 September 2007 and was headed "Direct Debit Rejection Notice." The letter stated: "We write to advise that your direct debit… for the following amounts was rejected due to insufficient funds being in the above company account."

111. In our view, however, that letter did not evidence a mandate given by the client to CredEcard. Instead, the letter simply evidences the fact that there was an agreement between CBS and the client in the Registration Form (dated 29 August 2007 in the case of JTPSL) as described in paragraph 53 *et seq* above. The letter evidences the fact that there was insufficient money in the client's account to satisfy the amounts which CBS wished to withdraw – it says nothing about the authority to debit amounts *vis a vis* CredEcard. It was not until 2 October 2007 that Mr Tooze, on behalf of JTPSL, signed a debit mandate addressed to CredEcard. We should record that there were numerous withdrawals from JTPSL's CredEcard account in the period 29 August 2007 to 2 October 2007 (and thereafter) in respect of CBS's fees.

112. As regards the other appellants, no Registration Form was available in respect of CL. Dr Osamwonyi stated that CL was set up by CBS in July 2007. A Letter of Engagement was signed by Dr Osamwonyi on 31 July 2007 and we, therefore, infer that a Registration Form was signed by Dr Osamwonyi on behalf of CL in July 2007 on some date prior to 31 July 2007. A CredEcard debit mandate was signed Dr Osamwonyi on behalf of CL on 26 September 2007. In the period from 31 July 2007 to 26 September 2007 (and thereafter) there were numerous withdrawals from CL's CredEcard account in respect of the payment of CBS's fees.

113. In relation to HL, the Registration Form was dated 8 November 2007 and the debit mandate addressed to CredEcard was dated 23 February 2008. The Registration Form indicated that Ms Ayodele wished to be paid a salary equal to the minimum wage on a weekly basis. In the period from 8 November 2007 to 23 February 2007 (and thereafter) there were numerous withdrawals from CL's CredEcard account in respect of the payment of CBS's fees.

114. No Registration Form was produced in relation to FSCL. There was, however, a Letter of Engagement dated 28 March 2007 and a CredEcard direct debit mandate dated 26 September 2007, both signed by Ms Fanning. In the period from 13 April 2007 to 26 September 2007 (and thereafter) there were numerous withdrawals from FSCL's CredEcard account in respect of the payment of CBS's fees. We infer that Ms Fanning signed a Registration Form on behalf of FSCL in or around March 2007.

115. In relation to DJT, there was a completed Registration Form, signed by Dr Trzaski, dated 28 February 2008 and a CredEcard debit mandate form dated 13 March 2008. The Registration Form did not indicate whether Dr Trzaski wished to be paid salary on the minimum wage model or in some other amount – the relevant section of form was left blank. Nonetheless, Dr Trzaski was paid on the minimum wage model. The first withdrawal from D JT's CredEcard account in respect of CBS's fees was 4 April 2008.

116. Accordingly, we conclude that prior the completion of CredEcard debit mandates CBS could withdraw funds from its clients' CredEcard accounts (including those of JTPSL, CL, HL and FSCL) without CredEcard requiring a mandate from the clients. DJT was an exception. In this case CBS only withdrew funds after DJT completed the CredEcard debit mandate. We also find that, after CredEcard debit mandates were introduced, CBS withdrew funds from its clients'(including those of JTPSL, CL, HL, DJT and FSCL) in accordance with the terms of the applicable mandates.

117. CredEcard informed HMRC that CBS would only attempt to access client funds when CBS knew that amounts had been credited to the client's account and "rejections" would only occur if the client had removed the funds first and the balance remaining was less than the amount proposed the collection. Such a "rejection" triggered an automatic failure notification which was sent to CBS and required no input from CredEcard.

*(c) Payment of CBS's Fees*

118. There were three fee structures in relation to the fees charged by CBS to its clients.

119. The Letter of Engagement sent to clients in March 2007 informed them CBS would charge "5.00% plus VAT (which equals 4.76% after tax) per invoice transaction." FSCL agreed to pay for the GBS on this basis.

120. From approximately July 2007, CBS changed its Letter of Engagement to provide that CBS would charge a fixed amount of £35 plus VAT "as and when work is done". This basis of remuneration was introduced at different times for different clients in the summer or late autumn of 2007. JTPSL and CL agreed to this fee structure.

121. The third fee structure was introduced in or around December 2007. The Schedule of Fees attached to the Engagement Letter indicated that CBS would charge

an "annual fee" of £1,350 plus VAT.[6] However, CBS continued to invoice clients as and when work was done. Thus, fees were deducted from a client's CredEcard account only when the client was paid. If the client was not paid, for example if the client was on holiday or sick, no charge was made. These "missing" payments were not pursued by CBS and were not charged on the next occasion that CBS ran a payroll in respect of that client.

122. CBS provided "fee accounts" to HMRC in June 2014. There is no evidence that these accounts were ever sent to the clients. The fees said to be due by clients according to the fee accounts were not, however, actually charged in the same amounts to the clients. For example, in the case of CL a credit of £465.75 was not carried forward from 2009 to 2010 and as regards FSCL an overdue balance of £38.14 in respect of 2008 was not added to the 2009 invoice.

123. In a letter to its clients in July 2009, CBS stated: "Historically if a client was with CBS for say three months then in many cases the remaining balance of the annual fee was not collected. Going forward this would be seen as a breach of the MSC legislation as the Accounting Service fee may not have been paid."

124. Mr Dootson and Ms Manning gave the following evidence in relation to the payment of fees by the five appellants to CBS. Their evidence was unchallenged and we therefore find it as fact. In short, their evidence was that CBS only charged fees when the appellant company was paid. If there was a week in which no services were provided to the third-party by the appellant company, no fee was charged. This was so regardless of the fee structure (see above) used by CBS. The fee appeared to be linked to the production of a payslip and the production of a payslip was driven by the company receiving income in a given period which, in turn, was linked to the services provided by the director. Where a client received two payments from the agency in one week it would be subject to two CBS's fees even though CBS produced one payslip. In other words, even though CBS had to run one payroll and one payslip, it still charged two fees. Thus, the fees charged related to the frequency of the payments received by the client from the agency rather than the number of times CBS had to process a payment.

125. Secondly, CBS did not pursue an appellant company for the fee in respect of those weeks in respect of which no charge was made. Thus, where there was ostensibly an annual fee in later periods, part of that annual fee was only charged in the weeks when the director of the appellant company was paid and no proportionate part of the so-called annual fee was paid or demanded in respect of weeks when no payment was made.

126. Dr Trzaski, Mr Tooze and Dr Osamwonyi all confirmed that CBS charged fees in respect of those weeks in which they worked but did not charge fees in respect of those weeks when they did not work (e.g. holidays and sickness).

[6] Dr Trzaski's Letter of Engagement was in this form.

*(d) Accounting for Tax and NICs*

127. As we have seen, CBS deducted tax and NICs from its clients' CredEcard accounts and later paid those amounts over to HMRC. The taxes concerned were PAYE, corporation tax, VAT (where the client was registered for VAT) and NICs. The deductions were made in accordance with the agreement contained in the Registration Form referred to above.

128. Also, as we have noted, CBS would receive an email from CredEcard telling it that a payment had been received into a client's CredEcard account. The amount of taxes to be deducted was calculated by CBS. CBS would then deduct that amount from the client's CredEcard account and that amount was then paid into CBS's bank account. The date on which the deduction was made was determined by the date of the receipt into the client's CredEcard account. It was not determined by the date on which the relevant taxes were actually due and payable to HMRC.

129. CredEcard stated that they had no control over the amount deducted by CBS. Furthermore, the client was not notified in advance of the amount to be deducted. The client only discovered what amounts had been deducted when it subsequently received a payslip.

130. The result was that substantial amounts of tax were deducted from clients' CredEcard accounts before it was due (and in some cases long before it was due). For example, as regards corporation tax, CBS could hold tax for up to 19 months after they first started to collect funds from the client's CredEcard account.

131. The taxes deducted by CBS were held in its bank accounts (with CredEcard and Anglo-Irish Bank and, later, with RBS) which earned interest on those amounts. At one stage the CredEcard account had a credit balance of approximately £1 million, according to information given to HMRC by CBS at a meeting on 19 August 2009. At the same meeting HMRC were informed that CBS account with RBS contained £3 .5 million.

132. According to Allied Irish Bank statements, disclosed after the first four days of the hearing but before the hearing resumed on 7 December 2015, over £4 million was transferred into that account over a 22 month period and interest of £126,936.18 was credited to the account.

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

134. The terms of the clients' CredEcard account specifically provided that the clients were not entitled to interest on their CredEcard credit balances.

135. At a meeting with HMRC on 19 August 2009, Mr Walton informed HMRC that amounts which CBS deducted from its clients' CredEcard accounts in respect of taxes went "to a Royal Bank of Scotland client account which accrues interest that is paid to client." Mr Stevenson accepted that at the time Mr Walton made that statement to HMRC it was false. Client accounts with RBS had not at that stage been set up and, in the event, were never set up.

136. In his evidence Mr Walton indicated that the monies deducted by CBS in respect of taxes continued to belong to the individual client companies which could ask for the money to be paid back.

137. In an email of 5 January 2010 sent to clients when CBS were ceasing to trade, clients were informed by CBS that any amounts deducted by it in respect of taxes would be refunded to clients.

*(e) Invoicing services*

138. As regards invoicing services, the individual client director would email a completed time-sheet to CBS which contained details of who should be invoiced on behalf of the personal service company and the hours worked (at a pre-agreed rate). The client would also complete an Expense Claim Sheet if any expenses had been incurred. Invoices were then raised on behalf of the client by CBS.

139. Mr Mian told HMRC that invoicing was done for 70% of CBS's clients (although he indicated that the percentage varied from week to week). However, he was unable to identify any clients who carried out their own invoicing when asked to do so by HMRC. We consider that it was very rare for clients to carry out their own invoicing. There is no evidence that any of the five appellants did so.

140. In the case of Mr Tooze, he accepted that CBS prepared the invoices that they were sent to the agencies which engaged Mr Tooze's services on behalf of third parties and that he did not see the invoices.

*(f) Payments to the shareholder/director by the personal service company*

141. The Registration Form invited clients to indicate whether they wished to use what was called a "minimum wage" model. In practice, clients extracted money from their personal service companies by way of a combination of payments of remuneration (usually, equal to the minimum wage) and transferred the balance from their CredEcard accounts to their own private bank accounts.

142. The Registration Form, as we have seen, allowed clients to select another "specified amount", but gave no guidance as to what that should be. CBS did not

advise clients on which type of model was best suited to their needs. Dr Trzaski was put on the minimum wage model without having ticked either box.

143. As at August 2009, 99% of clients were on the minimum wage model.

144. There was no evidence before us to indicate that any of the five appellants specified the amount of dividends they were to be paid from their CredEcard accounts to the individual directors or indeed that such payments were to be characterised as dividends. They simply withdrew the balance from their CredEcard accounts, after payment of a minimum wage salary.

145. At a meeting between CBS and HMRC in August 2009 (attended by Mr Walton and Mr Mian) Mr Mian accepted that copies of minutes of general meetings at which dividend resolutions were alleged to have been passed were false. He accepted that the meetings had not taken place.

146. We should note that the appellant companies had Articles of Association based on Table A of the Companies Act 1985. Those Articles provided:

> "102. Subject to the provisions of the Act, the company may by ordinary resolution declare dividends in accordance with the respective rights of the members, but no dividend shall exceed the amount recommended by the directors.
>
> 103. Subject to the provisions of the Act, the directors may pay interim dividends if it appears to them that they are justified by the profits of the company available for distribution."

147. Mr Tooze said that he had not attended any board meetings or shareholders meetings of JTPSL. He also said that CBS decided what salary payments were made to him and the proportion that salary payments bore to dividend payments. He said that the quantum of the salary payments was "dictated" to him. He said he had no role in that process: "I was just told in the payslip what was due to me as dividend and what was salary." However, Mr Tooze on his Registration Form dated 29 August 2007, had ticked the box indicating that he wished to be paid the minimum wage on a weekly basis.

148. Dr Trzaski said that he did not understand the UK tax system or dividends. Confirmed that he had not attended any board meetings of his company. He could not remember asking CBS to prepared dividend vouchers at the end of the year.

149. Dr Osamwonyi said that he did not understand the concept of dividends and left it to CBS to determine what dividends were paid. He did not attend any directors' or shareholders' meetings.

150. In the light of the evidence of Mr Tooze, Dr Trzaski and Dr Osamwonyi, we infer that Ms Fanning and Ms Ayodele did not attend board or shareholders meetings to approve the payment of dividends. Moreover, there was no evidence of any genuine resolutions approving the payment of dividends.

151. HMRC produced in evidence interview notes in respect of other clients of CBS who were not parties to these appeals ("the third-party interview notes"). We shall discuss later the extent to which it is proper to rely on this evidence. However, for present purposes, we note that:

(1) one interviewee, "CW", said that he "had no idea" how the minimum wage level had been decided upon. He said he "may have ticked a box indicating minimum wage", but could not recall doing so.

(2) Another client interviewed, "CN", indicated, for example, that he was told by CBS to take the minimum wage to minimise tax and NIC payments. He already knew what salary to take he had instructed CBS on the level of dividends to be paid.

(3) Another interviewee, "CE", had little perception as to how the level of salary was initially set and that he had "simply left all that side of things to CBS. When the salary was increased it was really without his knowledge."

(4) "CF" said that he was aware that payments to him were split between salary and dividends but CBS "just did it". He did not get involved in any of the detail. He did not know what a dividend was. CBS definitely decided on the dividend payments. No meetings were held.

(5) "MH" was asked to explain the nature of the non-salary payments that he had taken from the company each week. He said that they simply represented the money he was due in respect of his work. MH had no idea what a dividend actually was. There were no company meetings of his personal service company.

(6) "SSR" did not understand what a dividend was. She was not involved in dividend payments – it was automated.

(7) "HG" had no perception of ever agreeing to a level of salary. It appeared that she was paid the minimum wage by way of salary. HG never queried the amount of salary shown on her weekly payslip.

(8) "BS" knew what a company dividend was. However, she said that CBS had worked out the dividend figures without reference to her.

(9) "KH" could not recall any discussion with CBS concerning the level of salary taken and she stated that she had never told CBS that she wanted to draw a specific amount per week. She could not recall whether she had indicated on her Registration Form that she wished to be paid the minimum wage. KH said she had no idea what a dividend was. She never attended any company meetings when dividends may have been proposed.

(10) "JH" said that the level of salary paid to him was recommended by CBS – he could have changed it but he went along with their suggestion. He took a mixture of salary and dividends but he never voted on a dividend resolution.

152. CBS prepared dividend vouchers automatically at the end of each tax year for the directors of the appellants to include in their personal tax returns.

153. The payslips produced by CBS for the appellant companies typically referred, in the final line, to "Surplus funds in this pay period" together with a figure. There was no reference to a specified amount to be paid to the client by way of dividend. The payslip referred to a figure representing "Net profit after tax". A footnote then stated:

> "A Dividend Voucher showing the total Dividends paid to you in this Financial Year together with your tax credit will be provided at the end of the Financial Year (or sooner if you elect to close your company prior to that date)."

154. The unaudited annual accounts of the appellant companies recorded a "Final dividend". No interim dividends were recorded. Some of the accounts were unsigned. In a note of the meeting of 11 and 12 February 2009, Mr Walton stated that final accounts would show the actual dividends taken for the year, based on interim dividends taken throughout the year. There was, however, no evidence that interim dividends had been declared nor that the shareholder approved any "final dividend". Instead, the individuals simply seemed to withdraw money from their personal service company's CredEcard accounts as they pleased.

*(g) Companies House returns, company accounts and corporation tax returns*

155. The preparation and filing of Companies House returns was a standard feature of the GBS, which it did with little input from the clients.

156. Similarly, CBS prepared the statutory accounts and corporation tax returns for its clients. This was done automatically at the end of the year. There was no evidence of any meaningful discussion between CBS and its clients in relation to the preparation of the accounts.

157. HMRC's investigation

158. Mr Walton was cross-examined at length about HMRC's investigation into CBS and how it operated the GBS. It is not necessary to record that evidence in detail. However, we note that many of HMRC's letters and telephone calls received no reply. CBS only agreed to a meeting with HMRC after HMRC indicated that it would use its statutory information gathering powers.

159. Eventually, there was a meeting which took place over two days on 11 and 12 February 2009. According to the notes of that meeting, Mr Walton misled HMRC on a number of points. In particular, Mr Walton indicated that CBS was entirely independent from and had no connection with any of the i4 companies or those running them. HMRC requested various documents which Mr Walton and Mr Mian agreed to provide.

160. Although some information was provided, much of the information and documents requested were not provided or were provided late.

161. A further meeting took place on 19 August 2009, attended by Mr Walton and Mr Mian on behalf CBS and representatives of HMRC.

162. HMRC had previously asked CBS for evidence of clients agreeing to the levels of dividend paid out by the personal service companies. At the meeting, as we have seen (paragraph 141), Mr Mian produced minutes of shareholders' meetings at which dividends were purportedly resolved to be paid by client companies. When pressed by HMRC, Mr Mian accepted that the meetings did not take place and that the minutes were produced automatically.

163. Mr Walton also misled HMRC when he indicated that none of the personal service company clients had previously been operating through the composite company model. This was clearly untrue. The evidence before us show that the vast majority of composite company clients of CBS transferred to personal service companies utilising the GBS.

164. HMRC requested further documents from CBS. These included a list of all personal service company clients, bank account statements for all CBS accounts and a copy of the mandate form for CredEcard. CBS did not respond to HMRC.

165. HMRC followed up with letters and telephone calls. On 26 October 2009, HMRC telephoned again but were told Mr Mian "wasn't in the office" and, later in the day, that he had left the company. Mr Dootson asked to speak to Mr Walton and was assured that he would call him. He did not do so.

166. Further efforts were made by telephone and email to contact CBS, in particular Mr Walton, but Mr Walton did not respond.

167. In cross-examination Mr Walton accepted that he realised HMRC have been trying to contact him and that he had "probably" been deliberately trying to avoid HMRC. Mr Walton also conceded in cross-examination that a number of his responses to questions asked by Mr Dootson during HMRC's enquiries were inaccurate.

168. Mr Stevenson, also in cross-examination, accepted that a number of Mr Walton's replies to HMRC's enquiries were untruthful or misleading.

*CBS ceases to trade*

169. On 4 November 2009, Mr Walton wrote to HMRC stating that he had decided to close CBS's business as soon as possible. He attributed this decision to Mr Mian's departure and the fact that there was no one else suitably qualified to continue running CBS.

170. In fact, CBS continue to trade for almost five months after the date of Mr Walton's 4 November 2009 letter. CBS wrote to clients on 5 January 2010 to notify them that CBS would be ceasing to trade "within the next few months."

171. CBS ceased trading with effect from 1 April 2010. Clients were informed that they should now operate through i4 and a company called i4 Services Ltd started providing a personal service company product.

*The Appellants*

*Dr Jacek Trzaski Limited ("DJT")*

172. As already noted, Dr Trzaski gave evidence.

173. Dr Trzaski is a qualified doctor and a Polish national.

174. Between October 2007 and February 2008 he was an employee of a company called 4 Ways Healthcare. In around every 2008, he approached a recruitment agency to find new employment and was given a choice to be paid through the ordinary payroll or through a limited company. Dr Trzaski chose to be paid through limited company and he was referred by the agency to CBS.

175. Dr Trzaski had little experience of running an English limited company and had little knowledge or experience of English company law (although he had run a company in Poland). He did not understand the UK tax system or about dividends. He was unaware that a company secretary and a registered office were required for a limited company. He said that he required CBS to "fill the gap" in his experience.

176. Dr Trzaski signed a Registration Form dated 28 February 2008 for the provision of the GBS and a CredEcard debit mandate form dated 13 March 2008. On the Registration Form, Dr Trzaski indicated that he wished to be provided with a limited company, a CredEcard account and accounting services to be paid for from his company's CredEcard account. The Registration Form made it clear that there was no additional charge if Dr Trzaski elected to pay CBS's fees from his CredEcard account (whereas a 5% surcharge will be added for other methods payment). Dr Trzaski , however, left unticked the boxes on the Registration Form indicating how he wished to be paid i.e. he did not specify the salary payments (minimum wage or other specified amount) which he required to be made to him. He was, nonetheless, paid on the minimum wage model. In the Letter of Engagement sent to Dr Trzaski on 10 March 2008, CBS promised to provide him with a registered office and a company secretary.

177. Dr Trzaski accepted, in cross-examination, that there had been virtually no contact between him and CBS in the course of his dealings with CBS. He accepted that the division of responsibilities was that he would provide his medical services but that CBS would provide all the other services required for his business to operate i.e. invoicing and payroll. He left it to CBS to determine the form in which he would receive his remuneration from JTL (i.e. the mixture of salary and dividends).

178. CBS automatically produced dividend certificates for Dr Trzaski at the end of the year – Dr Trzaski could not remember asking CBS to do this. He could not recall setting up his CredEcard account and thought that CBS "must have" done it for him.

179. Dr Trzaski understood that CBS would be collecting his payments on his behalf and depositing them in his CredEcard account. He confirmed that he understood that if he was to use the GBS he had to authorise CBS to deduct funds from his CredEcard account by means of the debit mandate form. The mechanics of how this happened were never explained to him. He only found out how much CBS had deducted from his account when he subsequently received his payslip.

180. Dr Trzaski was unaware of when the taxes in respect of which CBS made withdrawals from his CredEcard account were actually due and he confirmed that CBS had not explained this to him. CBS did not tell him that they would be holding his tax payments in some cases for many months before paying it over to HMRC.

*Jonny Tooze Physiotherapy Services Limited ("JTPSL")*

181. Mr Tooze is a physiotherapist. Before October 2001, he had worked as an employee. From that date until 4 March 2007, he provided his services through to different composite companies run by a company called Freelance Professional Services ("FPS"). In March 2007, FPS setup a personal service company for Mr Tooze but ceased to operate when the MSC legislation was introduced shortly afterwards. Mr Tooze next worked for the Ministry of Defence until August 2007 as an employee.

182. Mr Tooze then approached a recruitment agency called Piers Meadow Recruitment. The agency informed Mr Tooze that, if he wished to work with them, he had to provide his services through a limited company. The agency sent him a list of companies to contact about setting up a personal service company, one of which was i4 Partners. Mr Tooze called i4 group and, although he could not remember the details of his conversation, evidently ended up dealing with CBS.

183. Mr Tooze wrote to HMRC in March 2011 saying that he trusted CBS "to set up and wholly run the company on my behalf as I had no knowledge in this area." In cross-examination Mr Tooze changed his position saying that he:

> "wouldn't say 'wholly run', I would say to provide the accounting and payroll side of things."

184. After an initial telephone call, Mr Tooze did not speak to anyone again at CBS during his time with them. Otherwise, Mr Tooze's communications with CBS consisted of receiving his payslips by email and the occasional letter.

185. Mr Tooze already had an existing company, but CBS set up a new company for him in July 2007 as well as a CredEcard account (although presumably his existing company already had a bank account). Mr Tooze believed that CBS collected payments on his behalf from the recruitment agencies and then made payments into his CredEcard account.

186. Mr Tooze explained that CBS did not charge him fees for weeks in which he was not working. CBS only charged him a fee when he was providing physiotherapy services and being paid.

187. Mr Tooze was unaware of how much tax needed to be paid and only found out how much had been deducted by CBS on account of taxes when he subsequently received his payslip. The calculation of the tax due was handled by CBS.

188. As we have seen, on his Registration Form dated 29 August 2007, Mr Tooze ticked the "minimum wage" box indicating that he wished to be paid this amount weekly. The Registration Form also authorised CBS to supply a CredEcard account and also authorised the payment of CBS's fees for accounting services to be paid from that account. On this latter point, Mr Tooze ticked a box which said: "I hereby authorise Costelloe Business Services Ltd to collect the fees automatically via direct debit from this account." There was no indication, however, on the Registration Form that this authority was addressed to CredEcard. CBS stated on the Registration Form that, by ticking this box, "there are no transaction charges for this" i.e. there were no transaction charges if Mr Tooze elected to pay by "direct debit" from his CredEcard account, whereas any other form of payment incurred a 5% surcharge.

189. As regards the payment of dividends by his company, Mr Tooze said that he did not attend any board meetings and did not vote on any dividend resolutions at any meetings.

190. In re-examination, Mr Tooze was asked if he was involved in the decision-making concerning his salary payments. He replied that he did not have a role. He was simply told on his payslip what was due to him as dividend and what was salary. He said it was "dictated to me. I just accepted that a calculation would be made and I accepted that." As we have said, there was no evidence that Mr Tooze's payslips referred to dividends, save in a footnote relating to the "Net profit after tax" figure which simply referred to the eventual provision of dividend vouchers.

191. Mr Tooze stopped using CBS in mid-January 2010 because CBS were ceasing to trade.

*Christianuyi Limited ("CL")*

192. Dr Osamwonyi is a forensic medical examiner and was the sole shareholder and director of CL at all material times.

193. Between 1994 and 2003, Dr Osamwonyi worked directly for the NHS as an employee. In 2003 he was employed by medical agency (Medteam) who dealt with his pay arrangements and taxes. In around 2007, Medteam's accountant advised Dr Osamwonyi that the agency would only engage his services if he operated through a limited company and gave him a list of various companies which could assist him. Having tried a company called Simply Contracting Limited, who set up a limited company for him, Medteam advised him in July 2007 to move to CBS.

194. Dr Osamwonyi said he had no knowledge of limited companies when he approached CBS – he did not know how limited companies worked. He was uncertain about his responsibilities as a company director.

195. Dr Osamwonyi signed the Letter of Engagement on 31 July 2007. CBS incorporated a company for him, CL, in or around July 2007 even though he had an existing limited company. Although he also had an existing corporate bank account, a CredEcard account was set up for him by CBS. CBS also provided the registered office and company secretary. Dr Osamwonyi, in his oral evidence, did not understand the role played by a company secretary. In addition, he did not understand the UK tax system or the concept of dividends.

196. Dr Osamwonyi signed a CredEcard mandate form on 26 September 2007. The documentary evidence shows that he provided services in August and September 2007 and a Pay Advice dated 10 August 2007 showed that CBS had deducted its fee. In other words, CBS was deducting its fee from CL's CredEcard account prior to the mandate being signed.

197. Dr Osamwonyi was unsure whether he received the payslip before the deductions took place or afterwards. He was unaware of the dates on which tax had to be paid to HMRC by CBS.

198. Dr Osamwonyi did not attend shareholders or board meetings and left it to CBS to determine what dividends and remuneration were paid to him. He did not recall signing any dividend resolutions.

*Fanning Social Care Limited ("FSCL")*

199. Ms Susan Fanning was the sole shareholder and director of FSCL. Ms Fanning did not give evidence.

200. She was a social worker at times material to her appeal. Originally employed by Calderdale Metropolitan Council, she ceased to be a direct employee and provided her services through a composite company arrangement.

201. At some time in late 2006 to early 2007, Ms Fanning started providing her services through an i4 composite company. Ms Fanning signed a Letter of Engagement with CBS on 28 March 2007. She was then provided with the standard package of GBS services i.e. a CredEcard account, a company secretary, payroll and invoicing services.

202. When CBS ceased to trade in January 2010, Ms Fanning ceased to use its services.

203. There was no record of any telephone contact between CBS and Ms Fanning or any record of any advice given by CBS tailored to her circumstances.

*Haddassah Limited ("HL")*

204. Ms Pamela Ayodele was the sole shareholder and director of HL. She did not give evidence.

205. Ms Ayodele was a social worker who had previously provided her services through a number of intermediary companies.

206. Ms Ayodele signed the Registration Form for the provision of the GBS on 8 November 2007. On that Registration Form, Ms Ayodele elected to be provided with a new limited company. Oddly, she did not tick the box specifying that she wished to be supplied with a CredEcard bank account. Nonetheless, she elected to pay CBS's fees from a CredEcard bank account. It was clear, however, that a CredEcard account was opened for HL – there were CredEcard bank statements in HL's name with the first item (a debit of £10) appearing on 12 November 2007. She elected to be paid the minimum wage as a salary. CBS provided her with her own personal service company, HL. Similarly, she had the standard GBS services provided: a CredEcard account, a company secretary, a registered office payroll and invoicing services.

207. There was no record of any telephone conversations between CBS and Ms Ayodele or any record of any tailored advice given to her by CBS.

208. In January 2010, when CBS ceased to trade, Ms Ayodele ceased using CBS's services.

**The evidence of Mr Walton and Mr Stevenson**

209. We did not consider Mr Walton or Mr Stevenson to be reliable witnesses.

210. In particular, we found Mr Walton to be evasive and lacking in credibility on numerous occasions, of which we give a few examples below. We concluded that Mr Walton's evidence should be treated with considerable caution.

211. We have already recorded that Mr Walton himself accepted that a number of his replies to HMRC's enquiries were "inaccurate".

212. In the note of a meeting between HMRC and CBS on 19 August 2009, Mr Walton is recorded as saying that amounts deducted by CBS from its clients in respect of taxes went to a Royal Bank of Scotland client account "which accrues interest that is paid to client [sic]." It was put to Mr Walton by Mr Nawbatt that this was untruthful. Mr Walton's response was to suggest that he was referring to a future intention to pay interest. We found Mr Walton's explanation wholly unconvincing.

213. Similarly, Mr Walton was questioned about a statement made by Mr Mian at the meeting with HMRC on 19 August 2009. Mr Mian had falsely told HMRC that general meetings had taken place at which dividends were declared to the owners of the personal service companies. Mr Mian had shown HMRC copies of minutes of these general meetings. Mr Mian subsequently acknowledged that the meetings had not taken place. In cross-examination Mr Walton accepted that he knew that the meetings had not taken place. He was asked why he had not corrected a statement (by Mr Mian) that he knew to be false:

> "Mr Walton: I cannot give an answer to that.

…

Mr Nawbatt: I am just trying to clarify. Is the reason you cannot give a reason because you are not willing to give a reason or because you do not have an alternative explanation?

Mr Walton: I am saying I do not have an explanation. Not an alternative explanation."

214. Throughout his evidence, we found Mr Walton was evasive and played with words in an obstructive manner. For example, in relation to CML, a note of a meeting between HMRC and CBS (represented by Mr Walton, Mr Mian and a colleague) on 19 August 2009 recorded Mr Walton as saying that CML had nothing to do with him. Mr Walton was cross-examined about the statement as follows:

"Mr Nawbatt: … Paragraph 20 you said that Costelloe Management Ltd was nothing to do with you?

Mr Walton: Only in the broader sense, as I say, that I had – I mean, from the beginning I said yes, I had a beneficial ownership in all of the companies at that early stage.

Mr Nawbatt: No, you just told me, I didn't understand your reference to a broader sense. Why were you telling the Revenue that Costelloe Management had nothing to do with you?

Mr Walton: Again, in the directorship or shareholding sense, I wasn't.

Mr Nawbatt: Can you have been any broader in the phrase you used? It has nothing to do with me. Just answer me this: was that a truthful statement that Costelloe Management Ltd had nothing to do with you?

Mr Walton: In that sense no, it wasn't.

Mr Nawbatt: You agree with me that it wasn't a truthful statement?

Mr Walton: When you put it, as I say, to the ultimate level, it wasn't a true statement."

215. As regards Mr Stevenson, we found him at times to be evasive and inconsistent in his evidence. We considered that his evidence needed to be treated with caution. In the following paragraphs we give some examples of instances in which we regarded Mr Stevenson's evidence as being unsatisfactory.

216. Mr Stevenson at first claimed that i4 Group (of which he was a director and shareholder) was an entirely separate business from CBS. Later, Mr Stevenson changed his evidence and accepted that there were links between i4 Group and CBS. Mr Stevenson was a director and shareholder of i4 Group and later accepted in cross-examination that he and Mr Pittard were running CBS.

217. Also, at the outset of his evidence, Mr Stevenson was asked in what capacity he was giving evidence and maintained that he was giving evidence on behalf of Casa Consulting Ltd but later changed his evidence to admit that he was doing so as a director and shareholder of i4 and beneficial owner of CBS.

218. Furthermore, Mr Stevenson initially accepted that some of Mr Mian's statements in relation to CredEcard accounts were untrue, but subsequently attempted to retract his statement.

219. Mr Stevenson initially denied that calls to CBS went to i4's offices in the Isle of Man but later, under cross-examination, he admitted that this was correct.

220. Mr Stevenson's witness statement contained a sample Registration Form. In fact, however, this was a version of the Registration Form that was used in later periods. He did not mention that there had been earlier versions of the Registration Form and accepted that this omission was "grossly misleading". However, he contended that he did not intentionally attempt to mislead the Tribunal.

221. Like Mr Walton, Mr Stevenson also had a tendency to play with words. For example, he accepted that CBS made it "easier" for clients to use personal service companies but doggedly denied that CBS was "facilitating" the use of personal service companies. Again, like Mr Walton, he refused to accept that the GBS was a "product" and preferred to describe it as a "service", even though he had used the word "product" to describe the GBS in an email to CredEcard.

**Third-party interview notes**

222. As we have explained, HMRC produced notes of several interviews with clients of CBS who were not the appellants in these appeals.

223. Mr Way submitted that we should disregard these notes on the basis that they did not concern any of the five appellants.

224. These notes are, of course, hearsay evidence. As such, they are admissible and it is for the Tribunal to decide what weight should be accorded to them.

225. Mr Stevenson accepted that the GBS was a standardised product. Accordingly, it would be expected that there would be relatively little variation in the way that the GBS was provided to different clients. Obviously, there would be differences in terms of the dates on which various documents were signed and, for example, the boxes that may or may not have been ticked on the Registration Form.

226. We have decided that the third-party interview notes should be accepted as evidence in these appeals. However, bearing in mind that the appellants have had no opportunity to cross-examine the statements made by the interviewees, we consider that reliance should only be placed on these notes in so far as they corroborate other direct evidence in these appeals.

**Alleged non-disclosure of evidence**

227. In the course of the hearing, Mr Walton and Mr Stevenson appeared to indicate that there were documents, in particular bank statements of CBS, relevant to the

appeals which had been provided to the appellants' representatives, Mazars, but which had not been disclosed.

228. We considered these to be very serious issues.

229. We asked Mr Way to investigate these matters. Mr Way produced a report, in his capacity as an officer of the court, on 4 December 2015, just a few days before the final day of the hearing of these appeals on 7 December 2015. We are grateful to Mr Way for undertaking this task.

230. Mr Way's report and its attachment revealed that Mazars had been sent the first and last statements of CBS's account with Anglo Irish Bank on June 2014. The statements were sent by a Mr Mawdsley of RMS Tenon. RMS Tenon were acting in relation to the debt transfer litigation in respect of which Mazars were not instructed. Mazars did not consider that the CBS bank statements were relevant to the five appeals currently before us.

231. HMRC, in its investigations into CBS, had specifically requested sight of CBS's bank accounts. HMRC's Statement of Case and HMRC's witness statements made clear the relevance of the retention of taxes in respect of its clients by CBS in its own bank accounts. In our view, Mazars failure to obtain and produce these documents was, at worst, simply an error of judgement. We accept that there was no intention deliberately to suppress documents which should have been disclosed.

**Submissions on behalf of the appellants**

232. Mr Way made the following submissions.

233. The MSC legislation was not intended to apply to individuals who operated on their own account and essentially ran their own affairs even if they did so through a personal service company and even if that company "outsourced" many of its activities to third parties. CBS was merely in the business of assisting with the provision of companies and related advice and was not "involved with" the appellants in the way in which the MSC legislation envisaged.

234. Mr Way supported his primary argument in relation to the policy of the MSC legislation by numerous quotations from Hansard by Mr John Healey MP, who was then the Financial Secretary to the Treasury and from Consultative Documents.

235. As regards s 61B(2)(a), the use of the word "ongoing" meant that it was necessary to find a continuous fee. CBS charged an annual fee and the fees for annual accounting and for the tax return were fixed. The bookkeeping fee was variable by reference to the amount of work which CBS was asked to do. The fee therefore varied by reference to the services supplied by CBS and not by reference to the supplies of services made by the personal service company to third parties.

236. In relation to s 61B(2)(c), when each appellant signed up for the GBS, the appellant (and its director) were able to direct CBS what it should do. CBS provided back-office services of bookkeeping and tax compliance. All the relevant details were

on a payslip which would show the surplus available for payment by way of dividend if the individual so requested. Therefore, the decision to pay a dividend rested with the company and the individual.

237. CBS did not influence the way in which payments were made. The instructions for the payment of a dividend would be made by the individual company.

238. As regards s 61B(2)(d), the arrangements with CredEcard involved what was, effectively, a direct debit arrangement. A CredEcard account was set up because it could be done quickly. Although CBS knew what was in the bank account of each appellant, this was to ensure that no direct debits were paid unnecessarily e.g. if there were insufficient funds. Just because CBS had the benefit of a direct debit did not mean that it controlled or influenced the appellants' finances.

239. The MSC legislation was not aimed at ordinary "outsourcing" but rather at a situation where the MSC provider took over the running of the company to such an extent that essentially it usurped the individual's involvement with that company. The MSC provider had to influence or control a company to such an extent that the individual had no say in the services that he or she provided. Usually, the MSC legislation was engaged where the whole arrangement was typically wrapped up as part of a tax-driven scheme where the promoter guaranteed that the individual would suffer no loss of tax. That was not the case in the five appeals before the Tribunal.

240. Furthermore, a typical MSC arrangement would not involve the individual being a director of the same company, unlike the situation for each of the five appellants.

241. In relation to Dr Trzaski and Dr Osamwonyi, the services provided by CBS to their companies were typical of ordinary outsourcing services.

242. As regards Mr Tooze, he had given instructions to CBS on his Registration Form to pay him the minimum wage on a weekly basis. The authority for the payment emanated from Mr Tooze. Accordingly, s 61B(2)(c) could not be triggered if the client company gave the relevant authorisation. It would be the authorisation that influenced or controlled the way in which activities were carried out.

243. The provision of CredEcard accounts had the attraction that they could be set up quickly and enabled individuals to move money quickly, which would not have been the case had a traditional bank account been used. Dr Osamwonyi gave the relevant instructions to authorise the creation and running of his CredEcard account.

244. The opening of a CredEcard account did not mean that influence or control was usurped by CredEcard or CBS.

245. Mr Way submitted that CBS simply followed instructions given by each appellant. A person who followed instructions did not exercise influence or control within the meaning of the legislation. The influence or control came from the giver of the authority i.e. from the appellant companies.

246. It was significant that no guarantee of tax savings (which would have triggered s 61B(2)(e)) was included in the agreement between CBS and the five appellants.

247. Mr Way further submitted that the Registration Form authorised CBS to carry out certain instructions, such as running the payroll and the making of dividend payments, did not mean that CBS had influence or control over the company's finances or any of its activities nor did it influence or control the way in which payments to the individual were made.

248. All the information on how to run a company, Mr Way submitted, was made freely available to CBS's clients.

249. As regards the payment of CBS's fees, it did not charge clients in those weeks when it did not have to provide services because the client's director did not provide services to those third parties.

250. Mr Way submitted that, on the basis of Mr Stevenson's evidence, CBS could not log on and did not have passwords in relation to individual client CredEcard accounts. CBS were only able to logon (and had passwords for) CBS's own accounts. They used logon and passwords to access its own accounts to upload data files to request fees and tax payments to be transferred from client accounts to the CBS accounts in accordance with the debit mandates. The CBS passwords did not give access to the clients' accounts.

251. In relation to the management and administration of private companies, Mr Way submitted that this would often be informal. He referred to *Re Mumtaz Properties Ltd* [2011] EWCA Civ 610, where Arden LJ [46] found it unsurprising that the company was run with a high degree of informality, with decisions not necessarily been taken of board meetings. Even if the correct formalities for the payment of dividends had not been observed, Mr Way argued that this had no bearing on the question whether CBS was "involved with" the appellant companies.

252. Mr Way submitted that the question in these five appeals was whether *these* appellants were influenced or controlled by CBS. The question could not be answered by looking at matters from CBS's point of view or by reference to personal service companies other than the appellant companies.

**Submissions on behalf of HMRC**

253. Mr Nawbatt drew attention to what he described as the unsatisfactory background to these five appeals.

254. First, the five directors of the appellant companies appeared to have had little input or involvement in the appeals. Only three of the appellant companies' directors gave evidence. Originally, none of the directors of the appellant companies were proposing to give evidence. Moreover, the witness statements of the three directors were not written by the directors themselves but were the result of a pro forma questionnaire (as the directors admitted in cross-examination).

255. Secondly, it became clear that the litigation was being funded to a "substantial" degree by the i4 Group and/or its directors on the basis that they faced the ultimate financial liability for tax and NICs under the debt transfer provisions. Mr Stevenson stated that i4 were not instructing Mr Way's instructing accountants (Mazars), which begged the question of who was providing instructions and running the litigation.

256. Thirdly, there were substantial issues relating to disclosure in this case. Most of the documentation before the Tribunal had been provided by HMRC. The appellants and their witnesses provided very little documentation. Nonetheless, in cross-examination Mr Stevenson and Mr Walton stated that there were documents and/or computer records which were relevant to the litigation and which were available but which had not been requested by or provided to Mazars. Mr Walton also stated that there were relevant documents, particularly bank statements, which had been provided to Mazars but which had not been disclosed.

257. Mr Nawbatt submitted that the lack of disclosure (including last-minute selective and piecemeal disclosure of evidence) was something that the Tribunal could take into account in determining whether the appellants had discharged the burden of proof and, where appropriate, to draw inferences as to the reasons why there had been a failure to disclose (or belatedly disclose) information.

258. Fourthly, Mr Nawbatt submitted that Mr Tooze, Mr Stevenson and Mr Walton were unsatisfactory witnesses.

259. As regards s 61B(2), if any one of subs (2)(a), (c) or (d) are satisfied in respect of any appellant, that appellant would then be a managed service company. Mr Nawbatt argued that the evidence of Mr Dootson and Ms Manning set out the position of each appellant company in detail. However, Mr Stevenson admitted that the GBS was a "standardised" product while it was in operation. All of the appellants signed up to the same product and had shown nothing unique about their own particular circumstances. The standardised product was designed to enable all clients to hand over the entire day-to-day administration of their limited company to CBS. Once the service was put in place there was virtually no contact between the appellant company and CBS. Mr Nawbatt submitted, therefore, that the question of whether CBS was "involved with" the five appellants was materially the same for each appellant, including the two appellants who did not give evidence.

260. As regards s 61B(2)(a), Mr Nawbatt submitted that the way in which CBS operated the GBS had the result that it benefited financially on an ongoing basis from the provision of services by the individual. There were two ways in which CBS benefited financially within the meaning of the provision.

261. First, CBS's fee structure was such that its fees were directly linked to work done by clients. From March until July 2007, CBS charged a 5% fixed charge "per invoice transaction" and, from July until December 2007 a set figure payable "as and when work is done". Three of the five appellants, Dr Osamwonyi, Mr Tooze and Ms Fanning all signed up to the above fee models.

262. From December 2007, CBS purported to charge an "annual fee" of £1350 plus VAT, although it did not in fact do so. CBS merely deducted a fee each time a payroll was processed. Thus, where two payslips were produced by CBS there were two fees and where the individual did not work there was no fee. CBS failed to pursue any "missing payment" to charge extra for weeks when payments were not received.

263. CBS was, therefore, directly linking its fees to work done by clients and benefiting financially from their services. Indeed, CBS itself recognised that the way in which it was operating its fees up to July 2009 "would be seen as a breach of the MSC legislation".

264. The second way in which CBS benefited from the individual's provision of services was the deductions which it made in respect of taxes. CBS deducted those taxes many months in advance of the time on which they were would have been due for payment by the appellant company (sometimes as much as 19 or 20 months in advance). Substantial amounts of money were held by CBS in its bank accounts with CredEcard and Anglo-Irish Bank and, subsequently RBS). CBS earned interest on those amounts. At one stage CBS held approximately £1 million in its CredEcard account and £3,500,000 in an RBS account. The Allied-Irish Bank accounts recently disclosed by the appellants showed that over £4 million was transferred into that account over a 22 month period and £126,936.18 of interest was credited to the account.

265. In relation to s 61B(2)(c), Mr Nawbatt submitted that CBS influenced and/or controlled the way in which payments were made to each of the appellants.

266. First, Mr Nawbatt argued that the way in which the minimum wage model was offered as standard constituted the necessary influence or control. If the client did not want that model they had to specify another payment model. Mr Nawbatt argued that for most clients such a decision would have been beyond their expertise and CBS offered no advice about any alternative payment structure. Some clients (other than the appellants) told HMRC that they felt they had little option but to use the minimum wage model. As at August 2009, 99% of clients from the minimum wage model.

267. Secondly, CBS produced, as standard, Dividend Vouchers for its clients for each year ended five April. This was a "built-in" feature of the GBS and the vouchers were issued automatically by CBS. There were no meetings at which directors voted on dividends and, although CBS purported to provide HMRC with minutes of such meetings, CBS admitted that the meetings had not taken place. The absence of dividend meetings and valid resolutions was not merely an "informality". These decisions were simply left to CBS. The directors of the three appellants who gave evidence told the Tribunal that they were on the minimum wage model despite having no understanding of how dividends worked. They appeared to have no informed say in respect of their company's pay structure.

268. In relation to s 61B(2)(d), Mr Nawbatt submitted that CBS influenced or controlled either the finances or activities of the appellants. The evidence of the appellants' witnesses was that the personal service company directors concentrated on

their full-time jobs and that CBS were responsible for running all other aspects of those companies. In effect, there was no practical difference, as regards the involvement of the individuals, from their degree of involvement with the i4 composite company product.

269. First, in relation to finances, CBS effectively required its clients to use a CredEcard bank account. Nearly all CBS's clients used the CredEcard accounts. These accounts were designed to allow CBS to access them. CBS was, according to CredEcard, given its own logon and password to enable them to gain access and take funds from each client account. CBS received an email from CredEcard notifying it that the client had been paid and, then, CBS accessed the client's account to make deductions in respect of its fees and taxes. No mandate was in place and CBS was therefore making withdrawals without authority.

270. Even after September 2007, when the mandate form was in place, CBS continued to access its clients' CredEcard accounts with its logon details. The appellants did not know what CBS had deducted until they subsequently received their payslips. Moreover, CredEcard allowed CBS three to four months to obtain the mandates.

271. CBS controlled the accounts to the extent that it could, if it wished, empty the client's bank account completely without reference to the appellants. CBS also received copies of the client's CredEcard bank statements.

272. CredEcard made it clear that the deductions that CBS was making were not direct debits. CredEcard refused to confirm that the clients had complete control of their own accounts.

273. Secondly, Mr Nawbatt submitted that CBS influenced or controlled the manner in which the appellants paid their statutory taxes. CBS decided when taxes had to be deducted from the CredEcard accounts. CBS deducted statutory taxes many months before they were actually due. This was a standard feature of the GBS and clients were not offered an ability to opt out. CBS held the amounts deducted in respect of taxes in bank accounts in its name (although these amounts were probably still beneficially owned by the clients) and therefore controlled these amounts.

274. The appellants' directors who gave evidence accepted that CBS had made deductions from their companies' accounts and were all unable to say what taxes they had to pay, when those taxes were payable or what happened to the money once it had been deducted. They were not aware that CBS was holding the money deducted in respect of taxes for many months or that they were being denied interest.

275. As regards whether CBS exercised influence or control over "other activities", CBS exercised such influence or control by dictating who the company secretary should be, where it is registered office should be located and its pay structure. As regards the pay structure, although there was an overlap with s 61B(2)(c), Mr Nawbatt submitted that the two provisions were not mutually exclusive. "Activities" of a personal service company was an expression which is wide enough to encompass

activities relating to the payment of dividends. In addition, Mr Nawbatt submitted that CBS also influenced or controlled the invoicing and payroll activities of its clients, including the appellants. Invoicing was offered as a standard service as part of the GBS.

## Discussion

276. We were informed that these appeals are the first in which the meaning of s 61B(2) has been considered.

277. The MSC legislation was introduced by the Finance Act 2007 with effect from 6 April 2007. Earlier legislation, which is still in force, tackled the use of intermediary companies in the provision of personal services is generally known as the "IR 35 rules". The test contained in the IR 35 rules, in very broad terms, was to postulate a contract between the end client (the third-party) and the worker supplied by the intermediary company and to determine whether that hypothetical contract would be a contract of employment. HMRC, however, gradually came to the conclusion that the IR 35 rules were unsuitable to mass-marketed intermediary schemes which were set up by promoters of intermediary companies.

278. Thus, in the 2006 Budget, the Government announced that it would introduce rules to deal with mass-marketed intermediary schemes. A Consultation Document was published in December 2006 and contained draft legislation which defined a "managed service company". This definition, however, was substantially re-drafted as a result of the consultation exercise. The re-drafted definition focused more on the role of the MSC provider than the MSC itself.

279. The result of this legislative process was s 61B.

280. We have already recorded the concession made by the appellants to the effect that CBS was an "MSC provider" for the purposes of s 61B(1). That is important because the definition in s 61B(2) of the expression "involved with the company" is only relevant if there is an "MSC provider". This "gateway" (i.e. the presence of an MSC provider) limits the practical application of the expansive language used in s 61B(2).

281. Furthermore, s 61B(3) further limits the scope of the definition of an "MSC provider" by excluding persons who might otherwise fall within the scope of the definition merely by virtue of providing legal or accountancy services in a professional capacity. The evident purpose of this exclusion was to avoid the possibility that professional advice might turn the adviser into an MSC provider.

282. At various points in the hearing, reference was made to the scope of s 61B(3) and we are aware that certain assurances were given in Parliament by the Financial Secretary to the Treasury that it was not intended that independent, tailored advice should bring an adviser within the scope of the definition of an MSC provider. On the facts of this case, it is not necessary for us to comment on this further because the appellants conceded that CBS did not fall within the scope of the s 61B(3) exclusion.

283. Moreover, Mr Way made frequent references to *Hansard* in order to establish the mischief at which s 61B ITEPA was aimed. We do not consider this to be a permissible use of *Hansard*. The decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3 governs the appropriate use by a court or tribunal of *Hansard*[7]. Resort to statements of a sponsoring minister can only be relied upon in cases where the statutory language is ambiguous. Attempting to use *Hansard* in order to establish the objective of the legislation is the use of an impermissible extrinsic aid to statutory construction.

284. The scope of s 61B is to be determined by reference to the ordinary and natural meaning of the words used in the provision, construed purposively.

285. In our view, once it is established that there is an MSC provider, it is clear that Parliament intended the provisions of s 61B(2)(a) – (e), which define "involvement", to be construed widely – the statutory language is expressed in very general terms.

286. It was common ground that if any one of the tests set out in s 61B(2)(a) – (e) was satisfied in relation to an appellant, that appellant would be an MSC.

287. It was also common ground that the burden of proof lay upon the appellants to show that CBS was not involved with any of the appellants within the meaning of s 61B(2).

*Section 61B(2)(a) – Does the MSC provider benefit financially on an ongoing basis from the provision of the services of the individual?*

288. There is no definition of the phrase "benefits financially on an ongoing basis". We consider, as we have said, that these words should be given their ordinary meaning and construed purposively.

289. In our view, CBS did benefit financially on an ongoing basis from the provision of the services by the owners of each of the appellant companies.

290. We have set out above the different fee structures adopted by CBS. Initially, a fixed percentage fee was charged. Next, CBS charged a fixed amount "as and when work" was done. Thereafter, CBS purported to charge a fixed annual fee.

291. We consider that in each case CBS benefited financially on an ongoing basis from the services provided by the individual. The fixed percentage fee was a percentage of the income of the individual. This was clearly, as CBS itself recognised, a financial benefit directly related to the provision of services by the individual. The fixed fee per transaction basis of charging was also clearly related to the services provided by the individual. The fee was only charged when a payment was received by the personal service company. Moreover, the fee related to the number of payments received by the client (from the agency) rather than the number of times the

[7] There may be some exceptional additional circumstances where reference to *Hansard* may be made, but none of those circumstances is relevant here.

payroll had to be run or a payslip produced. Thus, if the client received two payments in one week from the agency, CBS ran one payroll and produced one payslip, but charged two fees. Thus the fees related to the number of payments received (which was a factor of the amount of work done by the client) rather than the number of times it had to run a payroll or produce a payslip. This, in our view, is a sufficiently close link to establish that CBS benefited "from" the services provided by the individual.

292. Furthermore, although CBS purported to move away from transaction fees to a fixed annual fee, the evidence was that fees were only charged when a payment was received by the client. Moreover, in periods when no work was done and no payment received the evidence established that CBS did not pursue the client for a fee in respect of those periods. In our view, therefore, this again establishes that, regardless of the fee structure used, there was a sufficiently direct link between the work done by the individual and the fee received by CBS.

293. Mr Way argued that the fees were derived not from the services of the individual but from the services provided by CBS. We reject that submission. First, the fact that CBS provided services in respect of which a fee was charged does not mean that a financial benefit was not derived by CBS from the services provided by the individual. As we have seen, the fees charged related to the number of payments received by the client rather than the number of time CBS had to run a payroll or produce a payslip. The services of CBS in processing payments only arose when the individual performed work and was paid for that work. It is true that the fees received by CBS were related to the services it supplied in processing the payments but they were more directly related to the number of payments received by the client and thus to the services supplied by the individual. The necessary connection between the services supplied by the individual and the benefit received by CBS is occasioned by the fact that either the fee was a percentage ("per invoice transaction" of the income earned from the individual's services (in earlier periods) or was a fee charged only when income was received. In our view, the wording of s 61B (2)(a) is wide enough to encompass such a benefit.

294. Secondly, and in our view more importantly, the view expressed in the preceding paragraph is consistent with and, indeed, promotes the statutory objective. We have considered the Explanatory Notes which accompanied the Finance Bill 2007. The relevant provisions of the Bill were Clause 25 and Schedule 3, the language of which is identical to the statutory provisions under consideration in these appeals. In relation to what is now s 61B(2)(a) the Explanatory Notes stated:

> "Paragraph (a) sets out the first criterion: that the MSC provider, or an associate, benefits financially on an ongoing basis from the provision of the services of an individual through the company that has been promoted or facilitated. This criterion differentiates between the person who receives a fee irrespective of the company's income, and the person who, by virtue of their specific relationship with the company and the individual, receives payment linked to the individual's provision of their services through the company."

295. It is well-established that it is permissible to have recourse to Explanatory Notes as an aid to the construction of a statute. In *Westminster City Council v National Asylum Support Service* [2002] UKHL 38 Lord Steyn said at [5]:

> "Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction."[8]

296. It is clear from the Explanatory Notes that s 61B(2)(a) was not intended to apply to a fee charged to the personal service company regardless of whether the individual produced income for that company. Conversely, where a fee is charged only where the individual produces income for the personal service company, as is the case in the five appeals before us, the legislative intention was that that fee should constitute a financial benefit derived from the provision of the services of the individual.

297. CBS deposited amounts which it had deducted in respect of taxes in its bank accounts with Allied Irish Bank and CredEcard and then, subsequently, with The Royal Bank of Scotland. CBS earned interest on these accounts as described above. The interest accrued in respect of the deposit of monies which CBS had deducted on account of taxes. That deduction arose every time the appellant was paid in respect of the services performed by its shareholder. In our view, the receipt of interest on amounts deposited was derived from amounts earned in respect of the services performed by the individuals and thus falls within s 61B(2)(a).

298. We therefore conclude, for the reasons given above, that CBS benefited financially on an ongoing basis from the services provided by the individual owners of the appellant companies.

*Section 61B(2)(c) – Does the MSC provider influence or control the way in which payments to the individual are made?*

299. We note that s 61J (Interpretation of Chapter) ITEPA specifically dis-applies the meaning of "control" set out in s 995 Income Tax Act 2007. We also note that, clearly, the payments in question are those made to the individual rather than to the personal service company or to CBS.

[8] See also *per* Lord Steyn in *R v Chief Constable of South Yorkshire Police ex parte LS and Marper* [2004] UKHL 39 at [4]:"Explanatory Notes are not endorsed by Parliament. On the other hand, in so far as they cast light on the setting of a statute, and the mischief at which it is aimed, they are admissible in aid of construction of the statute. After all, they may potentially contain much more immediate and valuable material than other aids regularly used by the courts, such as Law Commission Reports, Government Committee reports, Green Papers, and so forth." See also: *per* Lord Hope in *R v A* [2002] 1 AC 45 at [82]. With effect from the first Public General Act of 1999, almost all new Public Acts which result from Bills introduced into either House of Parliament by a Government Minister are accompanied by explanatory notes. Explanatory notes are produced by the government department responsible for the subject matter of the Bill.

300. The expression "influences or controls" is one that occurs, in slightly different forms, in a variety of statutory contexts. There appears to be no authority on the meaning of this phrase – we were referred to none and have discovered none ourselves. The expression must, we believe, be given its ordinary and natural meaning determined in accordance with its context and purpose.

301. In our view, "controls" means the exercise of the power or the ability to command or direct. Moreover, we consider that control can be shared and need not be exclusive.

302. "Influences" seems to us to have a different meaning, as indicated by the disjunctive "or". We consider that, in the relevant statutory context, a person exercises influence if it acts in such a way that it has an effect on another person or thing. Thus, an MSC provider "influences" the way in which payments to the individual are made if its actions or omissions have an effect on the way in which payments to the individuals are made. It is not necessary that, in order to influence behaviour, the person exercising influence should have the power to ensure or direct that the other person acts in accordance with their wishes.

303. When we refer to the expression "controls or influences" or its constituent parts later in this decision we are using those words in accordance with the meanings discussed above.

304. Essentially, it is said that CBS's clients received a mixture of salary and dividends from their personal service companies. On the Registration Form the client had to choose between being paid the minimum wage or an alternative amount.

305. In the case of Dr Trzaski he did not select the payment of the minimum wage but nonetheless was paid the minimum wage model. There was no indication that he authorised the payment of salary at the minimum wage level. CBS simply paid him the minimum wage. In the case of DJT, therefore, we find that CBS determined the level of Dr Trzaski's salary and therefore it controlled the way in which payments were made to him for the purposes of s 61B(2)(c).

306. As regards the other appellants, Ms Ayodele indicated on HL's Registration Form that she wished to be paid the minimum wage as a salary. Mr Tooze did likewise in respect of his company. As regards, Dr Osamwonyi and Ms Fanning, no Registration Forms were produced in evidence. We therefore do not know as regards CL and FSCL whether their directors authorised the payment of salaries in respect of the minimum wage on the Registration Form. Dr Osamwonyi's evidence, however, was that he left it to CBS to determine how he was paid.

307. As regards those appellants in respect of which the amount of salary to be paid was indicated on the Registration Form (i.e. JTPSL and HL) we accept that CBS did not control the amounts determined to be paid by way of remuneration. In these two cases, it was Mr Tooze and Ms Ayodele who determined this matter.

308. As regards CL and FSCL there is no evidence before us concerning the instructions, if any, given to CBS by Dr Osamwonyi and Ms Fanning respectively

concerning the level of their salary payments. Indeed, as we have said, Dr Osamwonyi's evidence was that he simply left how he would be paid to CBS. Therefore, in the case of CL we find that CBS controlled and influenced the way that payments were made to Dr Osamwonyi. As regards FSCL, the burden of proof is on the appellant to show that CBS did not control or influence the way that payments were made to Ms Fanning. FSCL has simply failed to do this. Accordingly, we conclude that FSCL has failed to show that s 61B(2)(c) did not apply.

309. As regards the payment of dividends, Mr Way submitted that if the individual clients had signed up beforehand stating that CBS were, on their behalf, to carry out certain actions (such as making dividend payments) that did not constitute influence or control within the meaning of s 61B(2)(c). We agree. The difficulty with the submission, however, is that it was not supported by the evidence. There was no evidence put forward on behalf of any of the five appellants to show that they determined that surplus profits of the personal service company were to be distributed by way of dividend. Even if the director or the appellant had determined the level of salary, it does not follow that every other payment made by the company to the director/shareholder out of surplus funds is a payment of a dividend rather than, for example, by way of loan. The evidence is that CBS simply provided dividend vouchers at the end of each tax year (as noted on the payslips) in what appeared to be an automatic process. In addition, CBS prepared its client companies' accounts in which it recorded a "Final dividend" even though no dividend resolutions had been passed by the director or the shareholder. It was CBS that determined that payments, otherwise than by way of salary, were or purported to be, dividends.

310. The Registration Form provided no authority to CBS to determine the amount of dividends. Indeed, the Registration Form (in its different versions) was silent on the question of dividends. In any event, a dividend paid by a company with the usual Table A Articles of Association (which were the Articles of the appellant companies) required dividends either to be resolved upon by the board of directors (interim dividends) or by the shareholders (final dividends). We accept that meetings were not essential and that dividends could be paid or resolved to be paid by a written resolution of the directors or of the shareholders. None of Dr Trzaski, Mr Tooze and Dr Osamwonyi, either as directors or shareholders, determined that a dividend should be paid and none recorded passing resolutions or attending board or general meetings at which dividend resolutions were passed. We infer that the same was true as regards the other two appellant companies. We have certainly seen no evidence to the contrary. In addition, we saw no genuine written resolutions authorising the payment of dividends.

311. Moreover, CBS created minutes of general meetings for some of its clients which were false – Mr Mian accepted that the meetings which the minutes purported to record had not taken place – a matter which was accepted by Mr Walton in cross-examination.

312. The third-party interview notes, in our view, corroborate the conclusion that it was CBS that determined that the surplus profits of a client personal service company would be distributed by way of dividend.

313. Our conclusion is that it was CBS that determined that surplus funds were paid by way of dividend. In so doing, we find that CBS in the case of all five appellants controlled or influenced the way in which payments from the appellant companies were made to each individual director for the purposes of s 61B(2)(c).

*Section 61B(2)(d)– Does the MSC provider influence or control the company's finances or any of its activities?*

314. On the Registration Form CBS's client had to indicate whether it wished to be supplied with a CredEcard account or whether it wished to use another existing bank account. In practice, nearly all clients elected to open a CredEcard account. That the client elected to open a CredEcard account, in our view, does not *of itself* result in CBS controlling the client company's finances. It was the client that authorised CBS to take the necessary steps open a CredEcard account in the client's name.

315. When indicating how CBS's fees would be paid, however, the client was given a choice. The fees could be paid either from the newly-opened CredEcard account, in which case there would be no transaction charges. Alternatively, the client could pay by a credit or debit card but in this case there would be a 5% surcharge. Even though surcharges in respect of the use of credit cards are common enough (although we take notice of the fact that 5% is considerably greater than the surcharge usually levied for the use of the credit card) a surcharge for the use of the debit card is more unusual. Be that as it may, we consider that the imposition of a 5% surcharge was clearly an attempt to persuade the client to use a CredEcard account rather than its own bank or credit card account.

316. Nearly all of CBS's clients opened CredEcard accounts for the purposes of the GBS. All of the appellant companies opened CredEcard accounts and used them to pay CBS's fees.

317. It seems to us that persuading a client to use a particular bank or payment account amounts to influencing the company's finances or any of its activities. The finances of a company include, in our view, its banking arrangements. Even if we are wrong about this, the width of the expression "any of its activities" is plainly wide enough to encompass a successful attempt to influence which bank account a company should use. Accordingly, for this reason we have concluded that CBS influenced the finances or other activities of the appellant companies within the meaning of s 61B(2)(d). To be clear, we consider that CBS influenced the finances of the client companies for all the periods under appeal – the effects of persuading the clients to use a CreEcard account lasted throughout all the appealed periods.

318. Moreover, we consider that CBS influenced the manner in which the appellant companies paid their taxes. CBS would receive an email notification when a payment was made into one of its client's CredEcard accounts. The amount of taxes would then be deducted by CBS every time a payroll was processed. The result was that the appellants paid away amounts in respect of taxes well before the statutory due dates for payment to HMRC. In our view, the acceleration of the appellants' tax payments constituted CBS influencing their finances.

319. Furthermore, we have also concluded that until CBS paid over the taxes from its bank account to HMRC on behalf of its clients the monies belonged to those clients. Mr Way's submission was that, once CBS deducted money on account of taxes from the clients' CredEcard accounts and paid that money into its own bank account, that money beneficially belonged to CBS. The difficulty with that submission was that it was unsupported by the evidence – indeed, the evidence contradicted it. It is true that CBS apparently contemplated at a late stage setting up a client account with RBS, but this never came to fruition. Therefore, the bank accounts into which the taxes were paid were in the name of CBS. Mr Walton's evidence was, however, that the money belonged to the clients. It cannot be said that the clients' understanding of the arrangements was different because the evidence on behalf of the appellants (Dr Osamwonyi, Dr Trzaski and Mr Walton) was that they were unaware that CBS holding onto money deducted in respect of taxes in its own bank account before paying it over to HMRC.

320. Furthermore, Mr Way appeared to accept that when CBS paid over the money to HMRC it did so as agent for each client. An agent stands in a fiduciary relationship to its principal: *Kelly v Cooper* [1993] A.C. 205. Therefore, absent terms to the contrary in the agreement between the clients and CBS, CBS would hold the money deducted in respect of taxes as a fiduciary and would not be entitled to make a secret profit from the principal's property. Mr Way was unable to point to any term of the agreement between the clients and CBS which would override the basic position at Common Law.

321. Therefore, in our view, CBS controlled its clients' money deducted in respect of taxes pending the payment of that money to HMRC because that money was in CBS's bank account earning interest (without the knowledge of its clients) for CBS.

322. As regards the other arguments put forward by HMRC in respect of s 61 B(2)(d), we have concluded that, after the introduction of debit mandates from September 2007, CBS did not use its password and login details to log into (and thereby access) its clients' accounts but, rather, debited amounts via the Instapay system pursuant to the debit mandates. In our view, debiting amounts from the client company's CredEcard account pursuant to a debit mandate does not of itself constitute CBS controlling or influencing the client company's finances. The debit is made pursuant to an authority given by the client and control (either to revoke or continue that authority) remains with the client. For the same reason we do not consider that, in this respect, CBS exercised influence over their clients' finances. Moreover, we do not consider that CBS shared control with the clients in these circumstances: control remained with the client.

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

evidence was that the CredEcard application forms were not sent by CBS to CredEcard in the period March to September 2007. It is, therefore, unlikely that CredEcard saw the authority contained in the Registration Form which permitted CBS to withdraw amounts from the clients' accounts. In any event, the evidence was that it was the CredEcard application that was sent to CredEcard rather than the Registration Form.

324. Therefore, we also conclude in relation to each appellant that, for the reasons given in the preceding paragraph, CBS had control of its finances until the following dates (being the dates on which a CredEcard debit mandate was signed):

(1) as regards CL, 26 September 2007;

(2) as regards HL, 23 February 2008;

(3) as regards FSCL, 26 September 2007;

(4) as regards DJT, 13 March 2008;

(5) as regards JTPSL , 2 October 2007.

## Decision

325. For the reasons given above, we dismiss all five appeals.

## Appeal rights

326. 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.

**GUY BRANNAN**

**TRIBUNAL JUDGE**
**RELEASE DATE: 21 APRIL 2016**