IN THE ISLE OF MAN VALUE ADDED TAX AND DUTIES TRIBUNAL

Appeal number:TC/2019/00182

VALUE ADDED TAX – nature of supply – whether supply of invoicing services to doctors working through recruitment companies – alternatively, supply of doctors to recruitment companies – contractual position – economic and commercial reality – appeal dismissed

INCOME PLUS SERVICES LIMITED	**Appellant**
- and -	
THE TREASURY	**Respondent**

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting at Murray House, Douglas 25-28 February 2020, with written submissions on 20 March 2020, 15 May 2020 and 12 June 2020

Mr Tarlochan Lall, instructed directly by the Appellant

Ms Marika Lemos, instructed directly by the Respondent

DECISION

INTRODUCTION

1. Income Plus Services Limited ("IPS") is an Isle of Man company which has been registered for VAT in the Isle of Man since September 2004. In the course of its business it supplies services in connection with self-employed individuals, including doctors and nurses working in the UK. This appeal concerns an assessment to VAT made on 5 June 2018 in the sum of £2,295,828 for VAT periods between March 2014 and November 2017. The VAT which is in dispute ("the Assessment") is £2,040,219 and is said by the Treasury Customs & Excise Division ("the respondent" or "IOMCE") to relate to supplies of doctors by IPS to various UK recruitment companies. The doctors were placed by the recruitment companies with end clients, mainly UK NHS hospitals. Sums were also assessed based on a discrepancy in IPS's sales records (£251,008) and for various other supplies wrongly treated as exempt from VAT (£4,605) which are not in dispute.

2. The respondents also issued a penalty to IPS in the sum of £344,374 based on carelessly making inaccurate VAT returns. The date on which the penalty was notified to IPS is not clear on the evidence before me. None of the grounds of appeal specifically address the penalty and IPS acknowledged at the outset of the hearing that the penalty will stand or fall with the appeal against the Assessment.

3. IPS contends in its grounds of appeal that it supplied invoicing, payment collection and administrative services to self-employed doctors. I shall refer to these generally as invoicing services. As such, only the fee charged to doctors for those services should be subject to VAT. The respondents contend that IPS made supplies of staff to UK recruitment companies and that the full amount paid by the recruitment companies to IPS was subject to VAT.

4. Both parties agree that the contractual framework within which IPS provided its services is the starting point for the VAT analysis. IPS contends that it entered into contracts only with the doctors, to provide services to the doctors, and that it had no contractual relationship with the recruitment companies. The doctors had a direct contractual relationship with the recruitment companies which did not involve IPS. In any event, IPS says that the economic and commercial reality of the supplies was that IPS made no supplies to the recruitment companies. In its grounds of appeal IPS acknowledges that the form of its written contracts with doctors did not match the economic and commercial reality, but says that it is the substance of the arrangements that determines what was supplied and to whom for VAT purposes.

5. The respondent contends that there was a contractual relationship between IPS and both the doctors and the recruitment companies pursuant to which doctors supplied services to IPS and IPS made a supply of staff to the recruitment companies. I shall refer to this as a chain of supply. Further, the economic and commercial reality was no different to the contractual position.

6. I set out below my findings on matters relevant to the issues I must decide, followed by my discussion and conclusion in relation to those issues. The decision is divided into the following sections:

(1) Background facts, which are not contentious.

(2) The legal framework within which a supply is chargeable to VAT, including the identification of what is being supplied and to whom for VAT purposes.

(3) The regulatory framework within which "employment agencies" and "employment businesses" operate.

(4) Findings of fact, including findings relevant to the contractual relationships between the various parties, the way in which the various parties operated in the context of those contractual relationships and the economic and commercial reality of the supplies.

(5) The parties' submissions

(6) Discussion of the issues.

(7) Overall conclusion.

7. My findings of fact are based on the witness and documentary evidence adduced by the parties. I heard evidence from the following witnesses, who all provided witness statements and gave oral evidence:

(1) Mr Christopher Champion, who has been a director of IPS since it was established in 2004.

(2) Mr Peter MacGregor, who commenced employment with IPS and associated companies in May 2017 and became group accountant in September 2018.

(3) Mr Alec Wooding, a senior customs assurance officer within IOMCE who made the Assessment.

(4) Ms Stacey Morgan, a senior customs officer within IOMCE who reviewed and upheld the Assessment.

BACKGROUND FACTS

8. IPS was incorporated on 6 September 2004 by Mr Champion and his co-directors, Mr Michael Hall and Mrs Julie Hall. The shareholdings were 40%, 40% and 20% respectively. Mr Champion and Mr Hall had previously worked for an Isle of Man company, Charterhouse Group International which provided business services, including services in relation to self-employed contractors obtaining work through UK recruitment companies. Mr Champion joined Charterhouse in 2001 and he was involved in sales, as a business development executive reporting to Mr Hall who was the business development manager. Their role was to approach UK recruitment companies to identify contractors who might be interested in Charterhouse's services. Mr Hall took the lead in leaving Charterhouse in 2004 and Mr Champion followed a

few months later. They set up IPS with the benefit of a grant of £5,000 from the Isle of Man Government, obtained with the assistance an advisor called Ian Montcrief-Scott. An advocate called Janice Turnbull, who was known to Mr Hall assisted with incorporating IPS and drafting contract documentation.

9. Initially IPS was introduced to self-employed contractors including doctors by recruitment companies. I shall refer to the doctors as "contractors" or "consultants", the latter term being used in the contractual documentation. Marketing was mainly directed towards the recruitment companies. Other means of findings contractors included giving incentives to existing contractors under an "introduce a friend scheme". Since 2004 IPS has expanded. IPS presently has about 3,000 self-employed contractors on its books at any one time. Mr Champion estimated that about 90% of contractors would be introduced by recruitment companies. IPS deals with about 300 recruitment companies at any one time.

10. Mr Hall and Mr Champion have set up various companies registered in the Isle of Man or the UK which operate under an informal group structure. The companies are all involved in one way or another in the recruitment sector and include:

(1) Income Plus Services (UK) Limited ("IPS UK") which carries out identical activities to IPS but is domiciled in the UK.

(2) IPS Umbrella Limited is a UK company operating as an "umbrella company" providing services to UK recruitment businesses. I discuss what is meant by that term below. Essentially, the company employs contractors, locums and temporary workers who it supplies as staff to UK recruitment companies. The company operates a PAYE scheme in respect of the contractors, locums and temporary workers that it employs.

(3) Trusted Accounts Limited which is an Isle of Man registered company providing accountancy and taxation services to self-employed individuals who are almost exclusively clients of IPS. It also has some personal service company clients.

11. IPS Group as a whole has some 42 employees. Mr Champion's responsibilities include day to day management of the IPS Group. IPS itself has about 8 employees, of which 4 are involved in sales and 4 are involved in administrative matters, including receiving payments from recruitment companies and making payments to contractors.

12. I consider the precise nature of the services provided by IPS, and to whom those services are provided in detail below. At this stage it is sufficient to say that a doctor will generally have a relationship with a recruitment company. The recruitment company will identify an assignment for that doctor with an NHS hospital trust. Generally, the recruitment company will also introduce the doctor to IPS. It is common ground that IPS is not involved in finding work for doctors or in finding doctors to fill specific roles. IPS is either providing invoicing services to doctors, or it is supplying staff to UK recruitment companies. Payments are made by the NHS Trust to the recruitment company, for services provided by the recruitment company to the NHS Trust. Payments are then made by the recruitment company to IPS. The issue on

this appeal is whether that payment is received by IPS as agent on behalf of the doctor in consideration of services provided by the doctor to the recruitment company (IPS's case), or in consideration of services provided by IPS to the recruitment company (the respondent's case).

13. IPS does not advertise for candidates for specific roles and does not carry out any checks on doctors. It does not obtain any information as to the doctor's employment history or qualifications and does not carry out any "disclosure and barring service" checks.

14. In October 2014, HM Revenue & Customs ("HMRC") asked IOMCE to verify the output tax declared by IPS. A UK recruitment company had claimed input tax credit using self-billed invoices on supplies involving IPS. IOMCE made enquiries of IPS and the matter was dealt with by Mr Hall, who led on VAT matters, Mr Clive Williamson, an accountant at Trusted Accounts Ltd and Mr David Shand who was IPS's office and compliance manager. In fact, IPS had not accounted for VAT on supplies it had treated as being exempt supplies of medical services by IPS to the recruitment company. I shall refer to this as "the 2014 Enquiry" and consider it in more detail below.

15. On 14 October 2014, as a result of the 2014 Enquiry IPS made a voluntary disclosure of errors in its VAT returns for periods 2012/08 to 2014/05. The error was described as "*relating to whether sales invoices relate to provision of medical services or doctors*" and a sum of £118,410 was identified by IPS as being due to IOMCE.

16. IPS made a second voluntary disclosure dated 20 November 2014 on exactly the same basis and identifying a further sum of £115,659 as due from IPS to IOMCE. It covered periods 2012/11 to 2014/05.

17. IPS made a third voluntary disclosure dated 12 March 2015, again on exactly the same basis and identifying a further sum of £54,268 as due from IPS to IOMCE. It covered periods 2011/11 to 2014/02.

18. Mr MacGregor joined the IPS group in May 2017. He qualified as a Chartered Certified Accountant in about 1991 and worked in a medium sized accountancy firm in Scotland until 1998 when he moved to the Isle of Man. In the Isle of Man he worked in the fiduciary services sector for several years before returning to work in an accountancy firm in 2011. Mr MacGregor has a particular expertise in the design and implementation of financial systems. He was approached to join IPS Group in 2017 by Mr Glyn Shaw who was also a Chartered Certified Accountant and had worked as the IPS Group accountant since June 2016. Prior to June 2016, IPS did not have an internal accountant and had only a very basic accounting system for which Mr Williamson had been responsible. Mr Shaw left IPS group in August 2018, at which stage Mr MacGregor took over his role.

19. In March 2018 Mr Wooding of IOMCE carried out a VAT inspection of IPS. I shall refer to this as "the 2018 Enquiry". It commenced with an interview on 1 March 2018 at which Mr Wooding met with Mr Shaw and Mr Shand. Mr Hall, the director

was also present for a few minutes. The precise discussions which took place at this meeting and subsequently in the 2018 Enquiry are controversial and I shall consider the evidence of those discussions in more detail below. It was the 2018 Enquiry which led to the Assessment in this appeal concerning doctors and to the penalty for careless inaccuracy in June 2018. No assessment was made in relation to supplies concerning nurses where a similar issue arose because Mr Wooding accepted that IPS should have the benefit of what is referred to as the "nursing concession", described below.

20. On 28 June 2018, IPS asked for a review of the Assessment. The request for a review was limited to the treatment of supplies relating to doctors and did not include a review in relation to the other sums which had been assessed. It did however include a request for a review of the penalty. The review was carried out by Ms Morgan. She entered into correspondence with Mr Hall and Mr MacGregor. In the course of that correspondence, Ms Morgan requested and was provided with further information and documents relevant to the review. Ms Morgan considered that the Assessment had been properly issued and she upheld the Assessment in a letter dated 5 December 2018. It is not clear how, if at all Ms Morgan dealt with the penalty in her review.

21. IPS lodged a notice of appeal against the Assessment and the penalty on 3 January 2019, although none of the grounds of appeal specifically referred to the penalty. The parties have agreed that the decision in relation to the penalty will follow the decision in relation to the Assessment.

LEGAL FRAMEWORK – VAT

22. VAT is charged on supplies of goods and services on the Island by virtue of section 1(1) Value Added Tax Act 1996 ("VATA 1996"). VATA 1996 is intended to implement the provisions of EC Council Directive 2006/112/EC which is known as the Principal VAT Directive, or "PVD". At all material times the PVD had direct effect by virtue of section 2(1) European Communities (Isle of Man) Act 1973.

23. Section 4 VATA 1996 provides that VAT will be charged where there is a taxable supply by a taxable person in the course or furtherance of a business. Section 5(2) provides that anything which is not a supply of goods but which is done for a consideration is a supply of services. This appeal is concerned with supplies of services by IPS, which is a taxable person for the purposes of VATA 1996.

24. Certain supplies are exempt from VAT pursuant to section 31 and Schedule 10 VATA 1996. Group 7 Schedule 10 exempts from VAT supplies consisting of the provision of medical care by registered medical practitioners, including doctors and nurses.

25. Specific provision is made in relation to supplies through agents. Section 47(3) VATA 1996 provides as follows:

> "Where services … are supplied through an agent who acts in his own name the Treasury may, if it thinks fit, treat the supply both as a supply to the agent and as a supply by the agent."

26. Article 28 of the PVD provides as follows:

> "Where a taxable person acting in his own name but on behalf of another person takes part in a supply of services, he shall be deemed to have received and supplied those services himself."

27. The respondent drew my attention to section 47(3) in its skeleton argument without placing specific reliance on it. It was not relied upon by the respondent in closing submissions. In the context of section 47(3), IPS also drew my attention to Article 28 PVD, but at the same time submitted that there is no basis on which section 47(3) could be engaged. In the circumstances, nothing seems to turn on these provisions for the purposes of this appeal and I mention them solely for the sake of completeness.

28. Section 73 VATA 1996 makes provision for the respondent to assess underpaid VAT and sections 82-84 make provision for the review and appeals procedure, although nothing turns on these provisions for present purposes.

29. There are a number of authorities at the highest level setting out how the nature of a supply and the identity of the recipient of a supply should be identified for VAT purposes. Judgments of the Court of Justice of the European Union in relation to the PVD have effect in Manx law. By an agreement dated 15 October 1979 between the Manx Government and the UK Government, the Manx Government agreed to ensure that Manx VAT law would correspond to UK VAT law. Both parties therefore made submissions on the basis that judgments of the courts of England and Wales were also authoritative.

30. The parties agree that in determining who is supplying what and to whom, the starting point is the contractual relationships (see *WHA Limited v Revenue & Customs Commissioners* [2013] UKSC 24 at [27]). There must be a legal relationship between the supplier of a service and the recipient of that service involving reciprocal performance. However, the contractual terms are not decisive where they do not wholly reflect the economic and commercial reality of the transactions (See *Secret Hotels2 Limited v Revenue & Customs Commissioners* [2014] UKSC 16 and *Revenue & Customs Commissioners v Airtours Holidays Transport Limited* [2016] UKSC 21).

31. In *Revenue & Customs Commissioners v Newey (trading as Ocean Finance) Case C-653/11* the CJEU stated as follows:

> "40. … As regards, more specifically, the meaning of supply of services, the Court has repeatedly held that a supply of services is effected 'for consideration', within the meaning of Article 2(1) of that directive, and hence is taxable, only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient …
>
> 41. It is also apparent from the case-law of the Court that the term supply of services is therefore objective in nature and applies without regard to the purpose or results of

the transactions concerned and without its being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person (see, to that effect, *Halifax and Others*, paragraphs 56 and 57 and the case-law cited).

42. As regards in particular the importance of contractual terms in categorising a transaction as a taxable transaction, it is necessary to bear in mind the case-law of the Court according to which consideration of economic and commercial realities is a fundamental criterion for the application of the common system of VAT (see, to that effect, Joined Cases C-53/09 and C-55/09 *Loyalty Management UK and Baxi Group* [2010] ECR I-9187, paragraphs 39 and 40 and the case-law cited).

43. Given that the contractual position normally reflects the economic and commercial reality of the transactions and in order to satisfy the requirements of legal certainty, the relevant contractual terms constitute a factor to be taken into consideration when the supplier and the recipient in a 'supply of services' transaction within the meaning of Articles 2(1) and 6(1) of the Sixth Directive have to be identified.

44. It may, however, become apparent that, sometimes, certain contractual terms do not wholly reflect the economic and commercial reality of the transactions.

…

52. In the light of the foregoing considerations, the answer to the first to fourth questions is that contractual terms, even though they constitute a factor to be taken into consideration, are not decisive for the purposes of identifying the supplier and the recipient of a 'supply of services' within the meaning of Articles 2(1) and 6(1) of the Sixth Directive. They may in particular be disregarded if it becomes apparent that they do not reflect economic and commercial reality, but constitute a wholly artificial arrangement which does not reflect economic reality and was set up with the sole aim of obtaining a tax advantage, which it is for the national court to determine."

32. The approach to these issues was summarised by Lord Neuberger in *Airtours Holidays Transport Limited*:

"47. This approach appears to me to reflect the approach of the Supreme Court in the subsequent case of *WHA Ltd v Revenue and Customs Comrs* [2013] UKSC 24; [2013] STC 943 where at para 27, Lord Reed said that "[t]he contractual position is not conclusive of the taxable supplies being made as between the various participants in these arrangements, but it is the most useful starting point". He then went on in paras 30 to 38 to analyse the series of transactions, and in para 39, he explained that the tribunal had concluded that "the reality is quite different" from that which the contractual documentation suggested. Effectively, Lord Reed agreed with this, and assessed the VAT consequences by reference to the reality. In other words, as I said in *Secret Hotels2 Ltd v Revenue and Customs Comrs* [2014] STC 937, para 35, when assessing the VAT consequences of a particular contractual arrangement, the court should, at least normally, characterise the relationships by reference to the contracts and then consider whether that characterisation is vitiated by [any relevant] facts."

33. Ms Lemos for the respondent referred me to what was said by Arden LJ as she then was in *ING Intermediate Holdings Ltd v HM Revenue & Customs* [2017] EWCA Civ 2111:

> “43. The fact that the terms and conditions use the word "service" does not of course bind the tribunals to find that there is a supply of services, but the parties' own description of the nature of a transaction is contemporaneous evidence as to what it really was and may sometimes throw light on that matter (see per Lord Neuberger in *Secret Hotels2* at [32], paragraph 39 above).”

34. In many cases it is HMRC arguing that artificial contractual arrangements do not reflect the economic and commercial reality of a supply. It is clear, however that economic and commercial reality may be relevant in other types of cases. Indeed, *Airtours Holidays Transport Limited* was not a case of artificial avoidance, although the Supreme Court held that the contract in that case did reflect economic reality.

35. The relevance of economic and commercial reality in cases not involving artificial arrangements was recognised by the Upper Tribunal in *Adecco UK Ltd v HM Revenue & Customs* [2017] UKUT 113 (TCC) at [43]:

> “43. We consider that it is clear from *Airtours* that determining the nature of a supply and who is making and receiving it is a two-stage process. The starting point is to consider the contractual position and then consider whether the contractual analysis reflects the economic reality of the transaction. If, as a matter of contract, a party undertakes to provide services to another person in return for consideration from the other or a third party then there is, subject to the question of economic reality, a supply to the other person for VAT purposes. If the person who provides the consideration is not entitled under the contractual documentation to receive any services from the supplier then, unless the documentation does not reflect the economic reality, there is no supply to the payer. The contractual position normally reflects the economic reality of the transactions but will not do so where, in particular, the contractual terms constitute a purely artificial arrangement.”

36. Adecco is relevant in the context of the issues in this appeal. The facts and issues bear some similarity to the present appeal. Adecco is a well-known employment bureaux supplying clients with temporary staff (“temps”). The case was concerned with the nature of services being provided by Adecco to end-user clients. There was no issue as to the identity of the supplier or the recipient. Adecco maintained that its services amounted to the introduction of temps to its clients. The temps were not employees of Adecco and it argued that the consideration for the supply of those services on which VAT was chargeable was the retained commission element of the fee it charged to its clients. The balance of the monies it collected from clients represented the employment costs of the temps, namely salary, PAYE and national insurance contributions which it merely disbursed. Temps worked under the direct supervision and control of the clients. They agreed with Adecco to perform assignments and Adecco agreed to pay them at an agreed rate. The FTT found in favour of HMRC and the Upper Tribunal dismissed Adecco’s appeal. Adecco appealed to the Court of Appeal ([2018] EWCA Civ 1794).

37. The Court of Appeal analysed the contractual position and the economic and commercial reality and found that Adecco was supplying temps to clients and the value of that supply was the total amount paid by clients to Adecco. The factors which led the Court of Appeal to this decision were set out at [49] of the judgment of Newey LJ and included the following:

(1) There were no contracts between temps and clients. Services of temps were provided pursuant to contracts between Adecco and clients on the one hand, and Adecco and temps on the other.

(2) The contract between Adecco and temps spoke of temps undertaking assignments "for a client" and providing services "to the client", but also spoke of services and temps being provided "through Adecco".

(3) Temps agreed with Adecco that they would be under the control of clients, and Adecco conferred control on clients.

(4) Adecco paid temps on its own behalf, and not as agent for clients. The regulatory framework prevented Adecco paying temps as agent for its clients.

(5) Adecco was obliged to pay temps regardless of whether it received payment from the clients.

(6) Adecco charged clients a single sum per hour for temps. The consideration was not split between remuneration for the temp and commission for itself.

38. Newey LJ concluded at 49(xiii) as follows:

> "In all the circumstances, it seems to me that, both contractually and as a matter of economic and commercial reality, the temps' services were supplied to clients via Adecco. In other words, Adecco did not merely supply its clients with introductory and ancillary services, and VAT was payable on the totality of what it was paid by clients."

39. Mr Lall for IPS also referred to a decision of the Court of Appeal in *Trafalgar Tours Ltd v Customs & Excise Commissioners* [1990] STC 127. In that case, T organised coach tours in Europe. T's parent company, P was based in Bermuda and arranged for brochures to be published. The brochures were distributed to travel agents by T. Travel agents obtained customers for the tours and notified their identity to T to be passed on to P. Travel agents paid P for the tours and P paid T an agreed percentage of the brochure price for a tour, that is a "net price". T accounted for output tax by reference to the net price of tours sold. At a later stage, T agreed with P that it would purchase tours exclusively from P and the consideration payable in respect of each tour was the net price which T invoiced to P. T represented that it acted as principal in an agreement with customers. The contractual arrangements put in place suggested that a supply of services was being made by T to P, concealing the fact that the supply was being made by T to customers. HM Customs & Excise assessed T to VAT on the basis that consideration for the supply by T to customers was the full brochure price which was paid by customers through travel agents to P.

40. Mr Lall relied on this case to illustrate that notwithstanding the contractual arrangements, the Court of Appeal held that the VAT Tribunal was entitled to find that the reality was that T made a supply to customers in consideration of the full brochure price. Whilst the case does illustrate circumstances where the VAT treatment is based on economic and commercial reality, in my view it does not take matters of principle any further than the authorities referred to above.

LEGAL FRAMEWORK – RECRUITMENT COMPANIES

41. It will be helpful for an understanding of some of the factual issues in this appeal to briefly describe the legal framework in which recruitment companies operate in the UK. The recruitment companies that IPS was dealing with were all based in the UK and therefore it is the UK legislation contained in the Employment Agencies Act 1973 ("EAA 1973") which is relevant. I understand those provisions are mirrored in the Island's Employment Agencies Act 1975.

42. The EAA 1973 applies in different ways to different businesses known as "employment agencies" and "employment businesses". Section 13 EAA 1973 defines employment agencies and employment businesses as follows:

> "(2) For the purposes of this Act "employment agency" means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of providing services (whether by the provision of information or otherwise) for the purpose of finding persons employment with employers or of supplying employers with persons for employment by them.
>
> (3) For the purposes of this Act "employment business" means the business (whether or not carried on with a view to profit and whether or not carried on in conjunction with any other business) of supplying persons in the employment of the person carrying on the business, to act for, and under the control of, other persons in any capacity."

43. Section 13 EAA 1973 provides an interpretation of the term "employment" for these purposes as follows:

> "13(1) In this Act –
> …
> 'employment' includes –
>
> (a) employment by way of a professional engagement or otherwise under a contract for services;"

44. This extended definition of employment to cover employment "under a contract for services" appears to have the effect that a business engaging a self-employed person and supplying that person to act for or under the control of a client would be treated as an employment business.

45. I was referred to The Conduct of Employment Agencies and Employment Businesses Regulations 2003 ("the 2003 Regulations"). The purpose of the EAA 1973 and the 2003 Regulations is to protect the interests of work-seekers using the services of employment agencies and employment businesses. A work-seeker is defined by regulation 2 as "*a person to whom an agency or employment business provides or holds itself out as being capable of providing work-finding services*". Work-finding services are defined as services provided:

> "(a) by an agency to a person for the purpose of finding that person employment or seeking to find that person employment;

(b) by an employment business to an employee of the employment business for the purpose of finding or seeking to find another person, with a view to the employee acting for and under the control of that other person;

(c) by an employment business to a person (the "first person") for the purpose of finding or seeking to find another person (the "second person"), with a view to the first person becoming employed by the employment business and acting for and under the control of the second person;"

46. Most of the restrictions on employment agencies and employment businesses relate to the provision of work-finding services to work seekers and are contained in the 2003 Regulations. The following regulations are relevant for present purposes:

"8(1) Subject to paragraph (2), an [employment] agency shall not, in respect of a work-seeker whom the agency has introduced or supplied to a hirer—

(a) pay to;

(b) make arrangements for the payment to; or

(c) introduce or refer the hirer to any person with whom the agency is connected with a view to that person paying to, or making arrangements for the payment to,

the work-seeker, his remuneration arising from the employment with the hirer.

14(1) Subject to paragraph (7), before first providing any work-finding services to a work-seeker, an agency or employment business shall obtain the agreement of the work-seeker to the terms which apply or will apply as between the agency or employment business and the work-seeker including—

(a) whether the agency or employment business will operate as an employment agency or an employment business in relation to the work-seeker;

(b) the type of work the agency or employment business will find or seek to find for the work-seeker; and

(c) in the case of an employment business, the terms referred to in regulation 15, and in the case of an agency which is to provide any work-finding services mentioned in regulation 16, the terms referred to in that regulation.

(2) Subject to paragraph (3), an employment business shall ensure that—

(a) all terms in respect of which the employment business has obtained the work-seeker's agreement are recorded in a single document or, where this is not possible, in more than one document; and

(b) copies of all such documents are given at the same time as each other by the employment business to the work-seeker before the employment business provides any services to the work-seeker to which the terms contained in such documents relate."

> "15 In the case of an employment business, the terms to be agreed in accordance with regulation 14 shall include—
>
> (a) whether the work-seeker is or will be employed by the employment business under a contract of service or apprenticeship, or a contract for services, and in either case, the terms and conditions of employment of the work-seeker which apply, or will apply;
>
> (b) an undertaking that the employment business will pay the work-seeker in respect of work done by him, whether or not it is paid by the hirer in respect of that work;"

> "32(1) Subject to paragraph (9), in these regulations –
>
> (a) any reference to a work-seeker, howsoever described, includes a work-seeker which is a company; and
>
> (b) the regulations mentioned below shall be modified as set out below in a case where the work seeker is a company.
>
> …
>
> (9) Subject to paragraph (12), paragraphs (1) – (8) shall not apply where a work-seeker which is a company, and the person who is or would be supplied by that work-seeker to carry out the work, agree that they should not apply, and give notice of that agreement to an employment business or agency, provided that such notice is given before the introduction or supply of the work-seeker or the person who would be supplied by the work-seeker to do the work, to the hirer.
>
> …
>
> (11) Where a notice as referred to in paragraphs (9) or (10) is given to an employment business or agency whilst the person who is or would be supplied to carry out the work by a work-seeker which is a company is in fact carrying out the work in a position with a hirer, then the notice shall not take effect until that person stops working in that position.
>
> (12) Paragraph (9) shall not apply where a person who is or would be supplied to carry out the work by a work-seeker which is a company, is or would be involved in working or attending any person who is under the age of 18, or who, by reason of age, infirmity or any other circumstance, is in need of care or attention."

47. I consider these provisions in more detail below, in the context of the parties' submissions.

FINDINGS OF FACT

48. IPS must establish on the balance of probabilities that it is supplying an invoicing and payment collection service to doctors, and not supplying doctors to the recruitment companies. I make all my findings of fact on the balance of probabilities. In doing so I have been careful to distinguish evidence of fact given by the witnesses

from evidence as to their opinions or perceptions as to matters of fact and law. Those subjective opinions and perceptions have only limited relevance. I only make findings in relation to such matters where I consider they might arguably have some relevance. One area where they are in my view relevant is Mr Champion's understanding in 2004 as to the regulatory background.

49. Mr Champion's evidence was that when he worked for Charterhouse, its business offered an "invoicing service" to self-employed contractors. He was not familiar with the way the documentation worked for that business but he did say that he and Mr Hall intended to adopt the same business model. Mr Hall instructed an advocate, Ms Turnbull to prepare documentation which was based on the Charterhouse documentation. Mr Hall provided Ms Turnbull with the Charterhouse documentation and she drafted the documentation including forms of contract which would be used by IPS. The documentation included a form of contract between IPS and the contractors and a form of contract between IPS and the recruitment companies. Those contracts continued to be used by IPS until 2019. Charterhouse charged a fee to contractors of 5% which was strictly non-negotiable. IPS generally charged a fee to consultants of 4%, and to be competitive it was open to negotiation.

50. The documentation used by IPS between 2004 and 2019 was used without any commercial difficulties. Mr Champion stated that it only became apparent to him during Mr Wooding's enquiry that the documentation did not accurately describe the invoicing service which he considered IPS supplied.

51. Mr Champion told me that in 2004 he understood from his experience at Charterhouse that recruitment companies could not pay contractors directly or experienced regulatory difficulties in doing so. His evidence was that the benefit to the recruitment companies of referring contractors to Charterhouse and then IPS was the recruitment companies would not have to operate a payroll. His role at Charterhouse did not involve explaining the documentation to recruitment companies or contractors. In his witness statement, Mr Champion said as follows:

> "We were generally aware through our experience at Charterhouse that recruitment agencies either could not or experienced difficulties in paying contractors. We provided, and still provide agencies with information about our service to contractors and how that helps them with their difficulty over paying contractors …"

52. Mr Champion said that he thought IPS might have provided recruitment companies with some marketing material which explained the benefit to recruitment companies but he could not be sure and he had not exhibited it.

53. There was considerable confusion in Mr Champion's evidence. At some stages in his evidence he described the services of Charterhouse and IPS as invoicing services to self-employed contractors, saying that IPS was not involved in a supply of staff or services to recruitment companies. At other stages he accepted that the structure was self-employed contractors providing their services to limited companies, in the form of Charterhouse or IPS, and those companies then supplying the services to recruitment companies. His understanding was that the model enabled contractors to have the tax benefits associated with self-employed status, namely reduced national

insurance contributions and tax relief for certain expenses. At Charterhouse the company used, which was the equivalent of IPS in the structure was called Consort Consultancy Services Limited. This was a product Mr Champion was involved in selling from the time he joined in 2001 and at that time it was an established product known as "a self-employed solution".

54. One example of Mr Champion's confusion appeared in the following exchange during cross-examination, just after Mr Champion had described IPS's services as "invoicing agents":

> "MISS LEMOS: So there was a limited company?
>
> MR CHAMPION: Yes.
>
> MISS LEMOS: And it was set up so that it would look like the, or it was the contractors providing their services to the limited company and the limited company invoicing the recruiting agencies?
>
> MR CHAMPION: Yes.
>
> MISS LEMOS: Did you understand that at the time?
>
> MR CHAMPION: Yes that's how we read it."

55. In another example, he accepted that the product IPS sold enabled recruitment companies to avoid tax and regulatory difficulties:

> "MR CHAMPION: I think the way it says the invoicing service that we provide is we don't provide anything other than an invoicing service to the actual contractor, to the actual recruitment company we're not providing anything if you like.
>
> MISS LEMOS: But why are recruitment companies your best referral?
>
> MR CHAMPION: Because they don't want to be bothered with doing their payroll so if they can let the contractors sort out themselves it's easier for them.
>
> MISS LEMOS: Okay so that's your, that's slightly not, you're not recognising in that answer something you've already accepted earlier today which is that the tax and regulatory landscape is part of the reason why this structure was attractive to the recruitment agencies.
>
> MR CHAMPION: Okay.
>
> MISS LEMOS: So it isn't as simple, of course you can say as you say a play on words, you can say well it was easier for them but it was easier for them not just because of having to run the payroll, it's because it was intended to get round some tax or regulatory difficulties for them, is that right?
>
> MR CHAMPION: Yes if you want to look at it like that, yes.
>
> MISS LEMOS: But there isn't really another way of looking at isn't it, I mean that is the business idea that you took from Charterhouse and applied in IPS?

MR CHAMPION: Yes."

56. IPS applied to be registered for VAT in an application dated 15 September 2004. It was registered with effect from 17 September 2004. The application described IPS's business activities as "engaging consultants to provide services to UK agencies". Estimated turnover for the next 12 months was put at approximately £200,000 for taxable supplies and approximately £200,000 for exempt supplies. Mr Champion was unable to explain what taxable supplies and what exempt supplies it was anticipated that IPS would be making. He did however accept that on any view, supplies of an invoicing service would not be exempt.

57. The VAT application also provided IOMCE with a business plan in which IPS described itself as "providing a professional and efficient invoicing structure" for temporary or contract workers to supply their professional services to the UK recruitment industry. The business plan had been produced by Mr Hall and Mr Champion with assistance from Mr Moncrief-Scott in connection with the government grant referred to above. Mr Champion accepted that an "invoicing structure" meant more than simply an invoicing service. At various points the business plan described IPS as providing workers with "an efficient payment solution" and "an invoicing tool", and as being "an invoice billing company". In particular, it claimed to give self-employed workers the opportunity to pay reduced national insurance contributions and obtain relief for business related expenses. The following is a description of IPS's services given in the business plan (sic):

> "Income Plus Services Limited is a company specializing in providing Temporary and Contract workers with an efficient payment solution.
>
> Income Plus Services Limited allows Contract workers to work in a self employed manner benefiting from reduced national insurance contributions and the ability to offset many business related expenses at tax year end. Income Plus Services operates as an invoicing tool for these Contract workers who supply their professional services into the Recruitment industry. Benefits also apply to the Recruitment Companies who utilise Income Plus Services as an invoice billing company. The 'Income Tax (Earnings and Pensions) Act 2003 Pt 11' allows an 'Agency Worker' or 'Employee of non UK employer' to be paid via two methods only. The UK's Pay as you earn system or to an intermidatory limited Company. It is deemed illegal to pay these workers a gross payment direct. The Pay As You Earn System deducts a significant amount from an individuals earnings. Income Plus Services Ltd acts as this intermediately allowing the contract worker to invoice via a Limited company for his or her professional services. The individual is then classed as a self employed worker declaring in the Country of work his or her taxable earnings along with their expenses at tax year end."

58. Mr Champion accepted that what was being described here was a means by which contractors could retain the tax benefits of being self-employed. Having said that, I am not satisfied from the evidence that Mr Champion actually understood the effect of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") and precisely what benefit IPS provided in relation to ITEPA 2003.

59. Having heard Mr Champion's evidence as a whole, I find that he did not have a clear understanding as to what service Charterhouse or IPS was providing and to

whom, either in 2004 or when he gave his evidence. However, Mr Champion was at least clear and did understand in 2004 and when he gave evidence that the benefits associated with the services Charterhouse and IPS were providing included helping recruitment companies avoid tax and regulatory difficulties and contractors to obtain tax benefits. He did not claim to have any real knowledge as to how IPS's services helped to avoid these difficulties or obtain these benefits.

60. The business plan set out a description of IPS's procedures which included the following:

> "On receipt of completed application form the Contractor is sent an IPS Welcome Pack. Included in this pack is a Terms and Conditions contract which is returned to IPS …
>
> The Recruitment Company also receives a 'Contract for Services' along with Income Plus Services Limited documentation which includes bank account details, certificate of incorporation and value added tax registration documents.
>
> …the Contract Worker raises an invoice via Income Plus for his or her professional services. The invoice is then raised to the Recruitment Company and the Contractor is paid with an administration fee deduction on receipt of cleared funds."

61. There are other references to invoicing in the business plan, including "a professional and efficient invoicing structure".

62. The business plan expressly referred to IPS having two "customers", identified as the temporary/contract worker and the recruitment companies. It states: "*as there are no fees taken against the Recruitment Company they are classed as a second customer, only benefiting our business from referral of contract workers*".

63. The business plan included some draft marketing literature aimed at workers. In an FAQ section, one question and answer was as follows:

> "Q. What will my company status be?
>
> A. You will not be a Director or shareholder of the company. **You only use the company for the purpose of raising your invoices**. This eliminates any company related administration from your side normally associated with owning your own limited company."

Emphasis added

64. The business plan also included a financial forecast of the profit IPS might make in its first 3 years of trading. Mr Champion described these figures as "guess work". It was not clear how those forecasts related to the estimated turnover included in the VAT application. Mr Lall sought to reconcile the two sets of figures in his closing submissions but with respect this was nothing more than a mathematical exercise based on various assumptions which were not tested in evidence and which did not satisfy me that the two sets of figures could be reconciled. More to the point was a submission by Mr Lall that if the gross turnover of IPS in year 1 was £400,000

and if this related to sums invoiced to recruitment companies, then IPS's gross profit at 5% would only be £20,000. Over the first 3 years the total gross profit would only be £156,000. No explanation was offered as to why supplies of £200,000 would be treated as exempt. I am satisfied however based on the evidence as a whole that the exempt turnover was based on an assumption that IPS's services in relation to doctors and nurses would benefit from the exemption for medical services.

65. Elsewhere, the draft marketing literature refers to "tax efficient payment solutions" and states under a heading "What can IPS do for you?":

> "IPS can help you maximise your income by allowing you to work as a self-employed contractor benefiting from reduced national insurance contributions and the ability to offset many expenses at the tax year end, giving you the opportunity to be in control of your own finances…"

66. There is no face to face contact between IPS and contractors. All communication is by telephone or email. Contractors would not generally approach IPS before they had approached the recruitment company and agreed an assignment.

67. IPS provided workers with a "Welcome Pack". The welcome pack in evidence was dated some time in or after 2013 and included the following:

> "**Contract for Services**
>
> Between IPS and yourself there is a base agreement which describes how you are a self-employed Contractor and gives information on how you will supply the services, which IPS supply to the client."

68. The welcome pack provided details to contractors as to how they should register with HMRC as self-employed and also invited contractors to use Trusted Accounts Limited as their tax agent. An "important note" in the welcome pack stated as follows:

> "It is very important that you as an individual demonstrate a self employed working nature.
>
> IPS has negotiated with your Recruitment Company/Client a Contract for Services. The content and terms within the Contract for Services clearly indicate self-employment.
>
> Although this contract indicates self employment it cannot guarantee your employment status.
>
> The relationship between your Recruitment Company/Client can be a relating factor. As a self employed worker you will need to conduct yourself in a self-employed manner.
>
> In effect you are not employed by the Recruitment Company/Client you are self-employed and should be able to demonstrate this status by not entering into an employee status or receiving any employer related benefits.

> It is your responsibility to ensure that your relationship with your Recruitment Company/Client meets with a self employment status test."

69. Mr Champion accepted that this note was included in the welcome pack because IPS was effectively an umbrella company for self-employed persons. He agreed that IPS ran a risk that if a contractor was not self-employed then it would be required to operate PAYE. He said that IPS would not run that risk for a 4% fee.

70. IPS's website in August 2019 included a page headed "Solutions: Sole Trader" and the following narrative:

> "Working with Income Plus Services Ltd means that you retain your sole-trader status and have all the advantages of sub-contracting with a company that has combined experience of over 60 years. We can process all your administration requirements, leaving you to concentrate on the job in hand."

71. The contract between IPS and contractors was headed "Contract for Services" and was used by IPS between 2004 and 2019. What follows are relevant extracts from the recitals and terms:

> (A) The Company [IPS] wishes to benefit from certain skills and abilities of the Consultant
>
> (B) The Consultant is in business as an independent consultant and is able and wishes to provide his services to the Company …
>
> **1. Services**
>
> 1.1 The Consultant will provide the services specified in the Schedule to this Contract ("the services").
>
> 1.4 In the event that either party wishes to alter the Services, that party may apply to the other in writing specifying the alteration sought. Both parties agree to consider any such application and if appropriate to agree the alteration. Until any alteration is agreed in writing and signed the Schedule shall apply.
>
> 1.5 The Consultant undertakes to provide the Services as a specialist and to act in a professional manner at all times …
>
> 1.7 The company shall appoint a contract manager who will be responsible for liaising with the consultant over all issues concerning Services …
>
> **2. Fees and Expenses**
>
> 2.1 The Consultant's fees shall be calculated by reference to time spent, complexity of service and specialist input required.
>
> 2.2 The fee to be paid by the Company to the Consultant shall be negotiated from time to time and shall be charged on the basis specified in the Schedule.
>
> 2.3 Subject to clause 4.2 and the prior authorisation of such items in writing by the Company, the Company agrees to pay all travel, accommodation and subsistence costs

and other reasonable costs and reasonable expenses incurred by the Consultant in connection with the provision of the Services.

2.7 The fee rate or expenses payable may be varied from time to time by the Consultant giving reasonable notice to the Company.

2.8 The Company shall be entitled to a contracting fee as set out in the Schedule.

3. Invoices

3.1 Each week on the day specified in the Schedule, the Consultant shall advise the Company of the hours worked by the Consultant and any approved expenses which the Company is liable to pay under clause 2.

3.2 Except as otherwise specified in the Schedule, each week the Company shall issue an invoice to the third party to whom the Services have been provided on the Company's behalf by the Consultant based on the information provided by the Consultant under clause 3.1.

4. Payment

4.1 Following presentation of an invoice under clause 3.2 and the receipt by the Company of cleared funds in full and final payment of the invoice, the Company shall pay the Consultant the sums due to it under this Contract…

4.2 Notwithstanding any other provision of this Contract no payment will be due to the Consultant under this Contract until full and final payment has been received by the Company in accordance with clause 4.1

4.4 The company may set off any losses incurred as a result of the Consultant's action against any sums which would otherwise be due to the Consultant under this Contract.

5. Term

5.2 The Company may by written notice summarily terminate this Contract with immediate effect if:

(a) the Consultant breaches any term of this Contract …

5.3 The Contract may be terminated by either party with immediate effect and without notice.

6. Confidentiality and conflicts of interest

6.2 During the period of this Contract the Consultant may accept and perform engagements for other companies, firms or persons which do not in the reasonable opinion of the Company conflict with or materially impinge upon his ability to provide the Services.

7. Consultant's warranty

> 7.1 The Consultant warrants and represents to the Company that he is an independent contractor. Nothing in this Contract shall render the Consultant an employee, agent or partner of the Company …
>
> 7.3 The Consultant undertakes to carry out the duties in an expert and diligent manner and to the best of his ability.
>
> 7.5 In the case of illness or accident preventing the performance of the Services the Consultant shall promptly notify the Company of such illness or accident.
>
> **10. General**
>
> 10.5 This document contains the entire agreement of the parties. It may not be changed by oral agreement but only in writing, signed by both parties and in the case of the Company no such agreement shall be binding upon it unless signed by a registered director.

72. The contract was intended to be signed by the consultant and by IPS.

73. Mr Champion confirmed that clause 1.4 had never been applied in practice and that IPS did not have any involvement with paying expenses to contractors, so clause 2.3 did not "make any sense" to him. Clause 4.4 had never been applied because if there was a problem with a contractor's work, Mr Champion considered that was a matter between the contractor and the recruitment company. IPS had never had cause to terminate a contract pursuant to clause 5.2.

74. At one stage in his evidence Mr Champion stated that consultants would raise invoices to IPS. This appears to be what the business plan anticipated, but there was no evidence of such invoices. It would be odd for consultants to invoice IPS in circumstances where they were paying IPS a 4% fee to invoice recruitment companies. To be fair, I think this was another example of Mr Champion's confusion.

75. The Schedule to this contract contained boxes to be filled in with certain details such as the consultant's name, the commencement date and the termination date of the assignment. The services were intended to be identified by reference to the consultant's occupation. There was a box for the contracting fee. A completed contract in evidence had narrative in the box which read "the greater of £7 or 4% of the invoiced fee (exclusive of VAT and expenses)". That was consistent with a fee payable by the consultant to IPS pursuant to clause 2.8, rather than a fee payable by IPS to the consultant pursuant to clause 2.2.

76. The schedule was intended to be signed by the consultant and IPS. Below the space for signature was the following narrative with space for a further signature:

> "THE CONDUCT OF EMPLOYMENT AGENCIES AND EMPLOYMENT BUSINESS REGULATIONS 2003 OPT OUT. To opt out of the regulations for all assignments that you undertake through Income Plus Services Limited, please sign and date this section of the form below and we will inform your recruitment company."

77. I was taken to examples of contracts signed by contractors and IPS. In all cases a signature of Mr Hall for IPS was applied digitally. In some cases, the opt out was

signed by the consultant, and in other cases it was not signed. Mr Champion did not understand the effect of the opt out, or the significance of it being signed or left unsigned. He thought that the opt out had been inserted "by one of the accountants" and would have been dealt with by Mr Shand as compliance manager.

78. On the same date that the contract was signed by the consultant, the consultant also received a standard form letter from IPS. There were two versions of the standard letter in evidence dated 21 April 2016 and 2 May 2017 which stated respectively as follows:

> "Thank you for choosing the services of IPS Limited, below is the registered details of the company that will invoice on your behalf."
>
> and
>
> "Thank you for choosing the services of IPS Limited, below are the registered details of the company you will be subcontracting to and which will be responsible for making payments to you."

79. Mr Champion gave evidence as to the circumstances in which the written contracts came to be drafted and used. His evidence as to the documentation used by IPS was again somewhat confused. In his witness statement he referred to the documentation used by IPS and said *" ... I believed that they accurately described the invoicing service IPS provided*". He maintained in his oral evidence that he held that belief until about 2017. In cross-examination he accepted that IPS's documentation was generally inconsistent with its case on this appeal that IPS provided an invoicing service to contractors.

80. IPS sent a standard contract to recruitment companies in relation to each contractor on its books. It was accompanied by a standard form letter, and it is likely both were sent as an attachment to an email, although the emails were not in evidence. The letter stated as follows:

> "Re Limited Company Details for <workers name>
>
> Income Plus Services Limited provide services to your organisation. below you will find details about the Limited Company to enable you to make payments directly into the company account for the professional services provided. Enclosed are copies of the Certificate of Incorporation and Certificate of Registration for Value Added Tax.
>
> [Table showing company registration, banking, tax and VAT details for IPS]
>
> We will be posting originals to you. When you receive the originals please could you sign and return one copy of the contract to us at the above address."

81. There was no evidence that any original documents were actually posted out to IPS.

82. A second version of this letter was identical except the introductory paragraph stated as follows:

> "We administer the above name's Limited Company. Below you will find details about the Limited Company to enable you to make payments directly into the company account for the professional services the consultant has or will be providing to your organisation …"

83. Mr MacGregor accepted that the second version may have been intended for an individual providing services through their own personal services company. It appears to me that is a likely explanation, so it is not relevant for the purposes of this appeal.

84. The evidence included a draft standard form contract sent to recruitment companies. Mr Champion confirmed that the letter and draft contract were "generated by the system" and would always be sent out the recruitment companies. The draft contract was headed "Contract for Services" and reflects many provisions of the contract between IPS and consultants. The form of contract sent to Blue Lantern Nursing Agency dated 21 April 2016 was in evidence and it contained the following relevant extracts from the recitals and terms:

> (A) The Client [Blue Lantern] wishes to benefit from certain skills and abilities of the Company.
>
> (B) The Company [IPS] is in business as an independent consultant and has agreed to provide services to the Client …
>
> **1. Services**
>
> 1.1 The Company will provide the services specified in the Schedule to this Contract ("the Services").
>
> 1.5 The Company undertakes to provide the Services as a specialist and to act in a professional manner at all times. The Company further undertakes to dedicate sufficient representatives, time, skill and care to the performance of the Contract …
>
> 1.9 The Company may, entirely at its expense, engage sub-contractors or other third parties to fulfil its obligations under this Contract … however the Company shall remain at all times liable to the Client under this Agreement and, in accepting performance by third parties engaged by the Company, the Client will have no legal or financial relationship with that third party.
>
> **2. Client Obligations**
>
> 2.4 The Company agrees to provide a copy of its VAT registration and certificate of incorporation to the Client within 7 days of entering into this contract.
>
> **3. Payment**
>
> 3.1 The Company's fee shall be calculated by reference to time spent, complexity of service, specialist input required and the use of any intellectual property belonging to the Company.
>
> 3.2 The fee to be paid by the Client to the Company shall be negotiated from time to time and shall be charged on the basis set out in the Schedule …

4. Invoices

4.1 Except as otherwise specified in the Schedule, each week the company shall issue an invoice to the Client specifying in pounds sterling the amount payable by the Client, such amount to be paid in that currency.

7. Warranties

7.1 The Company warrants and represents to the Client that:

(a) it is appropriately qualified to provide the Services

11. General

11.2 Neither party may transfer, charge or otherwise seek to deal with any of the rights or obligations under the Contract without the prior written consent of the other party. Nothing in this Contract is intended to confer on any person any right to enforce any terms of this Contract which that person would not have had but for the Contracts (Rights of Third Parties) Act 2001.

85. There is provision for the contract to be signed by IPS and Blue Lantern. A digital signature of Mr Hall was applied to the contract for IPS but it was not signed by Blue Lantern. There was some indication that an unsigned contract was sent back to IPS by Blue Lantern but the evidence is not sufficient for me to make any finding in that regard. The schedule is in very similar form to the schedule attached to the contracts with consultants. Indeed, it appeared to anticipate that it would be signed by the consultant rather than Blue Lantern which appears to be a mistake. It contained boxes to be filled in, including boxes to enter details of Blue Lantern's contract manager and IPS's contract manager. Instead of a box for "Contracting Fee" there was a box for "Fees" where the entry was "N/A".

86. Mr Champion's evidence was that recruitment companies never sent back a signed version of the draft contract and I accept that evidence. There was no other evidence, whether from IPS or from any recruitment companies to show whether recruitment companies signed such contracts, as they were requested to do by the standard letter which was sent with the draft contract.

87. Mr MacGregor exhibited documentation for a sample of 19 contractors out of 2,100 who IPS dealt with in 2016 and 2017. He accepted that the documents held for the contractors were incomplete. In particular, IPS's systems do not include all email correspondence that might have passed between IPS, the consultant and the recruitment companies. No attempts were made to contact contractors or the relevant recruitment companies to see whether they held any additional documentation.

88. The documentation which was available suggested that in 13 cases the contractor may have started working for an end-client through the recruitment company before contracting with IPS. This is a matter relied upon by IPS in support of a submission that consultants must have had a direct contractual relationship with recruitment companies for the provision of those services.

89. I was taken to several examples. Evidence as to email exchanges between IPS and the recruitment company was referred to but not adduced in evidence. In the case of one consultant, RB, the contract between RB and IPS was dated 8 January 2016. That was the same date as the first invoice from IPS to the recruitment company, Insta Care Limited. The invoice covered services supplied by RB in the period 28 December 2015 to 3 January 2016. The evidence included an email dated 8 January 2016 from IPS to Insta Care saying "can you send over new set up details for [RB] please?". There was a response on the same date providing banking details for RB. Mr MacGregor accepted that this email correspondence may not be complete because IPS's scanning system for recording emails in relation to contractors was not as good as it should have been. I am not satisfied that the correspondence for any of the samples is complete. It seems likely in the case of RB that there would have been further contact between IPS and Insta Care in relation to RB as a new contractor, and the email exchange in evidence leaves open the real possibility that the details being provided replace details which had previously been provided.

90. I cannot be satisfied on the evidence before me as to when the first contact took place between the consultants and IPS, in particular whether it pre-dated the contact between IPS and the relevant recruitment companies. Mr MacGregor's evidence was that IPS would often hear from a recruitment company for the first time on the date a payment was due to be made to a consultant. I do not know whether that was the position in 2004 when the business started. In any event, I am unable to accept Mr MacGregor's evidence in this regard in the absence of supporting documentary evidence. The documentary evidence is incomplete, there is no evidence before me from consultants or recruitment companies and there is no documentary evidence to show how or when recruitment companies introduced consultants to IPS. Even if there was no contact between consultants and IPS prior to a consultant commencing work, I do not know what discussions the recruitment company and consultants would have had about the involvement of IPS.

91. The documentation for one of the samples included a copy of the contract sent by IPS to the recruitment company. IPS accepts that contracts signed by Mr Hall would have been sent out to the recruitment companies but were not retained by IPS. this may be an example of a recruitment company returning a contract, albeit unsigned, but if it is I am satisfied it is an isolated example.

92. There was no evidence as to how contractors declared their income for tax purposes. Either, gross income comprising the sum due from recruitment companies with the 4% payable to IPS treated as an expense or, gross income comprising the sum due from IPS after IPS had deducted a 4% fee.

93. Documentation for one of the sampled consultants included a copy of a contract between the consultant and the recruitment company. This was the only such contract in evidence. The consultant was a nurse called JH and the recruitment company was called Nurses Friend. The contract was signed by both parties and dated 4 July 2017. There was also another Nurses Friend document signed by JH on 4 July 2017 in which there was an indication that JH would be taxed under PAYE.

94. Unlike the other samples, there was no copy of a screenshot of IPS's system entry for JH, no copy of IPS's contract with JH, no evidence of invoicing and no evidence of payments. A handwritten checklist indicates that JH was sent a welcome pack on 12 September 2017, some 2 months after her contract with Nurses Friend. The checklist has a handwritten note on it saying "Moved to Umbrella". A bank statement provided by JH as identification was dated 21 September 2017.

95. I am not satisfied on the evidence that JH was a client of IPS. More likely is that she was a client of IPS Umbrella Limited which employed workers and operated PAYE on payments made to those workers. It is not therefore necessary for me to set out in detail the terms of the contract between JH and Nurses Friend. For the sake of completeness, I can say that I am satisfied that it is a contract whereby Nurses Friend agreed to provide services to JH as an employment agency, rather than JH agreeing to provide services to Nurses Friend.

96. IPS would generally invoice recruitment companies on a weekly basis, based on timesheets. Mr MacGregor's evidence was that in most cases timesheets would be sent to IPS by the recruitment company who had introduced the consultant to IPS. In some cases, the consultant might provide the timesheet to IPS. The invoices sent to recruitment companies were in the name of IPS and included a narrative "For services supplied by [name of contractor]". They identified the invoice period which was usually a period of one week. There was then a breakdown of the number of hours worked, and the rate per hour which was chargeable. It is not clear why, but the rate could vary on one invoice. Possibly this was because of different overtime rates but nothing turns on that. There were also entries for mileage. VAT was expressed as applying at 0%. The invoices included IPS's banking details, company registration number and VAT number.

97. In at least one of the sample cases, IPS charged VAT on its invoices to recruitment companies. The invoice from IPS to the recruitment company dated 7 June 2016 in relation to GK charged VAT at 20%. This appears to be because he was providing "driving services" which would not have been treated as exempt.

98. I was taken to sample documents for a contractor called AI. There was an invoice dated 24 May 2017 with an invoice total of £1,076.15. A separate document was sent to the contractor in a similar form, although it was headed "For Tax Purposes Only". There was no reference to VAT in this document, but an administration fee was identified using the appropriate percentage, usually 4%. The example I was shown which corresponded to the IPS invoice described above was dated 26 May 2017. It showed an administration fee of £43.05 being deducted and an "invoice total" of £1,033.10. Each of the documents sent to the recruitment company and the consultant contained the same reference: "invoice number 399405".

99. Payments from recruitment companies were paid into IPS's own bank account. IPS did not have a separate client account. IPS's bank statements show that it received £1,076.15 from the recruitment company into its bank account on 26 May 2017. I infer that this payment generated the document sent to AI on the same date. Payment of £1,033.10 was made by IPS to the contractor on 1 June 2017. In evidence Mr

MacGregor suggested there was a reason for this delay in that IPS did not have a copy of IA's passport on the day the payment was received which led to a delay. This explanation was not challenged in cross examination and I accept it.

100. I am satisfied that IPS aimed to ensure that it paid contractors on the same date that it received funds from recruitment companies and that was the basis on which IPS marketed itself to contractors. When IPS first started in business, payments to contractors were made manually by Mr Champion and by Mr and Mrs Hall. This became very time consuming as the business grew and at some stage the bank permitted it to make bulk BACS payments.

101. There is no evidence of any disputes concerning payments by recruitment companies in relation to the services of any contractor. Mr Champion said it had never happened in practice, if it did then he considered it would be a matter for the contractor to approach the recruitment company.

102. I was also taken to a contract between IPS UK and a nurse, dated 29 September 2017. The recitals to that contract indicate that the consultant (defined as the "sub-contractor") would be providing services to IPS UK which would in turn provide services to its recruitment company clients. Under a heading "payment for the services", clause 9 stated as follows:

> "The Subcontractor shall raise an invoice for the Services where VAT registered. Where not VAT registered, the Subcontractor shall use the Contractor's self-billing procedure so there is no requirement for invoices to be submitted by the Subcontractor in such cases. Invoices will, instead, be produced by the Contractor and a copy provided to the Subcontractor."

103. Mr MacGregor was asked about this form of contract. He believed it was drafted by a firm of tax specialists and that Mr Shand would have dealt with the firm. He thought that the contract would have been adopted for use by IPS UK sometime after that company was incorporated in 2013. Mr MacGregor accepted that when a business model was set up for IPS UK it adopted the business model of IPS. I accept Mr MacGregor's evidence in this regard.

104. I turn now to consider the 2014 Enquiry. I am satisfied that IPS did not receive any external advice in relation to the 2014 enquiry. Matters were dealt with by Mr Hall, Mr Williamson and Mr Shand.

105. MedicsPro Limited was one of the recruitment companies that IPS dealt with. In 2013 MedicsPro produced self billed invoices in relation to what they must have understood were taxable supplies from IPS to MedicsPro. I was taken to an example of one self-billed invoice concerning supplies relating to Dr MJ. IPS had sent its standard form invoice to MedicsPro dated 15 August 2013 showing an invoice total of £4,432.50, with VAT stated to be 0%. An associated MedicsPro document was described as a "SelfBill Remittance Advice" dated 16 August 2013 which applied VAT at 20% to that figure, giving VAT of £886.50 and a total invoice value of £5,319. The VAT was described on the document addressed to IPS as "your output tax due to customs & excise".

106. Provisions of the VATA 1996 and the UK VATA 1994 permit the recipient of a supply from a VAT registered trader to set up self-billing arrangements with the supplier. In those circumstances the recipient prepares the suppliers VAT invoice and forwards a copy to the supplier with the payment. It is not necessary to have approval from IOMCE or HMRC but it is necessary to have a formal self-billing agreement in place between the supplier and the recipient. Various other conditions must be satisfied. Mr Champion and Mr MacGregor could not say whether any self-billing agreement was in place between IPS and MedicsPro.

107. Mr MacGregor's understanding from Mr Hall, although there was no evidence to confirm this, was that MedicsPro sent the self bill document to IPS together with a payment of £5,319 including VAT. IPS sent the VAT back to MedicsPro because IPS considered the supply was exempt and MedicsPro sent the VAT back again to IPS. It was agreed that MedicsPro would check the position with HMRC and HMRC made a reference to IOMCE which prompted the 2014 Enquiry.

108. The 2014 Enquiry seems to have commenced in early September 2014, prompted by a referral from HMRC relating to the MedicsPro self-billed invoices. There was a meeting between IPS and IOMCE on 16 September 2014, following which Mr Williamson investigated the MedicsPro invoices.

109. On 30 September 2014, IPS sent MedicsPro a standard form contract for services electronically signed by Mr Hall in relation to Dr MJ, together with the standard covering letter referred to above. The schedule indicated a commencement date of 11 July 2012. There was no change in the description which referred to IPS providing services to MedicsPro.

110. In an email dated 1 October 2014, Mr Williamson referred to his investigation in relation to self-billing invoices which had been created "since the system commenced on 19th October 2012". This appears to be a reference to the commencement of a self-billing system. He provided details of VAT included on all the MedicsPro self-billed invoices since 19 October 2012, and went on to state as follows:

> "Referring to the attached contract between Income Plus Services and Medicspro the schedule clearly refers to medical doctors services and as such it is our understanding that this is exempt from VAT in accordance with sections 2.1 and 2.3 of VAT Notice 701/57. As can be seen from the information I have provided, the self-billed invoices include VAT which we have corrected by issuing the replacements also attached hereto… I would point out that the majority of the charges relate to either healthcare services or nursing both of which are specifically exempt from VAT …
>
> Based on our understanding the VAT appears to have been included in the self-billed invoices in error and we have therefore issued revised invoices to Medicspro to amend their error and the VAT paid to us has been retained with the intention of repaying it."

111. In an email to IOMCE dated 7 October 2014, which was also copied to Mr Hall and Mr Champion, Mr Williamson said as follows in the context of doctors' medical services:

> "... if the employment business maintains the direction and control of its health professional staff to make a supply of medical care directly to a final consumer, then the employment business are providing medical services rather than merely a supply of staff. In these circumstances, the business is making an exempt supply of health services …
>
> I have attached a copy of the contract and I would point out that sections (A) and (B), 1 on services and 2 on client obligations all define the direction and control over the health professional staff. The contract essentially provides that Income Plus Services is providing the consultant and is responsible for his direction and control to this end the following points are relevant…"

112. In an email dated 9 October 2014, copied as above and also to Mr Shand, Mr Williamson told IOMCE that IPS was seeking an opinion on the matter, but that in the meantime it would give a notification of errors in respect of the self-billed invoices from MedicsPro, with further notifications if necessary following a review of IPS's records. There is no evidence that IPS did take advice at this stage. On 15 October 2014 IOMCE emailed HMRC as follows:

> "…the IOM trader has since submitted an error correction with payment that does include the VAT on those two self-billed invoices, and more.
>
> As background, the IOM trader believed the supplies were exempt (medical services) and did not accept the self-billed invoices, issuing their own invoices without VAT. They believed the VAT paid to them was paid in error and were looking at how to deal with it but have now accepted the supplies are standard rated, leading to the error correction (although they are currently taking advice on the matter)."

113. At or about the date of that email, IPS sent the first error notification mentioned by Mr Williamson, together with repayment of the sum of £118,410 referred to therein. This was followed by subsequent error notifications. The "errors" were clearly identified as relating to whether IPS's supplies to recruitment companies related to the provision of medical services or doctors. There was no question as to whether IPS was making any supplies to recruitment companies at all. In an email dated 20 November 2014 accompanying the second error notification, Mr Williamson said:

> "With reference to our recent correspondence and discussions in respect of the income earned by Income Plus Services Limited from agencies, for the provision of doctors, please find enclosed a form VAT652 notification of errors …"

114. Mr MacGregor's evidence was that these voluntary disclosures were themselves made in error. However, he was not employed by IPS at that time and this was simply his opinion based on discussions with others.

115. After the 2014 Enquiry, IPS accounted for VAT on sums it invoiced to recruitment companies in relation to some but not all supplies concerning doctors. The reason for this was apparently administrative. When new doctors started after October 2014, IPS accounted for VAT on receipts from recruitment companies. However, in relation to doctors already on IPS's books at that time, VAT was not

accounted for. It is VAT in relation to those alleged supplies since May 2014 which is the subject of the Assessment.

116. Mr MacGregor's evidence in his witness statement was that he briefly discussed with Glyn Shaw at some time in October or November 2017 "*whether or not our billing model should be changed to that of an invoicing agent*". He said that the idea was floated but not taken further because there was a lot of other work at the time and it wasn't a priority. In oral evidence, Mr MacGregor accepted that what was said in his witness statement looked as though he was suggesting changes to an existing model, but what he intended to say was that his discussion with Mr Shaw was more along the lines of "*isn't what we're doing more this type of model, this is what we actually do*". Later in his evidence he said "*we were going to change the paperwork, not the model*". Mr MacGregor stated that he had previously come across the "invoicing model" with the practice he worked for immediately prior to joining IPS. A recruitment company client was considering it, but in fact it was never implemented because they were actually supplying staff rather than providing an invoicing service. He also had experience of a similar issue in the context of travel agents.

117. Mr MacGregor said that at this time he considered that IPS's only involvement in the transactions was raising an invoice on behalf of contactors. This was based on his view of IPS's accounting systems. He discussed with Mr Shaw how they were accounting for income, although he did not look at the underlying contractual or other documentation. He was also aware that this would have significant VAT implications for IPS but he was new to the business and he considered this was really a matter for Mr Shaw. If matters had been taken further it would have been necessary to engage with Mr Hall and Mr Shand. He did not consider whether this would have been consistent with the benefits marketed to contractors arising from providing their services through a limited company or whether recruitment companies would have accepted the position.

118. IPS's financial accounts up to and including the accounts for year-ended 31 December 2015 were prepared by Crowe Morgan, Chartered Accountants. The 2015 accounts were approved by the Directors on 28 June 2017. The accounts for subsequent years were prepared in-house. There was no requirement for the accounts to be audited. The accounts for year ended 31 December 2016 were prepared by Mr MacGregor. The Directors' Report shows that they were approved on 29 September 2017. The principal activity of IPS is described as the provision of consultancy services. The turnover was £16,935,529 and Mr MacGregor agreed that this was the total sum received from recruitment companies. Previous accounts prepared by Crowe Morgan had been prepared on the same basis.

119. The relevance of Mr MacGregor's views in late 2017 arises in connection with the 2018 Enquiry. There is a significant issue of fact between the parties as to whether by 1 March 2018 IPS considered that the true nature of its services was an invoicing service. Mr MacGregor did not attend the meeting which took place with Mr Wooding of IOMCE on 1 March 2018. However, he recalled that he discussed the issue with Mr Shaw prior to the meeting and immediately following the meeting. IPS effectively wishes to counter any suggestion that it only raised the description of an

invoicing service after that meeting took place when it became aware that there might be a significant VAT liability.

120. Mr MacGregor was responsible for preparing IPS's accounts for year ended 31 December 2017. The Directors' Report states that they were approved on 29 September 2017 but that is before the year end and must be an error. It appears to be a date taken from the 2016 accounts. Mr McGregor's evidence, which I accept, was that they would have been prepared in or about September 2018. Again, the principal activity is described as the provision of consultancy services and the turnover of £11,888,259 was the total sum received from recruitment companies. By this stage the Assessment had been made, although the review requested by IPS had not been completed. Mr MacGregor's evidence was that he believed IPS's business model was to supply an invoicing service, so one would expect the turnover declared to represent approximately 4% of the amount invoiced to recruitment companies. Mr MacGregor told me that these accounts were prepared "*with the knowledge that they could change*", however he accepted that there was no note in the accounts to that effect.

121. Mr Wooding's evidence was that at the meeting on 1 March 2018, Mr Shand told him that the business made supplies of nursing and nursing auxiliary workers which Mr Shand considered were exempt from VAT. On examination of the invoices Mr Wooding identified that many supplies related to doctors which he considered should have been standard rated but which had been treated as exempt. Mr Wooding said that there was no mention at this meeting of IPS's business really being the provision of an invoicing service. His visit report notes that Mr Shand stated that the business of IPS had declined because of changes in UK legislation. That may be a reference to the introduction of a new section 44 ITEPA 2003 by Finance Act 2014, but it is not clear that it is and I make no finding in that regard.

122. Prior to the meeting on 1 March 2018, Mr Shand provided Mr Wooding with a copy of IPS's sales day book. Comparison of the sales day book with the VAT returns showed under-declared output tax of £251,008 and that element of the VAT assessed is not in dispute and does not form part of the Assessment under appeal.

123. IOMCE maintain on their systems a document with the reference 465a which records certain standing information in relation to a trader. The document can be accessed and updated over time. The 465a identifies IPS's principal outputs as follows "*Standard: Payments to contractors, admin fees ... Exempt: Payments to health workers. Incorrectly treated as exempt and should change in the future*". Under a heading referring to the structure and organisation of the business the document recorded as follows:

> "The company provides payroll services to UK Recruitment companies. This tends to be in 3 main areas: Doctors, Nurses/Health Workers and IT/Engineering Workers. The company invoices the UK Recruitment company's for the consultants 'wages', they then forward these funds on to the consultants less an invoicing fee which is between 3.5 and 4% (agreed individually)."

124. It is not clear when or by whom these entries on the 465a were made. The document shows when the report was initially written and when it was last updated

but it is impossible to say when any particular entry was made. However, Mr Wooding accepted, rightly in my view, that despite certain inconsistencies in the wording the entries were at least consistent with IPS's case that it was providing an invoicing service to consultants.

125. During the course of Mr Wooding's evidence it became apparent that his handwritten notes of the meeting on 1 March 2018 had not been disclosed and were not in evidence. I need not set out the circumstances in which this came to light, and both parties were content that they should be admitted in evidence. The notes written during the meeting by Mr Wooding include a reference to "invoice service company" and under a heading "Main Supplies" the following:

> "Self employed – staff
>
> VATABLE – some exempt
>
> Invoicing services → self employed
>
> Agency → Direct Client"

126. Mr Champion's evidence in cross-examination was that he only became aware that there was any issue in relation to the nature of IPS's supplies and the corresponding VAT treatment after the meeting on 1 March 2018. The first time he understood the argument was following a meeting with Mr Duchars, a VAT specialist referred to below. In contrast, Mr MacGregor's evidence was that he considered there was an issue as to the nature of IPS's supplies some considerable time prior to this visit and that Mr Shaw raised the issue with Mr Wooding at the visit.

127. Following the meeting, Mr Wooding informed Mr Shand that he would be looking at those supplies which IPS had treated as exempt, including "supplies of doctors". He would also consult with a VAT specialist on staffing to see if the "nursing exemption" could apply. The reference to a "nursing concession" is to an extra statutory concession applied by HMRC and IOMCE whereby supplies of nurses and nursing auxiliaries by nursing agencies and employment businesses were treated as exempt. It was only intended to apply to businesses that supplied nurses directly to the end-client without any other intermediary.

128. On 7 March 2018, Mr Shand emailed Mr Wooding with an analysis of certain invoices. He also said as follows:

> "Since our meeting we have introduced some immediate changes to our processes and software systems, to ensure the VAT is charged correctly."

129. On 14 March 2018, Mr Wooding emailed Mr Shand and Mr Shaw as follows:

> "I have received a response from the VAT specialist at HMRC.
>
> Unfortunately for the business the supply of nursing and auxiliary staff is standard rated. It is only the final supplier that is allowed to apply the concession. Therefore, VAT is due on the nursing and auxiliary services the business makes.

> Was there any other supplies the business makes that were exempt?
>
> I will prepare a draft assessment and send it over to you.
>
> I need to make the business aware of its rights therefore please see attached fact sheets."

130. The email referred only to the position of supplies in relation to nursing and nursing auxiliary supplies. Mr Shand replied on 20 March 2018 as follows:

> "Thank you for your email and update.
>
> Other than the mistake relating to the supply of some doctors as exempt which is analysed separately on the attached spreadsheet I can confirm the only other supply of services from the business treated as exempt are that of nursing and auxiliary supplies.
>
> Whilst I initially understood the rules surrounding the Nursing Concession for our business is a difficult and complicated subject, I am surprised to hear the response from the VAT specialist. Before our VAT inspection in 2010, we did have some concerns relating to our Nursing and Auxiliary supplies that we treated as exempt. However, this concern was alleviated after the inspection only highlighted errors in relation to the supply of Doctors, despite the inspection clearly considering all exempt supplies made by the business. This was also the case during the VAT inspection in 2014, only the exempt supply of doctors was highlighted as incorrect. Since our previous inspections, contracts and supplies have not changed it is my understanding that the VAT legislation has also not changed in that time…
>
> Are you available for another meeting to discuss the results of the above in more detail and the option available for the business going forward?"

131. The spreadsheet attached to Mr Shand's email showed cash receipts for supplies concerning doctors in the periods May 2014 to November 2017. The VAT due on those receipts was £2,111,005 and was apportioned between individual accounting periods. It reduced over time from £695,525 in accounting period 2014/05 to £317.50 in accounting period 2017/11. It seems likely that this was because of the gradual decline in the number of doctors who had been on IPS's systems since October 2014. Mr Wooding identified that the total included £70,786 which had been accounted for by IPS in the notification of errors in 2014 and 2015. The net assessment was therefore £2,040,219.

132. A meeting with Mr Wooding was arranged for 26 March 2018. Prior to that meeting, IPS instructed a VAT specialist, Mr Peter Duchars. It would have been a suggestion either of Mr Shaw or Mr MacGregor to consult Mr Duchars for what Mr MacGregor initially described as a "second opinion". Later in his evidence he said that they did not go to Mr Duchars for advice as such, but because they thought his experience could help in negotiations with IOMCE. Mr MacGregor, Mr Shaw, Mr Hall and Mr Shand met with Mr Duchars shortly before 26 March 2018.

133. The meeting on 26 March 2018 was attended by Mr Wooding and a colleague from IOMCE. IPS was represented by Mr Hall, Mr Champion, Mr Shand, Mr MacGregor and Mr Duchars.

134. There was no mention in any of the contemporaneous emails and correspondence prior to 26 March 2018 of any doubt as to the nature of the supplies made by IPS. This correspondence was with Mr Shand, and Mr MacGregor said that whilst Mr Shand was at the meeting on 1 March 2018 he was not sure that the issue would have registered in Mr Shand's mind. It is the respondent's case that it was only following advice from Mr Duchars, shortly before 26 March 2018, that IPS first argued that the real nature of its business was the provision of an invoicing service, with VAT chargeable on the fee charged to contractors. Mr Wooding's evidence was that the first time this was raised was at the meeting on 26 March 2018.

135. The evidence as to when this issue was first raised is not entirely satisfactory. It would have assisted to have heard evidence from Mr Shaw and Mr Shand. Looking at the evidence as a whole, and in particular Mr MacGregor's oral evidence and Mr Wooding's notes of the meeting, on balance I am satisfied that Mr Shaw did suggest to Mr Wooding at the meeting on 1 March 2018 that the business of IPS might be viewed as an invoicing service. I am not satisfied that he told Mr Wooding that IPS was in business providing an invoicing service. I am sure that Mr Wooding honestly believed that the first mention of an invoicing service was at the later meeting on 26 March 2018. However, it seems likely that to this extent his recollection and interpretation of his handwritten notes in this regard is incorrect.

136. I am not satisfied that Mr MacGregor had previously concluded that IPS was providing an invoicing service. I do accept and find that he and Mr Shaw had in mind in late 2017 that IPS's business could be structured as an invoicing service, but no steps were taken to investigate that possibility, or whether this would be consistent with the tax and employment regulatory benefits that were described in the marketing material provided to consultants and recruitment companies.

137. Following the meeting on 26 March 2018, Mr Wooding researched the issue and concluded that VAT was due on the sums invoiced by IPS to recruitment companies.

138. In July 2018 Mr MacGregor was in email correspondence with the review officer, Ms Morgan. In an email dated 16 July 2018, he indicated that an updated form of contract with contractors was being reviewed by a tax and employment specialist. On 13 August 2018, IPS provided IOMCE with what was described as a "draft of new agency agreement between IPS and the contractor". This agreement clearly referred to the appellant providing invoicing services to contractors, which involved raising of periodic invoices and collecting funds on behalf of contractors.

139. In fact, that contract was not implemented and IPS continued to charge VAT on the sums invoiced to recruitment companies until August 2019. Mr MacGregor said that this was done so as "not to antagonise Customs" and to ensure that IPS was not left with an even larger VAT liability if it should lose this appeal. Ms Lemos put to Mr MacGregor that the reason the new contract wasn't implemented was because the arrangement would not be acceptable to the recruitment companies. Mr McGregor denied that was the case. I accept Mr MacGregor's evidence as to the reason why the

new contract was not implemented. I make no finding as to whether the new contract would have been acceptable to the recruitment companies.

140. IPS's accounts for the year ended 31 December 2018 were approved by the Board of Directors on 30 August 2019. By this stage IPS had made its appeal to the Tribunal and indeed this is the same date that Mr MacGregor signed his witness statement. In these accounts the turnover shows the 4% fees which IPS says is its income from contractors. The turnover is therefore much reduced from previous years and the comparative figures for 2017 have been restated to show turnover for that year on the same basis. As one would expect, the gross profit figure for IPS shown in 2017 remained the same. Figures from the annual accounts may be summarised as follows:

	Y/e 31/12/16 **£**	**Y/e 31/12/17** **£**	**Y/e 31/12/17 (Restated)** **£**	**Y/e 31/12/18** **£**
Turnover	16,935,529	11,888,259	1,202,383	1,695,834
Cost of sales	(16,053,450)	(10,761,426)	(75,550)	(22,473)
Gross profit	882,079	1,126,833	1,126,833	1,673,361

141. Mr MacGregor states that IPS took informal advice as to the presentation of income in the 2018 accounts from Crowe Morgan. Whatever the content of that advice I do not consider that it assists me in determining the issues in this appeal.

142. I should refer at this stage to evidence which was not adduced by IPS. In particular, I had no evidence from Mr Hall, Mr Shand, Mr Shaw, from any consultants or from any recruitment companies. Ms Lemos invited me to draw certain adverse inferences from the fact that IPS did not adduce such evidence.

143. Mr Lall did not accept that any adverse inferences should be drawn from the absence of such evidence. Essentially his submission was that the evidence would not have added anything to the case before the Tribunal. Further, in some respects the case of the respondent had been disclosed late in the day. For example, the VAT registration documents and the business plan were only disclosed a week or so before the hearing and IPS could not have anticipated that evidence to explain the regulatory background would have been required. In any event, the memories of witnesses would probably not have been as reliable as the contemporary documentation. In relation to evidence from consultants and recruitment companies, Mr Lall submitted that such evidence would have amounted at best to evidence of opinion or perception and as such it would not have assisted the Tribunal. Mr Lall also criticised the invitation to draw adverse inferences as being too vague, and failing to clearly identify the inferences which I am being invited to draw.

144. Ms Lemos identified various areas where witnesses might have been expected to give relevant evidence and invited me to draw adverse inferences "where appropriate". This included the absence of evidence from Mr Hall, Mr Shand and Mr Shaw. Ms Lemos went on to refer to specific aspects where I was invited to draw

adverse inferences. This was the absence of evidence from recruitment agencies as to their dealings with IPS and the absence of evidence from consultants. In both cases I was invited to infer that "the evidence would have been adverse to IPS's appeal".

145. As to Mr Hall's absence, Mr Champion accepted that Mr Hall would have had more idea as to the nature of the Charterhouse and IPS products. Mr Hall took the lead in leaving Charterhouse, incorporating IPS and applying for VAT registration of IPS. He made the VAT returns in the early years of the business and was involved in the voluntary disclosures in 2014 and 2015. Mr Champion said that at the time witness statements were being served, Mr Hall had a lot of personal issues. Mr MacGregor suggested that there were "good reasons" why Mr Hall was not giving evidence.

146. Mr Champion also accepted that evidence from Mr Shand, from consultants and from recruitment companies would have been helpful. Further, Mr MacGregor stated that serious consideration was given to calling Mr Shaw as a witness to confirm his evidence as to when they first considered that IPS's accounting for its income was incorrect.

147. I was referred to the authorities as to when a court or tribunal can or should draw adverse inferences from the absence of evidence. In my view there is some merit in Mr Lall's criticism that Ms Lemos' submissions do not clearly identify the inferences I am invited to draw. Overall, I am not satisfied that the failure to adduce this evidence justifies me in drawing any adverse inferences. However, this is a case where the burden is on IPS to satisfy me that the Assessment is wrong and the absence of the evidence identified by Ms Lemos puts IPS at a disadvantage in satisfying that burden.

148. For the sake of completeness, I should add that on 1 November 2019 IPS made a claim for repayment of overpaid VAT pursuant to section 80 VATA 1996, covering periods between November 2015 and August 2019. This is in the sum of £4,393,054, and was claimed on the basis that IPS had incorrectly accounted for output tax throughout that period based on sums invoiced to recruitment companies. Credit is given for the VAT which IPS says was due on the fee charged to consultants and which it says related to invoicing services. Mr MacGregor accepted that IPS had continued to account for output tax on the sums invoiced to recruitment companies until August 2019 and said that this was in order to "play it safe". It is not clear whether this claim also relates to consultants other than doctors where IPS accounted for VAT. The claim is not the subject of this appeal, although the outcome of the appeal will clearly have implications in relation to the claim.

THE PARTIES' SUBMISSIONS

149. The parties' made extensive written submissions following the oral hearing, amounting to some 175 pages in total. I have taken all those submissions into account in determining this appeal. What follows is an outline of the principal submissions.

150. The case for IPS is that it was simply providing an invoicing service to contractors for a fee of up to 4% of the contractors' gross income from recruitment

companies. That was what it set up in 2004 and even if the contractual relationships indicate something different, that was the economic and commercial reality of the services which it provided. IPS's submissions placed particular reliance on the following matters:

Contractual relationships

(1) Certain terms in the written contracts between consultants and IPS are said to be inconsistent with a supply of staff. Other terms relied on by the respondent do not reflect the reality of the relationship between IPS and the consultants.

(2) The absence of any contractual relationship between IPS and the recruitment companies, including the absence of any signed versions of the written contracts sent by IPS to the recruitment companies. On the facts, there was no offer and acceptance necessary to establish contracts between IPS and the recruitment companies and no contract could be implied by conduct.

(3) Documentary evidence for the sample of consultants, including evidence that contractors entered into direct contracts with recruitment companies prior to the involvement of IPS.

(4) IPS submits that there is no basis for the respondent to say that contracts between consultants and recruitment companies were "superseded" by contracts between IPS and the recruitment companies. In reality, a contractor would not give up a right to be paid by a recruitment company in favour of a contingent right under clause 4.2 to be paid by IPS.

Economic and commercial reality

(5) The evidence of Mr Champion and Mr MacGregor as to the nature of IPS's business.

(6) Particular reliance is placed on cause 4.2 of the contract between IPS and consultants which provides that no payment is due from IPS to a consultant until IPS has been paid in full by the recruitment company.

(7) Evidence that IPS did not perform the functions it would be expected to perform if it was supplying staff or services to recruitment companies. For example, it had no involvement in negotiating fees with recruitment companies, in ensuring that a contractor was qualified to provide the services or in monitoring the quality of services. All the functions it performed were consistent with a supply of invoicing services. The provision of invoices to recruitment companies, the receipt of payments from recruitment companies and passing on those payments to the consultants were consistent with IPS providing an invoicing service.

(8) Documentary evidence as to the nature of IPS's business, including descriptions in the business plan, the VAT registration application, and IOMCE's own records.

(9) The inclusion of the same invoice number on documents provided by IPS to consultants and recruitment companies suggests one supply, by IPS to consultants.

(10) The reality is that no service was provided by IPS to recruitment companies and no consideration was paid by recruitment companies to IPS. The only consideration was the 4% fee charged by IPS to consultants for invoicing services.

(11) Evidence that IPS paid contractors on the same date that it received payment from recruitment companies. IPS had fiduciary obligations to pass on sums received from recruitment companies to the consultants, less the 4% fee charged to consultants.

(12) A fee of 4% would not adequately reflect the risk associated with IPS making a supply of services to the recruitment companies, including the risk that contractors might be treated as employees of IPS, giving rise to liability for PAYE and national insurance.

(13) IPS's case on the economic and commercial reality was not raised for the first time after it became apparent that there may be a significant VAT liability. Mr MacGregor had considered IPS's business model in late 2017, prior to the issue arising at the meeting with Mr Wooding on 1 March 2018. He had concluded that IPS provided an invoicing service.

151. IPS acknowledges that its contractual documentation has led to confusion as to the nature of its supplies and the identity of the recipient of those supplies. Mr Lall described this as a "disjunction between the contracts and economic reality" which persisted over a long period. He submitted that this confusion manifested itself in the way IPS treated its supplies for VAT purposes prior to 2018, the voluntary disclosures in 2014 and 2015, and in the recognition of income in its annual accounts.

152. Mr Lall criticised the respondent's submissions in relation to the regulatory background concerning both taxation and employment businesses and the role of IPS. He submitted that they were confused and erroneous. He acknowledged that Mr Champion could not speak to the detailed regulatory background, but submitted that if IPS was supplying services of contractors to the recruitment companies then there was at least at risk that it might be classified as an employment business which was a risk it would not have taken.

153. Mr Lall submitted that IPS's role in the market was simply to provide an invoicing service to consultants who did not want to administer their own invoicing and payment collection. However, he also described "*the very reason for IPS's function in the market as performing activities recruitment agencies cannot undertake because it is unlawful for those agencies to deal with payments and charge fees to workers*". In any event, Mr Lall submitted that what is relevant is IPS's belief that there were good practical and legal reasons for it to provide an invoicing service.

154. Mr Lall also sought to distinguish the facts in this case from the material facts in Adecco where the Court of Appeal found that Adecco's business amounted to a supply of staff.

155. The respondent's case is that IPS was making supplies of services in the form of staff to the recruitment companies. That was the nature of the contractual relationships and the economic and commercial reality was no different. The respondent relies in particular on the following matters in support of that submission:

Contractual relationships

(1) IPS entered into contracts with contractors and recruitment companies which are consistent only with a supply of services by contractors to IPS and a supply of services by IPS to the recruitment companies. In other words, the contracts demonstrate a chain of supply.

(2) Documentation sent to contractors in the form of a covering letter with a contract for services and a welcome pack clearly evidence a contract involving a supply of services by consultants to IPS. Similarly, the covering letter and VAT invoices sent by IPS to recruitment companies clearly evidence a contract involving a supply of services by IPS to recruitment companies. Fees for those services were received by IPS and paid into its own business bank account.

(3) The existence of contracts between IPS and the recruitment companies was evidenced by the documents and the parties' course of conduct in which IPS invoiced for the services and recruitment companies paid those invoices. The course of conduct was consistent with contractual documents sent to the recruitment companies. The fact that contracts were not signed by recruitment companies did not prevent the formation of such contracts and the evidence shows that the contractual offers were accepted by performance on the part of the recruitment companies.

(4) IPS has failed to adduce any evidence from consultants and recruitment companies of any direct contracts between consultants and recruitment companies.

(5) Evidence as to the existence of arrangements between consultants and recruitment companies prior to the involvement of IPS did not lead to a conclusion that there was a direct contract between consultants and the recruitment companies.

(6) Even if there was a contract between consultants and recruitment companies prior to IPS's first invoice, that contract was superseded by a contract between IPS and the recruitment companies.

Economic and commercial reality

(7) The contracts reflect the economic and commercial reality of the relationships between contractors, IPS and the recruitment companies. IPS has failed to produce sufficient evidence to establish any different economic and commercial reality.

(8) The fact that IPS does not "consume" the services of consultants does not mean that there is no chain of supply.

(9) IPS treated its supplies as being exempt supplies of medical services to the recruitment companies until 2018. It made voluntary disclosures of underpaid

VAT in 2014 and 2015 on the basis that it had wrongly been treating those supplies as exempt. There was never any question that it made supplies to recruitment companies.

(10) The regulatory background in terms of taxation and employment law supports the respondent's case on the economic and commercial reality. The structure was intended by IPS to help contractors and recruitment companies to avoid certain tax and regulatory issues. Whether or not it actually achieved those aims is not relevant.

(11) The significance of the regulatory background can be seen in Mr Champion's evidence as to the Charterhouse business model which IPS was seeking to replicate, the drafting of IPS's contractual documentation, the business plan and associated marketing material, and the VAT registration application. References in that documentation to "invoicing services" is a reference to a chain of supplies from consultants to IPS and from IPS to recruitment companies.

(12) The respondent's case on economic and commercial reality is also supported by the self billing invoices produced by MedicsPro, and the treatment of income in IPS's accounts.

(13) IPS UK replicated the IPS business model sometime in or after 2013 with contracts which were professionally drafted for IPS UK. They are not identical to the IPS contractual documentation, yet clearly establish a supply of services by consultants to IPS UK and a supply of services by IPS UK to recruitment companies.

(14) Mr MacGregor was in no position to give relevant evidence as to the economic and commercial reality of IPS's supplies which was established prior to his joining IPS.

(15) The evidence suggests that Mr MacGregor and Mr Shaw did not believe prior to 26 March 2018 that the contractual documentation and accounting treatment of IPS's income was inconsistent with the true nature of its supplies. The first suggestion that IPS was providing an invoicing service came after 1 March 2018, following the realisation that IPS faced a large VAT liability.

(16) IPS did not change its contractual or associated documentation after March 2018 and continued to account for VAT on sums invoiced to recruitment companies until August 2019.

156. During the course of cross-examination and in her closing submissions Ms Lemos described IPS as "an umbrella for the self-employed" and a "self-employed umbrella". These are not statutory terms. The term "umbrella company" is more commonly used to describe a business model where a company employs many individuals and then supplies those individuals or their services to recruitment companies. I took Ms Lemos' descriptions to be a form of shorthand to describe a business model where a company contracts to purchase services from numerous self-employed individuals with a view to supplying those services to recruitment companies. Mr Lall suggested this was a new case raised by the respondent late in the

day. I do not see it as such. The term was used to describe a business model which has been the respondent's case throughout these proceedings.

157. Ms Lemos also sought to identify similarities between the position in this case and the position in Adecco.

DISCUSSION

158. IPS says that as a matter of law and fact, the only contracts it had were with consultants to whom it supplied invoicing services. In any event, IPS says that irrespective of the contractual relationships, the economic and commercial reality was that it was providing an invoicing service to consultants. The respondent says that both the contractual relationships and the economic and commercial reality establish that IPS received services from contractors and it then supplied services to the recruitment companies.

159. Ms Lemos submitted that I could find that IPS was making a supply of services to consultants as well as a supply of services to recruitment companies. In those circumstances I could if necessary increase the Assessment. Looking at the evidence as a whole I do not consider that such a finding is open to me. IPS was either making supplies of invoicing services to consultants or a supply of services to recruitment companies.

160. I have set out my detailed findings of fact above. In this section I consider the existence and nature of the contractual relationships between the various parties and what those contractual relationships indicate as to the nature and recipient of IPS's supplies for VAT purposes. I then go on to consider whether the economic and commercial reality requires the nature and recipient of the supplies to be characterised differently for VAT purposes. It is convenient to consider the issues and the parties' submissions under separate headings, although I recognise that there is considerable overlap between the headings, in particular the legal relationships between the various parties. In the circumstances I shall not draw any conclusions about the legal relationships until I have considered the material relevant to all those relationships. The separate headings are as follows:

(1) The regulatory background

(2) The legal relationship between IPS and consultants

(3) The legal relationship between IPS and recruitment companies

(4) The legal relationship between consultants and recruitment companies

(5) Conclusions as to the legal relationships

(6) Economic and commercial reality

(7) Overall conclusion

161. Before considering these matters, it is important to note the absence of any suggestion that the nature of IPS's supplies has changed between the time it commenced business in 2004 to when the Assessment was made in 2018. Further, the

contractual and other documentation used by IPS which was originally drafted in 2004 remained largely unchanged throughout that period.

162. It is also important to note that an enquiry into the nature of a supply for VAT purposes is an objective exercise. The subjective intention of a taxable person is not relevant. In the circumstances I do not consider that evidence from Mr MacGregor as to his view of the nature of the services, whether from an accounting perspective or a VAT perspective, is of much assistance. Nor is evidence from Mr Champion as to what he considered IPS was supplying. I must form my own view as to the nature of IPS's services and to whom they were supplied. Having said that, for reasons which follow, I accept that Mr Champion's perception of what value IPS provided to consultants and/or recruitment companies will be relevant.

Regulatory background

163. There was no mention of the regulatory background in either IPS's grounds of appeal or the respondent's statement of case. The first mention of regulatory matters was in Mr Champion's witness statement at [12] where he says that recruitment companies experienced difficulties in paying contractors and how IPS's service to contractors "*helps them with their difficulty over paying contractors*". Mr Lall referred to this in his skeleton argument where he said that if IPS supplied services to recruitment companies that would "*undermine the very reason for IPS's function in the market as performing activities recruitment agencies cannot undertake because it is unlawful for those agencies to deal with payments and charge fees to workers*". He acknowledged in his closing submissions that "*it was very much part of the appellant's case, that IPS only had a role in the market because agencies had difficulty paying contractors*".

164. The precise nature of those difficulties has not been clearly explained, either in the evidence or in submissions. It is common ground that the recruitment companies dealing with the contractors and IPS, did so as employment businesses and not employment agencies. That is to say they employ work-seekers and supply those work-seekers to end-clients. In this context, as mentioned above, employment has a wide definition and includes employment under a contract for services and through a limited company.

165. Mr Lall acknowledged that Mr Champion could not speak to the detailed regulatory background. In his skeleton argument Mr Lall had acknowledged that IPS was not an employment business because it did not provide work-finding services. However, he submitted for the first time in his closing submissions that if IPS was supplying services of contractors to the recruitment companies then there was at least at risk that it might be classified as an employment business. Employment businesses are not defined in section 13(3) EAA 1973 by reference to the provision of work-finding services, however they are regulated in relation to such services by the 2003 Regulations. I cannot see that IPS could be viewed as providing work-finding services to consultants. That was clearly the role of the recruitment companies. In any event, there was no evidence that Mr Champion or IPS had any such risk in mind when setting up the business or at any time thereafter.

166. It is fair to say that the respondent's reliance on the regulatory background developed during the course of the hearing. The only reference to the regulatory background in Ms Lemos' skeleton argument was to regulation 8, which is the prohibition on employment agencies making payments to work-seekers. I infer that this was prompted by references in Mr Champion's witness statement and in Mr Lall's skeleton argument. There is no suggestion that recruitment companies would be acting as employment agencies in any arrangements involving IPS.

167. It was only after the skeletons had been served that the VAT registration application and associated documents were disclosed. On their face, the business plan and associated marketing material evidence a wider regulatory background. The business plan appears to be principally concerned with tax benefits associated with IPS's business offering. It appears to refer to tax benefits to consultants in terms of retaining self-employed status, and suggests that ITEPA 2003 requires consultants either to be paid subject to deduction of tax and national insurance via a PAYE scheme or to provide their services through an intermediary company such as IPS.

168. The business plan also refers to benefits to recruitment companies utilising IPS as "an invoice billing company". I am satisfied in the light of Mr Champion's evidence that this is a reference to avoiding perceived regulatory difficulties preventing employment agencies from making payments to work-seekers. Those difficulties may not actually have existed in relation to the arrangements IPS was involved in but the perception of Mr Champion was that they did exist. A belief as to the existence of employment regulatory issues is also consistent with the contracts entered into between IPS and consultants which contained the opt out provision referred to above.

169. I must therefore consider the regulatory background in terms of employment regulation and tax regulation separately. HMRC do not say that the regulatory background required IPS to take supplies from consultants and make onward supplies to recruitment companies, either from the perspective of employment regulations or tax. Nor indeed has IPS made any case that IPS's role providing an invoicing service provided a benefit to contractors in terms of tax issues or to recruitment companies in terms of employment regulations. The witnesses put forward by IPS had no reliable knowledge of the regulatory background in which IPS operated. One person who might have had such knowledge was Mr Hall but he did not give evidence.

170. Mr Lall submitted that without knowing which specific regulatory provisions were in point, all that mattered was that IPS believed there was a legal reason for providing services in a particular way. Ms Lemos appeared to make the same submission in closing where she said that whether or not the structure adopted achieved its aim was not the issue in this appeal and that the regulatory background was relevant in so far as it provided IPS with a perceived business opportunity. I agree with these submissions. It seems to me that what is relevant is not the way in which the regulations might have affected IPS's business or provided it with a business opportunity, but how IPS through its founders and directors perceived those regulations to affect IPS's business. There is no evidence before me as to any advice IPS obtained as to the effect of tax and employment regulations in 2004 or

subsequently. All I have is the business plan and marketing material, the contractual and other documentation and the evidence of Mr Champion.

171. It was open to IPS to set up whichever model it considered was appropriate to take into account the regulatory background and the circumstances generally. There were two alternative models for IPS: providing an invoicing service or acting in the role of an intermediary. Putting VAT issues to one side, the net result financially would be the same. IPS would either have a turnover of 4% of sums invoiced on behalf of consultants from the provision of an invoicing service, or a gross margin of 4% of sums it invoiced on its own behalf as an intermediary. If IPS was properly advised as to the regulatory background or itself properly understood the regulatory background then it might be that the role of intermediary was the only viable model. But that does not help me to identify, objectively what IPS intended when it commenced business in 2004. Suppose the regulatory background required IPS to act as an intermediary. If Mr Champion and Mr Hall misunderstood the regulatory background and believed IPS could add value by offering an invoicing service, the fact they misunderstood the regulatory background would not somehow change the nature of IPS's supplies. It seems to me that what is relevant is how IPS perceived its role in the market and what benefits it offered to contractors and/or recruitment companies. The best evidence available to me in that regard is the documentation.

172. In relation to the tax position, the business plan referred to ITEPA 2003. Ms Lemos submitted that the relevant provisions were sections 44-47 ITEPA 2003 which concern the tax treatment of workers who personally provide services to a client but which are supplied through a third person. Where section 44 applies, services provided by the worker are treated as performed in the course of an employment held by the worker with the third party and the income of the worker is treated as earnings from that employment. As such, the third party must operate PAYE on those earnings. The provisions were amended in the Finance Act 2014. The amendments related to workers provided to UK agencies by non-UK agencies. Ms Lemos submitted that those amendments which were announced in March 2013, caused IPS Group to incorporate IPS (UK) Limited.

173. I do not propose to burden this decision with a detailed analysis of how ITEPA 2003 might have applied to IPS's business model. Both parties agreed that the provisions are complex and did not set out any detailed analysis of how the provisions might apply to contractors and recruitment companies if IPS did not act as an intermediary in the chain of supply. More importantly, I have found as a fact that Mr Champion did not have any real understanding of the provisions, even though it is clear from the business plan and associated marketing material that the tax regime including ITEPA 2003 did feature in the business model of IPS.

174. In relation to employment regulations, I refer above to the restriction on employment agencies making payments to work-seekers or making arrangements to pay work-seekers. Mr Lall submitted that the practical solution for recruitment companies in those circumstances, to avoid any potential breach of the prohibition, was to make payments to workers through invoicing/payment collection businesses such as IPS. There is no evidence that recruitment companies adopt that "practical

solution" and I cannot see on any view that interposing IPS's invoicing service would circumvent the restriction in regulation 8 of the 2003 Regulations if the recruitment companies could be viewed as employment agencies.

175. Mr Champion's evidence was that IPS was seeking to replicate the Charterhouse model, although he had no real understanding of how that model fitted with the regulatory background. Also, I have no evidence of how Charterhouse operated and marketed its "self-employed solution", save that IPS contracts were based on drafts originating from Charterhouse.

176. Mr Lall submitted that the model Mr Champion knew from Charterhouse was operated prior to 2003. It therefore pre-dated the 2003 Regulations and cannot have been designed with those regulations in mind. I do not accept that submission. Mr Champion's evidence was that IPS helped recruitment companies with regulatory difficulties concerning payments to consultants.

177. Ms Lemos submitted that the relevance of the employment regulatory background and the 2003 Regulations lay in the "opt out". I have described the opt out provisions above, and I have also set out the terms in which consultants were invited to opt out of those restrictions. Ms Lemos submitted that the opt out clause in the contract indicated that IPS regarded itself as falling within the definition of a work-seeker for the purpose of the 2003 regulations. That was the only basis on which the opt out could be relevant, and was consistent with recruitment companies providing work-finding services to IPS. In other words, it must be IPS which was providing the services of the individual consultants to the recruitment companies.

178. Mr Lall submitted that IPS could not be considered a "work-seeker" for the purposes of the 2003 Regulations. Hence, the opt out served no purpose. In making that submission he relied on the explanatory note to the 2003 Regulations which refers to the opt out applying to work-seekers contracting their services "through their own limited company". He submitted that IPS could not be viewed as a work-seeker's own company when it acted for thousands of work-seekers. The regulations were aimed at companies which were to all intents and purposes the same person as the work-seeker. He also relied on aspects of the 2003 Regulations themselves and the DTI's guidance notes on the 2003 Regulations and made the following points:

(1) Regulation 32(11) provides that an opt out notice must be given before the individual starts work, whereas the evidence showed that in many cases individuals started work before signing IPS's contracts, including the opt out.

(2) Regulation 32(12) provides that an individual cannot opt out where the work involves working with persons under the age of 18 or persons in need of care and attention. The doctors in this case would be working with such persons.

179. Mr Lall also submitted that there was a risk that IPS might be viewed as an employment business. IPS would therefore be assuming obligations which would otherwise be on the recruitment companies.

180. In my view Mr Lall's submissions on the application of the opt out and any risk that IPS might be covered by the 2003 Regulations are beside the point. What matters is not how the regulations applied, but how IPS perceived them as applying. The contract was professionally drafted and I infer that the opt out was there for a reason, whether or not it applied to doctors or was limited to other types of workers with whom IPS contracted. There was no suggestion that the structure for services involving other occupations was any different to the structure for services involving doctors or nurses. Further, there was no evidence that IPS considered itself at risk of being covered by the 2003 Regulations. Mr Champion, despite being a founder and director of IPS, could not speak reliably as to the rationale for IPS's business model. In those circumstances I cannot be satisfied that IPS understood the implications of the 2003 Regulations for its business model.

181. IPS has failed to adduce any reliable evidence to explain how it perceived the rationale of its business model. There is no evidence to explain how the business model took into account the tax and employment regulatory benefits which IPS plainly intended to provide.

The legal relationship between IPS and Consultants

182. The legal relationship between IPS and the consultants will be defined by the written contracts, construed in the context of the background facts at the time they were entered into. I shall firstly consider the context in which the written contracts were executed.

183. Consultants are generally introduced to IPS by recruitment companies. I do not know what sort of discussions take place between consultants and recruitment companies as part of that introduction. However, IPS does provide marketing material to consultants. The FAQs from 2004 include a question relating to "*my company status*". The answer states "*you only use the company for the purpose of raising your invoices*". This tends to suggest what is being marketed is an invoicing service. The literature goes on to say that this eliminates the administration "*associated with owning your own limited company*", which tends to suggest that IPS provides an alternative to a contractor using his or her own limited company to provide services, and something more than an invoicing service.

184. The marketing literature also refers to "tax efficient payment solutions" and indicates that IPS is marketing a product which enables consultants to work as self-employed contractors with associated tax benefits. Again, this tends to suggest something more than an invoicing service. IPS's website in August 2019 referred to consultants "sub-contracting" with IPS.

185. The marketing literature it not without ambiguity. However, it is not appropriate to adopt an overly legalistic approach to the language used. Whilst the marketing literature might be said to be consistent with both an invoicing service and a chain of supply, overall in my view it tends to suggest a structure in which contractors supply services to IPS which in turn supplies services to recruitment companies in a chain of supply.

186. Once a consultant has been referred to IPS and agreed to establish a relationship with IPS, IPS provides a welcome pack. The welcome pack is unambiguous as to the nature of the relationship. It refers explicitly to consultants supplying their services to IPS which IPS then supplies to the client.

187. It seems to me that part of the factual matrix will include IPS's understanding of the regulatory background, the legal relationship between consultants and recruitment companies and the legal relationship between IPS and recruitment companies. At this stage I shall simply look at the main terms of the written contracts between the consultants and IPS, and the language used in those contracts. I have set out the terms of those contracts in my findings of fact.

188. The contracts are headed contract for services, and the recitals clearly state that the consultant is providing services to IPS. Mr Lall submitted that Recital A, which refers to IPS benefiting from certain skills and abilities of the consultant should be construed as IPS benefiting from those skills by way of the opportunity to provide an invoicing service. In my view that is a strained view of the language.

189. Clause 1 (Services) clearly states that it is the consultant providing services, and the consultant undertakes to do so in a professional manner. There is no suggestion that IPS is providing services to the consultant.

190. Clause 2 (Fees and Expenses) states that IPS will be paying a fee to the consultant which is clearly inconsistent with an invoicing service. The fee is to be "negotiated from time to time". In fact, the only negotiation between IPS and consultants was as to the 4% standard fee or margin required by IPS. The Schedule and clause 2.8 referred to the 4% as a "contracting fee" payable to IPS. Mr Lall submitted that this was consistent with an invoicing service and I agree. Clause 2.7 suggests that the consultant controls his or her fees and that IPS does not have any role in setting fees. I accept that it is the consultant and recruitment companies who negotiate what is to be paid by the recruitment company in relation to the consultant's services. However, it seems to me that is not a strong indicator as to the nature of the contractual relationships, in the light of the other terms of the contract. Overall, what is negotiated between consultants and IPS is the 4% contracting fee from which the fee payable by IPS to consultants is calculated. That fee is the sum payable by recruitment companies less the contracting fee and it is paid for services provided by consultants to IPS.

191. Clause 3 (Invoicing) refers to IPS issuing an invoice each week to the recruitment companies "to whom the Services have been provided **on the Company's behalf** by the Consultant". It clearly indicates services being provided by consultants to IPS.

192. Clause 4 (Payment) contains clause 4.2 which provides that no payment will be due to a consultant until full and final payment has been received by IPS from the recruitment companies. IPS places considerable reliance on this clause when it comes to the economic and commercial reality of the supplies and I shall consider it further in that context. It is notable that clause 4.4 makes provision for IPS to set off losses

incurred as a result of the consultant's actions. This can be read with clause 7.3 which includes an undertaking by consultants to carry out their duties in an expert and diligent manner. Again, this indicates that it is consultants who are providing a service to IPS pursuant to the written agreement. If IPS were simply providing an invoicing service there would be no need for such a warranty, nor could IPS incur losses as a result of the consultant's actions. IPS would be giving a warranty to consultants as to the quality of its services, but there is no such warranty.

193. Clause 6 (Confidentiality and conflicts of interest) restricts work that consultants can do for third parties, which is clearly inconsistent with an invoicing service.

194. Clause 7 (Consultant's warranty) includes various warranties by the consultant. Clause 7.3 is a warranty by the consultant to carry out duties in an expert and diligent manner which would not be required in the case of an invoicing service. Mr Lall relied on clause 7.1 which refers to the contract not rendering the consultant an agent of IPS. He submitted that the respondent's case is inconsistent with that clause because if consultants are supplying services on behalf of IPS then they must be doing so as agents. I do not agree. It seems to me that clause 7.1 is directed to avoiding consultants having authority as agents to bind IPS as principal and is consistent with a chain of supply.

195. The schedule to the written agreement contained the opt out permitted by the 2003 Regulations. I have already considered the regulatory background. For present purposes, I note that the opt out provision in the agreement refers to assignments being undertaken by consultants "through" IPS, which is consistent with a chain of supplies from consultants to IPS and from IPS to recruitment companies.

196. On the same date that the written agreement was signed by the consultant and IPS, IPS sent a standard form letter to the consultant. As mentioned above, there were two versions of this letter. It is fair to say that one may be viewed as indicating an invoicing service and uses similar language to the marketing literature. The other suggests a supply of services by consultants to IPS.

The legal relationship between IPS and Recruitment Companies

197. I have set out the terms of the document sent by IPS to recruitment companies, by reference to the example sent to Blue Lantern. Mr Lall submitted that somehow the terms of this document were unclear. I do not accept that submission. The document itself is clear on its face and if it had been executed by the recruitment companies it would clearly demonstrate that IPS was supplying services to the recruitment companies. The terms indicate that the services were clearly intended to be services which IPS contracted to purchase from consultants.

198. The real issue is whether there was in fact any legal relationship between IPS and the recruitment companies. The existence of the document sent by IPS to the recruitment companies at least indicates that IPS intended to enter into a legal relationship with the recruitment companies. Whether it did or not will depend on an

analysis of all the circumstances and whether there was offer and acceptance to establish a contract.

199. Mr Lall relies on two significant matters. Firstly, the absence of any versions of the contract signed by recruitment companies. Secondly, the existence of a contractual relationship between consultants and recruitment companies which pre-dated IPS sending contractual documentation to the recruitment companies.

200. Mr Lall submitted that I should not lightly make a finding that there was a contract between IPS and recruitment companies based on the unsigned written documentation sent to the recruitment companies. There was nothing in the evidence to support the respondent's case that the terms of the written contracts were accepted by the recruitment companies. The course of conduct of the parties was consistent with the existence of a contract between the consultants and the recruitment companies and not between IPS and the recruitment companies.

201. In support of IPS's case, Mr Lall submitted that the burden of proof as to the existence of a contract lay on the proponent of the contract. In this case, the respondent alleges a contract between IPS and the recruitment companies and therefore the burden of proof lay on the respondent. In this regard Mr Lall referred me to *Chitty on Contracts 33rd edition* at 2-168 and 2-170. These passages concern implied contracts to be inferred from conduct and the burden of proof as to whether the parties intended to create legal relations.

202. I was referred to the following passage from the Court of Appeal decision in *Reveille Independent LLC v Anotech International (UK) Ltd* [2016] UKCA Civ 443:

> "40. There are a number of rules of English contract law which, in combination, bear on the resolution of this appeal. First, classical analysis finds the parties' consent to a contract in the acceptance of an offer, and it is well accepted that acceptance can be by the conduct of the offeree so long as that conduct, as a matter of objective analysis, is intended to constitute acceptance: *Brogden* v. *Metropolitan Railway Co* (1877) 2 App Cas 666. Secondly, as in *Brogden*, acceptance can be of an offer on the terms set out in a draft agreement drawn up between the parties but never signed. Thirdly, if a party has a right to sign a contract before being bound, it is open to it by clear and unequivocal words or conduct to waive the requirement and to conclude the contract without insisting on its signature: *Oceanografia SA de CV* v. *DSND Subsea AS (The Botnica)* [2006] EWHC 1360 (Comm); [2007] 1 All E.R. (Comm) 28 at [94], per Aikens J.
>
> 41. Fourthly, if signature is the prescribed mode of acceptance an offeror will be bound by the contract if it waives that requirement and acquiesces in a different mode of acceptance. In my view it follows that where signature as the prescribed mode of acceptance is intended for the benefit of the offeree, and the offeree accepts in some other way, that should be treated as effective unless it can be shown that the failure to sign has prejudiced the offeror: see *Chitty on Contracts*, 32nd ed, 2015, §§2-066, 2-067; *MSM Consulting Ltd* v. *United Republic of Tanzania* [2009] EWHC 121 (QB), at [119] per Christopher Clarke J. Fifthly, a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly: *RTS Flexible Systems*

v. *Molkeroi Alois Muller GmbH* [2010] UKSC 14, [2010] 1 WLR 753, at [54]-[56]. Finally, the subsequent conduct of the parties is admissible to prove the existence of a contract, and its terms, although not as an aid to its interpretation: *Chitty on Contracts*, 32nd ed, 2015, §13-129.

42. These rules take effect against the background of legal policies recognised in the case law. One such policy is the need for certainty in commercial contracts, a policy which since Lord Mansfield's time has run as a thread through the jurisprudence. That need for certainty applies as well in commercial negotiations and to the question of whether a contract has come into existence: see *Cobbe* v. *Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752, at [91] per Lord Walker. A second policy is that in commercial dealings the reasonable expectations of honest, sensible business persons must be protected. In giving the judgment of the Supreme Court in *RTS Flexible Systems Ltd* v. *Molkerei Alois Muller GmbH*, Lord Clarke, at [50], approved dicta of Steyn LJ in *G. Percy Trentham Ltd* v. *Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25, that when considering whether a contract has come into existence, "the governing criterion is the reasonable expectations of honest sensible businessmen. Contracts may come into existence, not as a result of offer and acceptance, but during and as a result of performance" (see also *First Energy (UK) Ltd* v. *Hungarian National Bank Ltd* [1993] BCC 533, 533, per Steyn J). In a further passage in *Percy Trentham*, also approved by Lord Clarke, Steyn LJ said that a matter of importance to be considered in contract formation was

> "the impact of the fact that the transaction is executed rather than executory… The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential." at page 27.

In my view the same realistic approach must be taken in deciding whether a party has accepted an offer through its conduct."

203. In the present case there was no requirement for the contract to be signed if it was to be binding. IPS clearly made an offer in sending the draft contract to the recruitment companies and that offer could be accepted by conduct on the part of the recruitment companies.

204. Ms Lemos submitted that the fact IPS invoiced recruitment companies weekly and was paid weekly by the recruitment companies was in accordance with the terms of the contract between IPS and the recruitment companies. Whilst that conduct would be consistent with a chain of supply, it would also be consistent with the provision of an invoicing service.

205. Ms Lemos relied on the fact that IPS used its own VAT number on the invoices and if it was providing an invoicing service there was no reason it should not simply issue an invoice in the name of the consultant, without any reference to VAT. This submission was not explored in detail, and as I understand it an agent may act in its own name for VAT purposes.

206. Ms Lemos relied on the fact that IPS's invoices to recruitment companies did not distinguish payments made to the consultant and the fees due to IPS. This appears to be based on submissions made in Adecco, but that was a different set of facts. Adecco was claiming that payments it received were partly fees payable by clients for introductory services and partly sums which were treated as disbursements to cover the wage costs of temps. In the present case the recruitment companies are simply paying for the services they receive, whether they are provided by consultants or IPS. The recruitment companies would not be concerned how the sum they pay may be split as between IPS and the consultants.

207. More significant is that draft contracts were always sent to recruitment companies in relation to each contractor, and I infer would be sent multiple times to recruitment companies introducing more than one consultant. It may be said that this establishes a course of dealings on the basis of the unsigned terms. Further, there is no evidence that recruitment companies were introducing IPS to provide a different service to consultants than that described in the draft contracts and accompanying letters, or that IPS indicated to recruitment companies that it was invoicing and collecting payments as an invoicing service provided to consultants.

208. The present case is unusual in a contractual sense in that IPS alleges a contract between consultants and recruitment companies for supplies of services, whilst the respondent alleges a contract between IPS and recruitment consultants for supplies of services. As far as the burden of proof is concerned, I am not concerned with a civil claim relying on the existence of a contract. In that context, the burden of proof is clearly on the proponent of the contract. However, in relation to VAT appeals it is well established that the burden of proof lies on the appellant to satisfy the tribunal that an assessment is wrong or excessive. It must therefore be for IPS to satisfy me that there were contracts between the consultants and the recruitment companies, the corollary of which is that there were no contracts between IPS and the recruitment companies. I leave to one side for present purposes IPS's argument that the economic and commercial reality is that consultants were supplying services to recruitment companies.

209. Evidence as to the existence of contracts between consultants and recruitment companies is considered in the next section. Subject to that, there is at least evidence of offers by IPS to the recruitment companies in the form of the draft contracts sent out by IPS. As to whether the offers were accepted, there is Mr Champion's evidence that recruitment companies never sent signed copies back to IPS. Having received the draft contracts and the accompanying letters, the recruitment companies proceeded to make payments to IPS on production of invoices. It seems to me that in the absence of another explanation, that would be sufficient conduct to amount to acceptance of IPS's offers. However, there are other factors. Payments by recruitment companies to IPS could relate to an invoicing service being provided by IPS to consultants in connection with contracts for services between consultants and recruitment companies.

210. There is no evidence as to what information was provided by IPS to recruitment companies describing their involvement in the transactions. Mr Champion said that

information was provided to recruitment companies in the form of marketing literature, but no documents were produced. The absence of such evidence makes it difficult for IPS to satisfy me that there was no acceptance of IPS's contractual offer.

211. There is no evidence whatsoever of recruitment companies being informed, either by consultants or IPS that IPS was invoicing on behalf of Consultants. Apart from the draft contracts and accompanying letters, the evidence of communications between IPS and the recruitment companies was limited to some incomplete email chains which did not assist in identifying the nature of the relationship. The draft contracts sent to recruitment companies made clear that IPS was offering to provide services to the recruitment companies. The accompanying letter also made that clear. Subject to my conclusions generally in relation to the contractual relationships, I would be satisfied on the basis of that evidence that the draft contracts amounted to an offer which was accepted by performance. There is no evidence that recruitment consultants considered themselves under any direct obligation to consultants. The fact that recruitment companies did not sign the draft contract and return it to IPS is explicable on the basis that IPS had relationships with recruitment companies involving numbers of different consultants and may have seen no need to send a signed contract each time a consultant was engaged. It might also be explained on the basis that IPS never sent original documents by post and it was only when returning the original documents that recruitment companies were asked to send a signed copy of the contract.

212. Mr Lall relied on the fact that services were supplied by consultants to recruitment companies prior to IPS sending contractual documentation to the recruitment companies. As a result, there could not have been any contract between IPS and the recruitment companies. I deal with the question of whether there was any contract between consultants and recruitment companies in the next section. If there was such a contract, Ms Lemos submitted that the contract was superseded by a subsequent contract between IPS and the recruitment company which covered invoices after the first invoice. In the alternative Ms Lemos submitted that I should infer that all parties considered the contractual relationships to have been in place from the start of the first assignment.

213. Mr Lall says that the respondent has not provided any authority as to how and in what circumstances a contract may be "superseded". He submitted that for this to take place it would require a common intention of the recruitment companies, the contractors and IPS. I was referred to what is said in Chitty on Contracts at 22-028 in relation to substituted contracts. It contains a discussion which centres on a contract being rescinded and replaced with a new contract. Whether that is the analysis will depend on the intention of the parties to be gathered from the terms of the subsequent agreement and all the surrounding circumstances. Mr Lall submitted that it was inconceivable a contractor, having entered into a contract with a recruitment company, would then give up the right to sue for fees in exchange for a contingent right to fees, depending on the recruitment business paying IPS.

214. I do not consider that there is sufficient evidence for me to find that there was a common intention that all the parties intended that any contract between consultants

and the recruitment companies should be substituted with new contracts between IPS and the recruitment companies. I have not heard any evidence from consultants or from recruitment companies, and I have seen no evidence of dealings between consultants and recruitment companies.

The legal relationship between Consultants and Recruitment Companies

215. I was not referred to regulation 14(2) of the 2003 Regulations, which requires the terms agreed between a work-seeker and an employment business to be recorded in a written document. If consultants were engaged directly by recruitment companies then those documents should exist. No such evidence was before me. In contrast, there was a written document which purported to set out the terms agreed between IPS and the recruitment companies, even though there was no evidence that such documents were signed by recruitment companies.

216. Quite apart from regulation 14(2), there was no direct evidence as to the nature of the relationship, if any, between consultants and recruitment companies. Mr Lall submitted that in a significant number of cases, contractors commenced working through recruitment companies prior to being introduced to IPS. I am not satisfied that the documentary evidence produced by Mr MacGregor on behalf of IPS is complete. For the reasons set out in my findings of fact I am not satisfied that contractors did commence work prior to the introduction of contractors to IPS.

217. It does appear that some contractors commence work before contracting with IPS. However, I do not consider that means they must have contracted directly with the recruitment companies. It is explicable on the basis that the contractor was performing services for recruitment companies in anticipation of entering into a contract for services with IPS, with IPS entering into a contract with the recruitment companies. It is not unheard of in contractual dealings for performance to commence before the intended contracts are put in place.

Conclusion as to the legal relationships

218. My conclusions as to the existence and nature of the legal relationships between the parties are based on my consideration of the evidence and the issues as a whole. It is not a case of looking at each relationship separately.

219. Mr Lall cautioned against the direct application of domestic contract law in determining a VAT dispute governed by principles of EU law. What was required for the purposes of a supply was a "legal relationship" with reciprocal performance, namely the value given in return for the service. He submitted that there was no "exchange of value" between IPS and the recruitment companies. Having said that, both parties were content to rely on principles of English contract law in determining the contractual relationships.

220. Mr Lall emphasised in his submissions the simple, straightforward nature of IPS's supplies. He submitted that IPS raised invoices on behalf of consultants, collected payments for them and paid those sums to contractors less an administration

fee. I do not accept that submission. If this was a straightforward invoicing service, the documents would not be in the form they are. The forms of contract used by IPS at no stage refer to IPS providing an invoicing service to consultants. They clearly provide for consultants to supply services to IPS and for IPS to supply services to recruitment companies.

221. Mr Lall submitted that everything the consultants did was referable to their contracts with the recruitment companies, and everything that IPS did was referable to its contracts with consultants. Any ambiguities and inconsistencies in the contractual documentation can be resolved by looking at the reality of how the contract was performed and that economic reality should prevail. However, it is well established that written contracts must be construed by reference to their written terms and the factual matrix at the time they were entered into. Having said that, I acknowledge that the way in which the parties conducted themselves is relevant to the existence of contracts between IPS and recruitment companies and between consultants and recruitment companies.

222. I am satisfied that the written contracts signed by consultants and IPS clearly establish a contractual relationship between those parties. I acknowledge that there are some anomalous provisions which I have referred to above. Overall however, the intended effect of those contracts is clear from the wording of the contract, construed in the context of the background facts from 2004 onwards. Consultants were contracting to provide services to IPS.

223. In my view, the existence of the contracts between consultants and IPS is part of the factual matrix in which to consider the legal relationships between IPS and recruitment companies and between consultants and recruitment companies.

224. There is no signed written contract in place between IPS and the recruitment companies. It is therefore necessary to consider what if any relationship arises between IPS and recruitment companies by reference to the parties conduct. I have referred to the conduct of the parties above and have already said that subject to my conclusions as to the relationship between consultants and recruitment companies, I would be satisfied that when IPS sent the draft contracts and accompanying letters to recruitment companies that amounted to an offer which was accepted by performance on the part of the recruitment companies.

225. There was no direct evidence of any contractual relationship between consultants and recruitment companies. The fact that consultants commenced working through recruitment companies before entering into the written contracts with IPS does not lead me to conclude that they had a direct contractual relationship with the recruitment companies. Given the clear existence of a contract between consultants and IPS for a supply of services to IPS and in the absence of evidence as to dealings and communications between consultants and recruitment companies the most likely explanation is that work carried out by consultants was in anticipation of entering into a contract to supply services through IPS.

226. In my judgment, the contractual relationships were as follows:

(1) Contracts between consultants and IPS in which consultants agreed to provide their services to IPS in consideration of a payment by IPS to consultants. That payment was generally 96% of the sums received by IPS from the recruitment companies.

(2) Contracts between IPS and recruitment companies whereby IPS agreed to provide the consultants' services to the end-clients in consideration of the sums agreed between the individual consultants and the recruitment companies.

(3) There were no contracts between consultants and recruitment companies.

227. Having reached that conclusion, I take comfort from the fact that it is consistent with the following:

(1) Contracts made by IPS UK which was incorporated in 2013 and adopted the same business model as IPS. The contractual documentation as between consultants and IPS UK, which was drafted by a firm of tax specialists, clearly demonstrates an intention that consultants would provide services to IPS UK which would in turn provide services to its recruitment company clients.

(2) IPS's dealings with IOMCE in relation to the voluntary disclosures in 2014 and 2015 where it clearly accepted that it had been making supplies to recruitment companies in relation to doctors and nurses which were wrongly treated as exempt supplies of medical care.

(3) The fact that MedicsPro clearly considered that it was receiving services from IPS and that IPS sent MedicsPro a standard form contract dated 30 September 2014 which was intended to reflect the services provided since 11 July 2012.

(4) The fact that IPS accounted for VAT following the 2014 Enquiry on the basis that it supplied the services of new consultants to recruitment companies.

(5) IPS's financial accounts for all periods up to 31 December 2016 which were finalised before the 2018 Enquiry and showed IPS's turnover in relation to consultants as the gross sums received from recruitment companies.

228. Unless the economic and commercial reality is any different, IPS was making supplies for VAT purposes to the recruitment companies.

Economic and commercial reality

229. I have already described the significance of the contractual terms, and the economic and commercial reality in identifying the nature and recipient of a supply for VAT purposes. It is recognised that the contractual position normally reflects the economic and commercial reality. That is consistent with legal certainty. However, there may be circumstances where the contractual terms do not wholly reflect the economic and commercial reality of the supplies.

230. I have identified the nature of the legal relationships based on the evidence before me and I have found that the contracts provided for consultants to supply their services to IPS and for IPS to supply services to recruitment companies. I should say

at the outset that there is nothing commercially or economically unrealistic about such a model. It is ultimately a matter for the parties how they structure their transactions and there is no question of applying principles of abuse of law or sham in the present circumstances. Neither party argued to that effect. It seems to me that in circumstances where there is no question of abuse of law or sham, it will be a rare case where the economic and commercial reality leads to a different result for VAT purposes from an analysis based on the contractual position. Simply because dealings between parties could have been arranged differently does not mean that the economic and commercial reality is different.

231. I also note that the documentation in terms of contracts and associated documents was used by IPS between 2004 and 2019 without any commercial difficulty. Further, as previously mentioned the contractual relationships are consistent with the contracts drawn up for IPS UK, IPS's dealings with IOMCE during the 2014 Enquiry, its treatment of MedicsPro, the way it accounted for VAT following the 2014 Enquiry and the way it reported turnover in its annual accounts.

232. Mr Lall submitted that looking at the evidence as a whole "*the directors knew what they wanted to do, but did not understand the legal and VAT implications of how to achieve their intended result*". That may indeed be the case. The question for me at this stage of my decision is not how the directors subjectively intended the relationships to work, but objectively, what was the economic and commercial reality of the supplies? In particular, was the economic and commercial reality somehow different to the contractual relationships.

233. Mr Lall submitted that where commercial relationships involve many parties there can be difficulties in identifying the nature of the contractual relationships and the correct VAT analysis. I accept that is the case. Airtours Holidays Transport Limited was an example of such difficulties. Mr Lall submitted that in the circumstances of the present appeal, it was possible to see "how disjunction between the contracts and the economic reality could have arisen and persisted over a long period". He submitted that it is understandable in circumstances where IPS's VAT affairs were being dealt with by persons not expert in VAT, that there should be confusion in relation to the VAT treatment. He relied on a number of factors to argue that the economic and commercial reality was that IPS provided an invoicing service to consultants. I have summarised those factors above when referring to the parties' submissions.

234. I accept that IPS has no involvement in negotiating the terms of a consultant's assignment with the recruitment company, in particular the remuneration payable by the recruitment company. That is not surprising in the context of recruitment companies operating as employment businesses and providing work finding services to consultants. It is only once an assignment is agreed that the relationships between the parties and the nature of the supplies between the parties will be established. It does not suggest to me that the economic and commercial relationship is any different from the contractual relationships which are then established.

235. I also accept that IPS did not perform functions that might be expected if it was supplying staff or services to recruitment companies. It had no involvement in arranging or finding work for contractors, in ensuring that a contractor was qualified to provide the services or in monitoring the quality of services. Mr Lall argued that all the functions IPS performed were consistent with a supply of invoicing services. Namely, invoicing the recruitment companies, receiving payment from the recruitment companies and making payments to the consultants.

236. There is force in the point that IPS did not perform functions that might be expected if it was supplying staff or services to recruitment companies. On its own however I do not consider that it is sufficient to establish any different economic and commercial reality. The parties were free to contract and make supplies on whatever basis they saw fit and the commercial obligations entered into by the parties pursuant to the contracts would remain binding. As to what IPS actually did in terms of invoicing, receiving and making payments, that is also consistent with it making supplies to recruitment companies.

237. Ms Lemos submitted that the invoicing and payment of funds between recruitment companies and IPS and between IPS and consultants was entirely consistent with the respondents' case. That is true, but it is equally consistent with IPS's case. I do not consider the fact of invoicing and receiving payments is a significant indicator one way or the other. Nor is it significant that IPS's invoices to recruitment companies bore the same reference number as the documentation issued to consultants. What is relevant is that IPS invoiced in its own name as if it was providing the services, which is what it had contracted to do.

238. Ms Lemos suggested that the mixing of funds paid by recruitment companies to IPS in its own bank account was consistent with the respondent's case, and inconsistent with an agency agreement whereby IPS received the funds on behalf of consultants. Mr Lall accepted that this may be regarded as "minor and minimal breaches of fiduciary duty". I was not taken to any authorities as to the duty of a business operating an invoicing service in the Isle of Man to keep monies in a separate client account. I cannot therefore find that this is a significant factor in determining the economic and commercial reality of the supplies.

239. Similarly, the fact that monies from recruitment companies were paid into IPS's bank account and were generally paid out on the same day has no real significance. It is consistent with IPS operating as an efficient intermediary company or an efficient invoicing service.

240. Mr Lall relied on IPS's role in the market. It was simply providing an invoicing service to consultants who did not want to administer their own invoicing and payment collection. In my view the business plan and associated documentation together with the VAT application indicate that IPS was offering much more than a simple invoicing service. It marketed its services as an intermediary with associated tax and employment regulatory benefits to consultants and recruitment companies. That is so whether or not the directors properly understood the benefits IPS provided to consultants and recruitment companies.

241. Mr Lall relied heavily on the fact that IPS was not obliged to pay the contractor unless it had itself been paid by the recruitment company. That was a provision in clause 4.2 of the contract between contractors and IPS. Mr Lall submitted that the existence of clause 4.2 was powerful evidence that there was in reality no economic value flowing from contractors to IPS or from IPS to the recruitment companies. Mr Lall also submitted that if a contractor was providing services to IPS without any reciprocal obligation on IPS to pay for those services then there could be no supply for VAT purposes.

242. Ms Lemos submitted that the existence of clause 4.2 actually reinforced the respondent's argument. It was an acknowledgment that without clause 4.2, IPS would be bound to pay the consultants even where it had not itself been paid by the recruitment companies. The only basis on which that obligation would arise is if IPS was contracting to purchase services from consultants. It would not arise if IPS was merely providing an invoicing service to consultants.

243. I do not accept Mr Lall's submission. The parties were entitled to allocate the risk of non-payment by a recruitment company. They must be taken to have done so in the light of their understanding of the benefits and burdens of the contractual arrangements. IPS at least must be taken to have understood that there was a benefit in terms of both tax and employment regulations for services to be supplied through IPS, rather than by IPS offering a straightforward invoicing service because that was the product it was marketing. I accept that consultants would expect to be paid for their work. But IPS would not want to be left in the position that it had a liability to a consultant and might not be paid by the recruitment company. There is no reason consultants and IPS should not reach a commercial agreement as to the risk of non-payment by a recruitment company. In any event, the evidence was that this had never happened and in my view the clause does not affect the economic and commercial reality of the arrangement.

244. Mr Lall also submitted that clause 4.2 was inconsistent with IPS acting as an employment business, in particular the obligation on an employment business under regulation 15(b) of the 2003 Regulations to pay a work-seeker whether or not it has been paid by the hirer. However, consultants were not work-seekers as far as IPS was concerned. It was not providing work-finding services to consultants.

245. In Adecco, the Court of Appeal held that both contractually and as a matter of economic and commercial reality Adecco supplied the services of temps to its clients and was not supplying introductory or ancillary services. Mr Lall sought to distinguish the case of Adecco on its facts. He emphasised that Adecco had a contract with end-clients and there were no contracts between temps and end-clients. It was an express term of the contract that the services of temps were being supplied "through Adecco" and Adecco paid temps on its own behalf, and not on behalf of end clients. Mr Lall observed that payment was due from Adecco to the temps irrespective of whether the client paid Adecco so that Adecco was taking financial risk.

246. In contrast, Ms Lemos sought to identify similarities between the facts in Adecco and the present appeal. She emphasised the existence of contracts between

Adecco and temps whereby services of temps were supplied through Adecco and that temps were paid by Adecco on its own behalf rather than as agent. Further, IPS charged recruitment companies a single sum.

247. I mentioned above that Adecco bears some similarity to the present appeal, but of course it is important to consider the specific factual situation in that case. Whilst Adecco is a very helpful statement and illustration of the principles to be applied in cases such as this, I do not consider that there is any benefit in comparing and contrasting the different factual scenarios. Each case must be decided on its own facts.

248. Mr Lall submitted that the economic and commercial reality that IPS was providing an invoicing service was supported by the level of fee that it charged. A 4% gross profit for supplying staff would not be realistic in circumstances where IPS was contracting to buy in and supply services. A fee of 4% would not adequately reflect the risk associated with IPS making a supply of services to the recruitment companies, including the risk that contractors might be treated as employees of IPS giving rise to liability for PAYE and national insurance.

249. The fact is that IPS makes a gross profit of 4% of the sums invoiced to recruitment companies. That gross profit will be the same whether it is income from an invoicing service or whether it represents a margin on services purchased from contractors and sold to recruitment companies. I am not satisfied on the evidence before me that the risks associated with the purchase and supply of services would justify a fee greater than 4%. There is no evidence that those risks were appreciable or that they would justify a gross margin greater than 4%. IPS has been providing its services for many years prior to 2014 using the same contractual documentation and none of the risks identified by Mr Lall have materialised.

250. Mr Lall relied on the documentary evidence as to the nature of IPS's business, including descriptions in the business plan, the VAT registration application, and IOMCE's own records. He submitted that these all indicated an invoicing service. I accept that in some respects they are consistent with an invoicing service, but in my view the overwhelming tenor of the documentary evidence indicates that IPS was making supplies of services to recruitment companies.

251. There was a significant factual dispute between the parties as to when IPS through Mr MacGregor and Mr Shaw first recognised that its supplies were supplies of invoicing services to consultants. I have made a finding in relation to that dispute because both parties considered the issue relevant to the way I should approach the evidence. IPS says that the fact Mr MacGregor formed a view in 2017 that IPS supplied invoicing services to consultants supports their case that the economic and commercial reality is a supply of invoicing services. The respondent says that the fact no-one at IPS ever thought that they were supplying invoicing services until after Mr Duchars was consulted shortly before 26 March 2018, supports their case that the economic and commercial reality is a chain of supply.

252. I have found that Mr MacGregor and Mr Shaw had in mind in late 2017 that IPS's business could be structured as an invoicing service, but no steps were taken to

investigate the possibility. That finding is of little or no relevance in identifying the economic and commercial reality of the supplies. The economic and commercial reality of the supplies must be determined objectively, by reference to the all the surrounding circumstances in which the transactions took place. It cannot depend on the retrospective views of Mr MacGregor in late 2017, especially when he himself accepted that he was not aware of all the relevant material adduced in evidence during the hearing.

253. Equally, I do not consider that I should read anything into the fact that IPS continued to use the same documentation and to account for VAT in the same way from March 2018 until August 2019.

254. The regulatory background in terms of taxation and employment law supports the respondent's case on the economic and commercial reality. The documentation demonstrates that IPS was intended to operate as an intermediary company allowing contractors and recruitment companies to avoid certain tax and regulatory issues. Whether or not it actually achieved those aims is not relevant. I am satisfied that IPS was marketed to contractors as providing the tax benefits associated with a personal service company but with a reduction of the administrative burden. It was not marketed as an invoicing service.

255. Standing back and taking an overview of these factors and of all the evidence, I do not consider that the economic and commercial reality of the supplies was any different to the contractual relationships between the parties.

OVERALL CONCLUSION

256. For all the reasons given above I am satisfied as follows:

(1) The contractual position was that consultants supplied their services to IPS which in turn supplied services to recruitment companies. The legal relationships involved reciprocal performance between IPS and the recruitment companies with value being given by the recruitment companies to IPS.

(2) The economic and commercial reality matched the contractual position.

(3) For VAT purposes, IPS made standard rated supplies of consultants' services to recruitment companies.

DISPOSITION

257. In the circumstances the appeal is dismissed.

258. 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 14.19A of the Rules of the High Court of Justice 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 18/08/2020