2DS 2020/28

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
STAFF OF GOVERNMENT DIVISION

Between:

INCOME PLUS SERVICES LIMITED Appellant

and

CUSTOMS AND EXCISE DIVISION ISLE OF MAN TREASURY Respondent

Constitution of the court:

Judge of Appeal Storey QC
Deemster Crow QC
Deemster Bailhache QC

Judgment of the court
delivered on 20 July 2021

INTRODUCTION

1. This is an appeal by Income Plus Services Limited ['IPS'] against a decision of the Isle of Man Value Added Tax and Duties Tribunal ['the Tribunal'] dated 18 August 2020 [the 'Decision']. Before the Tribunal IPS was represented by Mr Lall and the Customs and Excise Division of the Treasury ['IOMCE'] by Ms Lemos. The appeal to this court is by way of a review of the decision of the Tribunal, not by way of a rehearing: Rule 14.14(1) and (2) of the Rules of the High Court of Justice 2009.

2. The Decision dealt with an appeal by IPS against an assessment to VAT made by IOMCE 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. 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. IOMCE also issued a penalty in the sum of £344,374.20 based on IPS having carelessly made inaccurate VAT returns. That penalty was not appealed to the Tribunal and has not been appealed to this court, but it stands or falls with the appeal of the Assessment.

3. We would wish at the outset to pay tribute to the clarity and thoroughness with which the Tribunal (Judge Jonathan Cannan) dealt with the issues before it. We see no grounds for overturning the Decision and we dismiss the appeal for the reasons set out in this judgment.

THE DISPUTE IN OUTLINE

4. The appeal turns on the nature of the services supplied by IPS. For its part, IPS says that it made taxable supplies of invoicing, payment and administrative services

(together 'Invoicing Services'] to independent, self-employed contractors [the 'Contractors']. In response, IOMCE says that IPS made taxable supplies of staff to UK employment and/or recruitment companies [together, the 'Recruitment Companies'].

5. In summary, the issue arises in this way. IPS is registered for VAT. It supplied services in connection with Contractors. The Contractors were placed by the Recruitment Companies with end-users (largely UK NHS hospitals). IPS raised invoices on the Recruitment Companies in respect of the Contractors' work. IPS deducted up to 4% from those payments and paid the balance to the Contractors.

6. The issue between the parties concerns the correct VAT treatment of the payments made by the Recruitment Companies to IPS. The Assessment was raised on the basis that VAT is chargeable on the full amount of the payment made by the Recruitment Companies to IPS in respect of doctors (i.e. Contractors). IPS's case is that it was simply providing Invoicing Services to the Contractors, and that VAT is accordingly chargeable only on the fee of up to 4%.

7. The Tribunal held that: the contractual position was that the Contractors supplied services to IPS, which in turn supplied services to the Recruitment Companies (i.e. that there were contractual relations between the Contractors and IPS, and between IPS and the Recruitment Companies) and the economic and commercial reality matched the contractual position (i.e. there was a 'chain of supply'); as a result, for VAT purposes, IPS made standard rated supplies of the Contractors' services to the Recruitment Companies.

THE BACKGROUND FACTS

8. It is convenient to start by setting out the background facts as determined by the Tribunal:

> *"**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* [of] *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 [sic] 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."*

THE LEGAL FRAMEWORK

- *VAT law*

9. The applicable VAT regime is outlined at paragraphs 22 – 23 and 28 of the Decision. IPS did not contend that there was any error in that summary (see paragraph 13 of its skeleton in this court).

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

11. Section 4 of the 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. It is common ground that IPS is a taxable person.

12. A taxable supply is a supply of goods or services made in the Island other than an exempt supply. In this context, 'supply' includes all forms of supply, but not anything done otherwise than for consideration. Section 5(2) of the VATA 1996 provides that anything which is not a supply of goods but which is done for a consideration is a supply of services. There is no dispute as to the characterisation of the supply for VAT purposes in this appeal. It is common ground that we are concerned with supplies of services by IPS.

13. The applicable legal principles for determining how the nature of a supply and the identity of the recipient of a supply should be ascertained for VAT purposes was described in the following terms by the Tribunal. In this court, IPS expressly recognised (in paragraph 15 of its skeleton) that "*The relevant principles were not in dispute*" before the Tribunal:

> "***29**. … 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 [the PVD], 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* [sic] *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* [*Halifax plc v Customs and Excise Comrs* (Case C-255/02) [2006] Ch 387, ECJ]*, 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 1-9187, 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 [EC Council Directive 77/388] *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 [sic] 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."

14. It is apparent from this summary of the law (and the Tribunal was well aware) that:

    (1) a supply of services is effected for consideration only if there is legal relationship between the provider of the service and the recipient, pursuant to which there is reciprocal performance, the remuneration received by the provider constituting the value actually given in return for the service;

    (2) an assessment of whether there was a supply of services, and (if so) by whom and to whom, involves the application of an objective test;

    (3) consideration of economic and commercial realities is a fundamental criterion, and in that context the relevant question is the economic purpose of a transaction (not its economic effect);

    (4) the contractual terms agreed by the parties normally reflect the economic and commercial reality, and in the interests of legal certainty it is important that that is so: as such, they are generally the most useful starting point for the VAT analysis and (to quote paragraph 15.10 of IPS's skeleton in this court) "*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*";

    (5) nevertheless, the question involves an application of the statute, not just the interpretation of a contract, and the contractual terms are not necessarily determinative, for example (to quote *Newey* at paragraph 45) "*if it becomes apparent that those contractual terms constitute a purely artificial arrangement which does not correspond with the economic and commercial reality of the transactions*"; and

    (6) when determining the relevant supply, regard must be had to all the circumstances in which the transaction or combination of transactions takes place.

- *The regulatory regime for recruitment companies in the UK*

15. Having set out the applicable principles for determining who supplies what, and to whom, for the purposes of VAT, the Tribunal then set out the legal framework in which recruitment companies operate in the UK:

> "***41***. *… 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.""

- *Contract law*

16. One of the issues before the Tribunal was whether there was a contract between IPS and the Recruitment Companies. It is a matter of record that no such written contracts were ever signed, so the question was whether any contract came into existence as a result of the parties' conduct.

17. It was common ground in this court (see paragraph 19 of IPS's skeleton) that the relevant legal principles were correctly summarised by the Tribunal as follows:

> "***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* [sic] *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 [L]*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.""

18. After setting out some of the relevant facts, the Tribunal then dealt with the burden of proof in this context:

> "***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."

19. There is no appeal by IPS against that finding as to the burden of proof.

- *The test on appeal*

20. In the course of oral argument in this appeal, Mr Macnab, counsel for IPS, sought to dissuade us from trying to differentiate between questions of fact and questions of law. In that regard, he relied on *Pendragon Plc v RCC* [2015] UKSC 37, [2015] 3 All ER 919, as authority for the proposition that "*in the context certainly of VAT appeals, it can be pretty tricky to work out where the line is, therefore don't fuss too much about it*". We reject that submission. Section 86 of the VATA 1996 only permits an appeal from the Tribunal to the Staff of Government Division on a point of law. In any event, it is critically important in any appellate context to differentiate between appeals on points of law, appeals on points of fact, and appeals on points of mixed fact and law. The difference between them dictates the appropriate approach of the appellate court. The Supreme Court in *Pendragon* was not saying anything different. It is apparent from the judgment of Lord Carnwath of Notting Hill SCJ (with whom Lords Neuberger of Abbotsbury P, Sumption, Reed of Allermuir and Hodge SCJJ agreed) in that case, at paragraphs [44] – [51], that the Supreme Court approved the conventional approach derived from *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 per Lord Radcliffe (with whom Lords Tucker and Somervell of Harrow and Viscount Simonds agreed), at 33, and specifically the application of that approach to VAT appeals. This is apparent from the passage quoted from *Procter & Gamble UK v RCC* [2009] EWCA Civ 407, [2009] STC 1990 per Mummery LJ (with whom Jacob and Toulson LJJ agreed), at paragraph [75]:

> "*For it is the tribunal which is the primary fact finder. It is also the primary maker of a value judgment based on those primary facts. Unless it has made a legal error in that in so doing (eg reached a perverse finding or failed to make a relevant finding or has misconstrued the statutory test) it is not for an appeal court to interfere*."

21. The Supreme Court in *Pendragon* said nothing to doubt or detract from that approach. What it did say was that, under the regime applicable in England and Wales, where there is a specialist First-tier Tribunal but also a specialist Upper Tribunal, the Court of Appeal in that case had been wrong to concentrate on the extent to which the Upper Tribunal should have second-guessed the evaluation made by the First-tier Tribunal. It was in that context that Lord Carnwath said this, in paragraph [51] of his judgment in *Pendragon*:

> "*The appeal to the Court of Appeal … was from the decision of the Upper Tribunal, not from the First-tier, and their function was to determine whether the Upper Tribunal had erred in law. That was best approached by looking primarily at the merits of the Upper Tribunal's reasoning in its own terms, rather than by reference to their evaluation of the First-tier's decision*" (our emphasis added).

22. That was a comment made on the role of the English Court of Appeal in relation to appeals from decisions of a specialist Upper Tribunal. It should not be interpreted as detracting in any respect from the importance in this jurisdiction of this court considering carefully whether, and to what extent, an appeal is truly being made on a

point of pure law. We derive support in that regard from what was said in paragraph [70] of the decision of Falk J and Judge Herrington in *Ingenious Games LLP v RCC* [2019] STC 1851.

23. Indeed, IPS rightly recognised (in paragraph 10 of its skeleton in this court) that the legal issue in the appeal "*turns in large part on correctly identifying the fact and terms of the relevant transactions*" between IPS, the Contractors and the Recruitment Companies respectively. IPS also rightly recognised that the correct test for determining whether an error of fact constitutes an error of law remains that laid down in *Edwards*, which has more recently been quoted in *Georgiou v CEC* [1996] STC 463, CA, by Evans LJ (with whom Saville and Morritt LJJ agreed) at 476. The test is whether the Tribunal has ignored relevant considerations, or taken account of irrelevant considerations, or reached a decision that no reasonable tribunal could have reached. That is the test we propose to apply when considering the arguments in this appeal in so far as they involve challenges to the Tribunal's findings of primary fact.

24. In its reasons (given on 30 October 2020) for granting permission to appeal to this court pursuant to Rule 14.19A, the Tribunal stated that although it was not satisfied the Decision contained any errors of law, it was arguable that there were such errors. Dealing collectively with Grounds (1) to (4), it said (in paragraph 6) that "*the heart of the appeal was the legal effect of the terms of [the] contract"* between IPS and the Contractors, and that it was arguable that the Decision involved an error of law "*as to the construction of the terms of that contract and therefore the existence and nature of the other contractual arrangements between the parties"*. Dealing separately with Ground (5), the Tribunal said (in paragraph 9) that it accepted that it was arguable that the Decision involved an error of law "*as to the Tribunal's finding as to economic reality"*. Finally, the Tribunal observed (in paragraph 10) that Ground (6) was "*an overarching ground of appeal which essentially relies on Grounds (1) to (5)"*. We are of the view that questions such as (i) whether or not contracts were made between IPS and the Recruitment Companies or between the Contractors and the Recruitment Companies and (ii) what was the commercial and economic reality are probably questions of fact – or at least mixed fact and law, as Ms Lemos, counsel for IOMCE, submitted (see further paragraphs 43 – 45 below). However, we do not have to adjudicate on this point. First, permission to appeal has been granted – although we do not consider that we are bound by the Tribunal's understanding of the nature of the issues that fall for determination in this court. Second, we are content to view the grounds of appeal as an attack on the exercise of an evaluative decision of the Tribunal which can constitute an error of law in the limited circumstances outlined at paragraph 23 above.

25. In our judgment, a comparable approach is also required in so far as IPS seeks to persuade this court to depart from the Tribunal's evaluation on matters of factual assessment. This is relevant in the present appeal because (for the reasons discussed in more detail in paragraph 44(1) below) the task of correctly identifying the economic and commercial reality of a situation does not involve the determination of a question of primary fact. Rather, it involves an exercise of evaluation. This court must accordingly recognise the proper limits on its own function, and again respect the judgment of the Tribunal. Taking that approach, it is not open to this court to overturn the Tribunal's evaluation of the facts unless IPS can satisfy us that the Decision was based on a misunderstanding of the applicable legal principles, or that it ignored relevant considerations, or took into account irrelevant considerations, or was one that no reasonable tribunal could have reached.

THE TRIBUNAL'S DETAILED FINDINGS OF FACT

26. The Tribunal set out its findings of primary fact in paragraphs 48 – 148 of the Decision. In light of the scope of this court's function, and the nature of the test on appeal, it is convenient to set out those findings in full:

> *"**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 1PS 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* [2018] *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 [A]*s* [Y]*ou* [E]*arn system or to an intermidatory [sic] 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 [sic] earnings. Income Plus Services Ltd acts as this intermediately [sic] 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* [S]*ervices").*
>
> *[…]*
>
> *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* [C]*onflicts of* [I]*nterest

[…]

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* [C]*onsultant 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 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* [S]*chedule was intended to be signed by the* [C]*onsultant 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* [to] *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 [C]*ompany 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.* [Company's] *Warranties* [and Liabilities]**

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.* [T]*his 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 1PS 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 "subcontractor") 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* [E]nquiry*. 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 [C]*ustoms &* [E]*xcise".*

***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 [sic] 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 [sic] 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 [sic] 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 [sic] for the consultants [sic] '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 1/12/18
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 TRIBUNAL'S JUDGMENT

- *Introduction*

27. The Tribunal outlined the parties' respective arguments in paragraphs 149 – 157 of the Decision. In essence, IPS's case was that: it provided Invoicing Services to Contractors for a fee of up to 4% of the Contractors' gross income from the Recruitment Companies; its only contractual relationships were with the Contractors; it had no contractual relationships with the Recruitment Companies; the Contractors had direct contractual relationships with the Recruitment Companies; and the economic and commercial reality of the supplies was that IPS made no supplies to the Recruitment Companies. IOMCE's case was that: there were contractual relationships between IPS and the Contractors, and also between IPS and the Recruitment Companies; pursuant to those contracts, the Contractors supplied services to IPS, and IPS made a supply of staff to the Recruitment Companies; and the economic and commercial reality was no different to the contractual position.

28. IOMCE also submitted that the Tribunal could make a finding that IPS was making a supply of services to the Contractors as well as a supply of services to the Recruitment Companies. On that basis, IOMCE submitted that the Tribunal could, if necessary,

increase the Assessment. Looking at the evidence as a whole, the Tribunal concluded that such a finding was not open to it: see paragraph 159 of the Decision. There is no cross-appeal on this conclusion. The Tribunal concluded that IPS was either making supplies of Invoicing Services to Contractors or a supply of services to Recruitment Companies.

29. The Tribunal then proceeded to consider the existence and the nature of the contractual relationships between the various participants, and what those contractual relationships indicated as to the nature and recipient of IPS's supplies for VAT purposes, under five headings:

    (1) the regulatory background;
    (2) the legal relationship between IPS and Contractors;
    (3) the legal relationship between IPS and Recruitment Companies;
    (4) the legal relationship between Contractors and Recruitment Companies; and
    (5) conclusions as to the legal relationships.

    It then considered:

    (6) whether the economic and commercial reality required the nature and recipient of the supplies to be analysed differently for VAT purposes, before reaching its overall conclusion. In doing so, it recognised that there was a considerable degree of overlap between the various headings, in particular the legal relationships between the various parties. With that warning to itself, the Tribunal indicated that it would not draw any conclusions about the legal relationships until it had considered the material relevant to all those relationships: see paragraph 160 of the Decision.

30. The Tribunal started by noting rightly (in paragraph 161 of the Decision) that:

    (i) there was no suggestion that the nature of IPS's supplies had changed between the time it commenced business in 2004 and the time when the Assessment was made in 2018; and

    (ii) the contractual and other documentation used by IPS remained largely unchanged throughout that period.

31. The Tribunal then rightly noted (in paragraph 162 of the Decision) that an enquiry into the nature of a supply for VAT purposes is an objective exercise and that the subjective intention of a taxable person is not relevant. For that reason, the Tribunal stated (again, rightly) that evidence from Mr MacGregor and Mr Champion as to their view of the nature of the services was not of much assistance. The Tribunal recognised that it had to form its own view as to the nature of IPS's services and to whom they were supplied. Having said that, the Tribunal did accept that Mr Champion's perception of what value IPS provided to Contractors and/or Recruitment Companies would be relevant: see paragraph 162. That perception included the need by employment agencies to avoid making payments to work-seekers due to employment regulatory issues. Whether Mr Champion's perception was in fact correct was not an issue for the Tribunal to determine.

- *The regulatory background*

32. The Tribunal observed (in paragraph 163 of the Decision) that no mention had been made of the regulatory background either in IPS's grounds of appeal or in IOMCE's statement of case. Furthermore, the supposed difficulties (under UK law) faced by UK recruitment companies, and the supposed benefits to such recruitment companies provided by IPS's offering remained unclear both to the witnesses and to the Tribunal at the hearing below: see paragraphs 164 – 169 of the Decision. It was and is common ground that Recruitment Companies dealing with the Contractors and IPS did so, not as employment agencies, but as employment businesses employing work-seekers and supplying them to end-clients. IPS did not therefore provide work-finding services to Contractors. That was the role of the Recruitment Companies. Nevertheless, the supposed significance of the regulatory background acquired increasing prominence as the hearing below developed, and it is convenient to pick up the Tribunal's Decision starting at paragraph 170:

> *"**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 the Contractors*

33. The Tribunal turned next to the nature of the legal relationship between IPS and the Contractors:

> *"**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 i*[s] *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 the Recruitment Companies*

34. The Tribunal turned next to the legal relationship between IPS and the Recruitment Companies by reference to the example sent to Blue Lantern, quoted above. At paragraph 197 of the Decision, the Tribunal rejected a submission from counsel for IPS, Mr Lall, that the terms of the document were unclear. On the contrary, the Tribunal considered that the terms would clearly demonstrate that IPS was supplying services to the Recruitment Companies and that the services were clearly intended to be services which IPS contracted to purchase from Contractors. The real issue was whether there was any legal relationship between IPS and the Recruitment Companies.

35. The Tribunal went on to observe (in paragraph 198 of the Decision) that the existence of the document sent by IPS to the Recruitment Companies at least indicated that IPS intended to enter into a legal relationship with the Recruitment Companies, and that the answer to the question whether it did or not would depend on an analysis of all the circumstances and whether there was an offer and acceptance to establish a contract. Having summarised the applicable law (quoted at paragraph 17 above) the Tribunal then said this:

"***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.*

…

***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."*

36. The Tribunal then dealt, in paragraphs 212 – 214 of the Decision, with an argument on behalf of IPS based on the fact that services were supplied by Contractors to Recruitment Companies prior to IPS sending contractual documentation to the Recruitment Companies. On that basis, Mr Lall submitted that there could not have been any contract between IPS and the Recruitment Companies. In response, Ms Lemos submitted that, if there was such a contract, it was superseded by a subsequent contract between IPS and the Recruitment Company which covered invoices after the first invoice. The Tribunal rejected that alternative argument on behalf of IOMCE, but in the event (as will be seen) the Tribunal held that there was no contract between the Contractors and the Recruitment Companies in any event, so there was nothing for the contract between IPS and the Recruitment Company to supersede.

- *The legal relationship between Contractors and Recruitment Companies*

37. The Tribunal dealt next with the legal relationship between the Contractors and the 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."*

- *Conclusions on the contractual relations*

38. The Tribunal then set out its conclusions on the contractual relations between the parties in paragraphs 218 – 228 of the Decision:

*"**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 [sic] 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.".*

- *The economic and commercial reality*

39. The Tribunal then turned to deal with the 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."*

- *The Tribunals' overall conclusion*

40. Having made its findings as to the nature of the legal relationships between the parties, and as to the economic and commercial reality of those relationships, the Tribunal then expressed its overall conclusion in these terms:

*"**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."

41. For those reasons, IPS's appeal was dismissed.

THE APPEALS

- *IPS's Grounds of Appeal*

42. By its Amended Appeal Notice issued on 29 January 2021, IPS seeks to appeal against the Tribunal's Decision on the following six grounds:

(1) Ground (1) is that the Tribunal "*erred in law*" in reaching the conclusion "*that the Contractors were providing their services to IPS "in consideration of payment by IPS to consultants""*". This contention is based on the assertion that "*the obligation on IPS to pay consultants under clause 4.2 of the Contract for Services between IPS and Contractors … was contingent on IPS being paid*" by the Recruitment Company. Under this heading, IPS also contends that "*the Tribunal placed reliance on provisions in the contract between IPS and the Contractors which did not on the evidence and findings made have substance, such that there were no reciprocal obligations between IPS and the Contractors on which any such finding could properly be based*";

(2) Ground (2) is that the Tribunal "*made an error of law in finding that IPS had a contract for supplying services to recruitment agencies, taking account of findings of the Tribunal and matters that were not in dispute*";

(3) Ground (3) is that the Tribunal "*made an error of law in finding that there were no contracts between the consultants and Recruitment Companies*";

(4) Ground (4) is that the Tribunal made "*an error of law in not finding that IPS was supplying invoicing services when there was no dispute as such that IPS was providing such services and reciprocal obligations substantiating such supplies were clearly evident*". We would observe that, in granting permission to appeal, the Tribunal said (in paragraph 7 of its decision dated 30 October 2020) that its "*understanding at the hearing was that this was disputed, indeed strenuously so*". In order to illustrate the point, the Tribunal quoted from paragraph [8] of IOMCE's closing submissions;

(5) Ground (5) is that the Tribunal "*made an error of law in finding that economic and commercial reality matched the apparent contractual position given the*

errors identified above". IPS contends that the economic reality "*only reflected a supply from IPS to* [the Contractors] *of invoicing services"*; and

(6) Ground (6) is that the Tribunal "*made an error of law that for VAT purposes IPS made standard rated supplies of consultants' services to the Recruitment Companies"*.

- *The nature of IPS's appeal*

43. In our judgment, the ultimate question in this appeal is whether the Tribunal was correct in reaching the conclusion that IPS made a taxable supply of services to the Recruitment Companies. Any decision as to whether a given set of facts could justify a conclusion that there was a supply of services within the VATA 1996 is a question of law, but, if they could, the conclusion that they did is one of fact (see paragraphs 20 – 25 above). However, in order to reach a conclusion on that question of law, it is common ground that:

(i) the court needs to determine the economic and commercial reality of the position;

(ii) the starting point for any analysis of the economic and commercial reality is the contractual position; and

(iii) the starting point for the contractual analysis is to determine which parties were in contractual relationships with each other.

44. Against that background, we would respectfully disagree with the Tribunal's understanding of the nature of the issues under appeal in a number of respects:

(1) first, in our judgment, the economic and commercial reality of any relationship is not a question of law. Rather, it involves an evaluation of the factual position. It does not constitute a finding of primary fact as such, but it does involve an assessment of the facts. Having reached that assessment, the separate question whether the economic and commercial reality (as so found) involves a supply of services within the VATA 1996, and (if so) by whom and to whom, will be a question of law, but the anterior exercise of correctly understanding the nature of the economic and commercial reality is one of factual evaluation;

(2) second, the question whether any particular parties were in a contractual relationship with each other is one of mixed fact and law. It necessarily involves determining questions of primary fact (for example whether the documents ostensibly constituting the contract were sent and received by the parties respectively) and then evaluating the legal consequences of those facts (for example whether a contract arose through the parties' conduct); and

(3) third, whilst contractual interpretation is indeed a matter of law (as the Tribunal rightly recognised), we do not agree that the issue in this case involved the Tribunal in resolving any dispute on the meaning of particular contractual terms. The meaning of the words on the page was not, and is not, in doubt. The dispute was whether the contracts involved a supply of

services by IPS to the Contractors, or by the Contractors to IPS, and also whether there was any contract between IPS and the Recruitment Companies. That dispute did not turn on the meaning of the contractual terms.

45. Applying the relevant test for an appeal (as outlined in paragraphs 20 – 25 above), it is important to recognise at the outset that IPS did not seek to persuade us that the Tribunal had misunderstood the applicable legal principles. Nor did IPS identify any irrelevant factor which the Tribunal is said to have taken into account. Nor did IPS identify any relevant factors which the Tribunal is said to have ignored, in the sense that IPS did not identify any factor on which it relies in support of its argument that was not mentioned in the Decision. In truth, IPS's argument on this appeal was little more than a re-run of the argument it presented to the Tribunal, relying on the same factual pointers and the same legal authorities. The essence of IPS's appeal was simply to invite this court to reach a different conclusion from that reached by the Tribunal based on all the same material.

46. We have set out the greater part of the Tribunal's Decision at such length for two reasons:

    (1) the first is to demonstrate that the Decision involved an application of the correct legal principles and that it was taken on the basis of (at least) an entirely reasonable evaluation of all the relevant factors, disregarding any irrelevant ones. Applying the appellate test outlined above, we accordingly dismiss IPS's arguments in support of its appeal; and

    (2) the second reason for setting out the Tribunal's findings and its reasoning at such length is to explain why, if (contrary to this court's finding) the appellate test outlined above were inapplicable and if (on that basis) this court were required to reach its own conclusion *de novo* on all the available material, we would have reached the same conclusion as the Tribunal and could not improve upon the very detailed and comprehensive reasons it gave.

47. With that as the starting point, we can dispose of the arguments raised on IPS's appeal relatively shortly.

- *IOMCE's Respondent's Notice*

48. IOMCE invites this court to dismiss IPS's appeal for the reasons given by the Tribunal. IOMCE has also served a Respondent's Appeal Notice dated 26 February 2021 in which it invites this court to uphold the Decision on one further ground. It says that it invited the Tribunal "*to draw adverse inferences as to the evidence, in light of IPS's failure to adduce evidence that would obviously have been relevant to the issues in the appeal"* (paragraph 4 of the Respondent's Notice). The Tribunal declined to do so in paragraphs 142 – 147 of the Decision. IOMCE now invites this court to draw such adverse inferences.

GROUND (1): CONTRACTUAL RELATIONS BETWEEN IPS AND THE CONTRACTORS

49. IPS's argument under Ground (1) of its appeal is that the Tribunal was wrong to conclude that the contract between IPS and the Contractors was a contract for the provision of services by the Contractors to IPS. In support of that argument, Ms

Lemos took us through the model contract between IPS and the Contractors, pointing out those passages which (he submitted) were indicative of a relationship under which IPS was providing Invoicing Services to the Contractor, rather than the Contractor providing a supply of services to IPS. He relied in particular on clause 4.2, which provides that IPS is not under any payment obligation to the Contractor until IPS has itself received payment from the Recruitment Company.

50. It is apparent from the passages quoted from the Decision that the Tribunal was fully alive to the existence of the various individual contractual terms which might be taken to support IPS's argument in this regard (for example, those mentioned in paragraphs 190 and 196 of its Decision). Furthermore, it was fully alive to the circumstantial material suggesting that IPS provided Invoicing Services to the Contractors (for example, the facts cited in paragraph 183 of its Decision, which are dealt with more fully in relation to Ground (5) below).

51. Nevertheless, the Tribunal assessed the contract in the round (paragraph 218 of the Decision), and (as importantly) it suspended final judgment as to the direction of supply and the nature of the relevant services for VAT purposes until it had evaluated all the evidence. In other words, the Tribunal adopted exactly the right approach in principle. Taking that approach, it held that the contract which undoubtedly existed between IPS and the Contractors was a contract for the supply of services by the Contractor to IPS, not a contract for the supply of Invoicing Services by IPS to the Contractor. In particular, it rejected IPS's reliance on clause 4.2 of the contract (in paragraphs 241 – 243 of the Decision). The Tribunal's conclusion was supported by the matters listed at paragraphs 135 – 6, 227, 231, 240 and 254 of the Decision – all of which are inconsistent with the provision of Invoicing Services by IPS to Contractors, but consistent with a supply of services to IPS by Contractors.

52. In our judgment, the Tribunal was (at least) fully entitled to reach that conclusion for the reasons it gave. Furthermore, if this court were to take its own decision on the issue *de novo*, it would have reached the same conclusion itself. Looking at the contract, and without seeking to list every relevant term, it is particularly striking that Recital (A) says that IPS "*wishes to benefit from certain skills and abilities*" of the Contractor, and that Recital (B) says that the Contractor "*is in business as an independent consultant and is able and wishes to provide his services to [IPS] from time to time on the terms set out in this contract for service*". Against that background, all the various operative provisions identified by the Tribunal, particularly in paragraphs 189 and 191 – 195 of its Decision, point clearly to the conclusion that the Contractor is indeed providing services to IPS. We reject IPS's argument that the Tribunal's decision in relation to clause 4.2 begs the question in issue: on the contrary, the Tribunal considered carefully whether clause 4.2 either demonstrated or even suggested that IPS's argument was correct, and it concluded that it did neither. We agree.

53. It should also be recognised that there was a tacit acknowledgment from IPS that, at least to some extent, the contractual documentation defining its legal relationship with the Contractors does not support its own analysis of the economic and commercial reality (see for example, paragraph 151 of the Decision). In paragraph 4.2 of its skeleton in this court, IPS said that "*to the extent that the form of IPS's written contracts with* [the Contractors] *suggested that* [the Contractors] *supplied services to IPS (and not vice versa)*" those contracts "*did not match the economic and commercial reality of the transaction*". IPS goes on to say that "*it is the economic and commercial*

reality of the transaction that determines what was supplied and to whom for VAT purposes". We will deal with the economic and commercial reality later, but for present purposes it is important to recognise the concession rightly and necessarily made by IPS in relation to the contractual terms as between IPS and the Contractors. It is important both because the parties are agreed that the starting point for any VAT analysis is the contractual position, and also because, in the context of an appeal on a point of mixed fact and law, the undoubted existence of contractual terms which indicate that the Contractors were providing services to IPS is bound to impact on this court's enthusiasm for interfering with the Decision.

54. For these reasons, we would dismiss the appeal on Ground (1).

GROUND (2): CONTRACTUAL RELATIONS BETWEEN IPS AND THE RECRUITMENT COMPANIES

55. IPS's argument under Ground (2) of its Appeal Notice was that the Tribunal was wrong to conclude that there were contractual relations between IPS and the Recruitment Companies. In paragraph 31 of its skeleton in this court, IPS submitted that the Tribunal's alleged error on Ground (2) "*was in whole or in part attributable to its error on Ground 1"*. Since we have dismissed the argument based on Ground (1), we would similarly dismiss the argument on Ground (2). Nevertheless, we will address IPS's arguments under Ground (2) on their own terms, unaided by our conclusion on Ground (1).

56. As is apparent from the Tribunal's Decision in paragraphs 84 – 86, the primary facts in relation to the issue under Ground (2) were not in dispute: draft contractual terms (with an accompanying letter) were provided by IPS to the Recruitment Companies, but signed copies were never returned. The question was accordingly whether contractual relations were established through conduct. The Tribunal concluded that they were, principally on the basis that the supply by IPS of the draft contracts constituted an offer, and the payment against invoices rendered by IPS in relation to the Contractors' work constituted acceptance by the Recruitment Companies.

57. IPS's principal challenge to the Tribunal's finding under Ground (2) was that there was no sufficiently clear and unequivocal conduct by the Recruitment Companies to constitute acceptance. We reject that argument. The Tribunal applied the correct legal test, and it was fully entitled to reach the conclusion it did on the evidence. If this court had had to decide the matter *de novo*, we would have reached the same conclusion for the reasons given by the Tribunal.

58. In his submissions to this court, Mr Macnab relied heavily on the terms of clause 3.2 of the draft contracts provided to Recruitment Companies (quoted in paragraph 84 of the Decision) and the fact that there was no evidence or finding that any fee to be paid by the Recruitment Companies to IPS was ever negotiated or agreed. He also relied on the fact that the Schedule to the sample contracts in evidence before the Tribunal had "*N/A"* written in the box marked "*Fees"*. Whilst we accept that these represent entirely respectable arguments in support of IPS's case, they do not begin to outweigh the overwhelming preponderance of contractual terms which clearly indicated a supply of services to the Recruitment Companies, or the existence of contractual relations based on those contractual terms and arising from the parties' conduct.

59. IPS also submitted in this court that the payments made by the Recruitment Companies to IPS were consistent with payment being made for Invoicing Services (see paragraphs 204 and 209 of the Decision), and that the Tribunal was wrong not to accept that alternative analysis on the basis of its finding (as explained in paragraph 210 of the Decision) that there was a lack of evidence as to what information was provided by IPS to the Recruitment Companies describing IPS's involvement in the transactions. IPS sought to argue in this court that that ruling was incorrect, in that the Tribunal had accepted that the Recruitment Companies introduced the Contractors to IPS "*and so must have known of IPS's role*" (see paragraph 35.2 of IPS's skeleton in this court). We reject that argument. The fact that the Recruitment Companies may generally have introduced the Contractors to IPS does not answer the question as to the role IPS played, as between itself and the Contractor or between itself and the Recruitment Company.

60. Furthermore, it is not open to IPS on appeal to invite this court to infer anything about what the Recruitment Companies "*must have known*" in the absence of any relevant evidence from IPS as to what in fact passed between it and the Recruitment Companies. Notwithstanding the argument raised in the Respondent's Notice, this does not require the court to draw any inferences which are adverse to IPS as to what the evidence might have shown had it been deployed. Rather, in the absence of that evidence, the position is simply that IPS cannot properly invite this court to overturn the finding of the Tribunal based on any inferences which are favourable to IPS. As the Tribunal rightly observed, the fact that IPS adduced "*no evidence as to what information was provided by IPS to recruitment companies describing their involvement in the transaction*" made it "*difficult for IPS to satisfy* [the Tribunal] *that there was no acceptance of IPS's contractual offer*" (paragraph 210 of the Decision).

61. IPS's next argument, in paragraph 35.3 of its skeleton, was this:

> "*At* [paragraph 211 of its Decision, the Tribunal] *stated that there was no evidence of* [the Recruitment Companies] *being informed whether by* [the Contractors] *or by IPS that IPS was invoicing on behalf of* [the Contractors]. *That statement was contradicted by* [the Tribunal's] *earlier finding* [in paragraph 96 of its Decision] *that the invoices submitted by IPS to the Recruitment Companies included the narrative that they were "for services supplied by* [name of Contractor]*"."*

In our judgment, there is nothing in this argument. The fact that an invoice was rendered in respect of a named Contractor's services does not answer the question as to the capacity in which IPS was rendering that invoice, nor does it demonstrate that IPS was only supplying Invoicing Services to the Contractors. At paragraph 96 of the Decision the Tribunal set out what narrative was contained on the invoices and why. The invoices also included IPS's own bank details, company registration and VAT number.

62. Finally, we would add this. As noted above, the Tribunal's finding in relation to the existence of contractual relations between IPS and the Recruitment Companies (Ground (2) in this appeal) is supported by its finding as to the content of the contractual relations between IPS and the Contractors (Ground (1) in this appeal). It is also important to recognise that its finding as to the existence of contractual relations between IPS and the Recruitment Companies (Ground (2)) is further supported by its finding as to the non-existence of contractual relations between the

Contractors and the Recruitment Companies. That issue itself forms the subject matter of Ground (3), which is dealt with below. For present purposes we would merely observe that the Tribunal was right as a matter of principle to factor its answer to the question whether there were contractual relations between the Contractors and the Recruitment Companies into its answer to the (separate but related) question whether there were contractual relations between IPS and the Recruitment Companies because the two alternatives are mutually exclusive.

63. In conclusion, IPS's argument under this Ground of Appeal constituted nothing more than a repetition of its argument before the Tribunal. There is no basis for suggesting that the Tribunal applied the wrong legal test, or that it reached an irrational conclusion, or that it ignored any relevant factor, or that it took into account an irrelevant factor. For these reasons, we would dismiss the appeal under Ground (2).

GROUND (3): CONTRACTUAL RELATIONS BETWEEN THE CONTRACTORS AND THE RECRUITMENT COMPANIES

64. IPS's next argument seeks to challenge the Tribunal's conclusion that there were no contractual relations between the Contractors and the Recruitment Companies. IPS recognised that its argument under Ground (3) "*is inextricably linked*" to its argument under Grounds (1) and (2) (see paragraph 39 of its skeleton in this court). Nevertheless, we will deal separately with its argument under this heading on its own terms.

65. The main point is this. As is apparent from paragraph 208 of its Decision, the Tribunal held that the onus was on IPS to establish the existence of contractual relations between the Contractors and the Recruitment Companies. Since IPS failed to adduce any relevant oral or written evidence on that issue (and apparently failed even to seek any such evidence), the Tribunal held that it had failed to discharge that burden. As a result, the Tribunal reached the conclusion that there were no contractual relations between the Contractors and the Recruitment Companies. There was no appeal to this court against the Tribunal's ruling as to the burden of proof on this point. In the circumstances, we do not consider that IPS has any plausible basis for inviting this court to overturn the Tribunal's ruling as to the non-existence of contractual relations between the Contractors and the Recruitment Companies.

66. Nevertheless, IPS submitted that the Tribunal failed "*to have proper regard*" (our emphasis added) to the fact that both the work done by the Contractor and what the Recruitment Company was to pay in respect of that work were agreed between the Recruitment Company and the Contractor (see paragraph 40 of its skeleton in this court). On that basis, IPS sought to argue that the Tribunal's conclusions "*are difficult to understand in circumstances where* [the Contractor] *did not know about IPS when* [the Contractor] *agreed the key terms of work and pay with* [the Recruitment Company]" (see paragraph 42 of its skeleton in this court). It is entirely clear from the way in which this argument is expressed (i.e. that the Tribunal failed "*to have proper regard*"), and also from the Decision itself at paragraphs 190, 225 and 234, that the Tribunal did take these matters into account. It also had in mind that:

    (1) there was no documentary evidence to show how or when Recruitment Companies introduced Consultants to IPS (in particular whether before or after contact between IPS and the Recruitment Company) – paragraph 90 of the Decision; and

(2) the Tribunal was not satisfied that Contractors did commence work prior to the introduction of Contractors to IPS – paragraph 216 of the Decision.

As a result, IPS's argument is that the Tribunal should have given them more weight. For the reasons given in paragraphs 23 and 25 above, we reject that argument. The Tribunal very properly took into account all relevant matters, and the weight it attached to each factor was a matter for its judgment. The Tribunal reached an overall conclusion that was well within the bounds of a reasonable decision.

67. Finally under this heading, IPS sought to rely (in paragraph 43 of its skeleton in this court) on the Tribunal's finding (at paragraph 214 of its Decision) that there was insufficient evidence to find that there was a common intention that all the parties intended that any contract between the Contractor and the Recruitment Company would be superseded by a new contract between IPS and the Contractor. However, there is nothing in that argument because (as noted at paragraph 36 above) the Tribunal concluded that there was no contract between the Contractor and the Recruitment Company in the first place, and accordingly there was nothing which needed to be superseded in any event.

68. If necessary, we would also add that the Tribunal's Decision on this issue was one with which this court would agree for the reasons given by the Tribunal, if we were to reach our own conclusion on it *de novo*. In particular, we reject the suggestion that there is any tension between the Tribunal's conclusion that there was no contractual relationship between the Contractors and the Recruitment Companies (on the one hand) and the fact that, in many cases, the Contractor may not have known about IPS when s/he agreed the key terms of work and pay with the Recruitment Company (on the other). It is not remotely unusual in a business context for the outline terms of a deal to be agreed before there is any clarity as to the exact identities of the substantive parties and their respective roles under the contractual arrangements that are ultimately put in place.

69. For these reasons, we would dismiss the appeal on Ground (3).

70. Having reached that conclusion, there is no real scope for the argument raised in IOMCE's Respondent's Notice to arise under Ground (3). As the Tribunal rightly held, the absence of relevant documents or witness testimony evidencing the dealings between the Contractors and the Recruitment Companies results in IPS having failed to discharge the burden of demonstrating that there were contractual relations between the Contractors and the Recruitment Companies. That is the significance of the absence of relevant evidence in that regard. There is accordingly no need for this court to draw adverse inferences on that issue.

GROUND (4): SUPPLY OF INVOICING SERVICES

71. As noted above, Ground (4) in IPS's Appeal Notice says that the Tribunal made an error of law in not finding that IPS was supplying Invoicing Services to the Contractors "*when there was no dispute as such that IPS was providing such services and reciprocal obligations substantiating such supplies were clearly evident".* As also noted above, the Tribunal said in its decision on permission to appeal that it had understood at the hearing that this was disputed, "*indeed strenuously so".* In paragraph 28.1 of its skeleton in this court, IPS's position on this point has been modified, or at least

clarified. It now says that there was no dispute "*as a matter of primary fact and as a matter of basic activity/function, leaving aside legal questions of contract and VAT – that IPS was invoicing for* [the Contractors'] *services"*. We will address IPS's argument under Ground (4) on the basis set out in its skeleton.

72. On that basis, the argument adds nothing to IPS's appeal. In essence, it does nothing more than emphasise the fact that IPS did indeed render invoices, and that it received a fee of up to 4% of the gross payments made by the Recruitment Companies. That fact is not in dispute, nor was it ignored by the Tribunal. But it does not dictate the answer to the question whether, for VAT purposes, the only analysis open to the Tribunal was that IPS was making a supply of Invoicing Services to the Contractors. If that was not the only analysis open to the Tribunal, then the fact that invoices were rendered by IPS presents nothing more than a relevant factor in the overall assessment, and since it was a relevant factor which the Tribunal took into account it cannot be invoked as a basis for arguing in this court that the Tribunal's Decision should be overturned.

73. For these reasons, we would dismiss the appeal under Ground (4).

GROUND (5): ECONOMIC AND COMMERCIAL REALITY

74. In disposing of IPS's submissions, we have adopted in this judgment the same structure as IPS adopted in its Appeal Notice. In summary, Grounds (1) to (4) inclusive dealt primarily with the contractual position, whereas Ground (5) dealt separately with the economic and commercial reality.

75. Nevertheless, we do not lose sight of the fact (any more than the Tribunal did) that there is only one question under the VATA 1996, namely whether (as IOMCE submits, and the Tribunal held) the Contractors were making a supply of services to IPS and IPS was making a supply of services to the Recruitment Companies, or (as IPS submits) it was making a supply of Invoicing Services to the Contractors. Whilst it is convenient to approach the answer to that question by reference to the contractual arrangements as a starting point, and then separately to consider the economic and commercial reality, we are as conscious as was the Tribunal that there is a single overall question to be answered. Indeed, it would appear from the caselaw that, far from involving a two-stage process in which the court looks first at the contract/s and then at the economic and commercial reality, the true position is that the contractual arrangements represent a convenient prism through which to ascertain the economic and commercial reality: see paragraph [35] of *Secret Hotels2* and paragraph [47] of *Airtours*, quoted above at paragraph 13.

76. It would appear that this is common ground, as it was before the Tribunal. Indeed, in assessing the strength of IPS's appeal under this heading, it is important to recognise that, in paragraph 52 of its skeleton in this court, IPS "*accepts* [the Tribunal's] *statement at* [paragraph 252 of the Decision] *that* "[t]*he economic and commercial reality of the supplies must be determined objectively, by reference to all the surrounding circumstances in which the transactions took place*"". In other words, IPS accepts (rightly and inevitably, in our judgment) that the Tribunal adopted the correct approach in principle.

77. Not only that, but it is also apparent that the Tribunal applied the correct legal test. As noted above, it recognised that the contractual arrangements between the parties

are not conclusive, although they provide a relevant and important starting point. The Tribunal recognised that it could in principle have decided that the contractual arrangements do not properly reflect the economic and commercial reality, and that it was not strictly necessary to treat those arrangements as a sham in order to have reached such a conclusion. We would not disagree – in particular where the tax authority asserts that what is in the contract does not represent the true position. However, where a contracting party chooses to structure his contract in a particular way, he is likely to have an uphill battle in persuading a court that the contract he drafted and chose to enter into does not in fact reflect the commercial and economic reality of what he was doing, such that the tax authority and the court should re-evaluate the arrangements.

78. In any event, in order for the Tribunal to have reached the conclusion that the contractual arrangements did not reflect the economic and commercial reality, there would have had to be a body of consistent and compelling material leading to that conclusion which was (in the language adopted by Lord Neuberger in *Airtours*, at paragraph [47]) capable of 'vitiating' the characterisation of the arrangements derived from the contractual terms.

79. The Tribunal rightly held that there is no such body of material in this case. Whilst IPS has drawn our attention to those features of the arrangements which, it says, are consistent with its own analysis, we do not consider that those features were anywhere near sufficient to have required the Tribunal to accept that they outweigh the clear conclusion based on the contractual arrangements.

80. In its submissions to this court, IPS has urged on us (in paragraph 28.2 of its skeleton) that it was not involved in finding work for the Contractors, or in finding an individual Contractor for a specific role, that the Contractors will generally have "*a relationship*" with the Recruitment Company, and that the Recruitment Company will generally introduce the Contractor to IPS. All of this is true, but (as IPS also rightly recognises, in paragraphs 28.2 to 28.5 of its skeleton) all of these matters were expressly taken into account by the Tribunal, along with the various other factors on which IPS seeks to rely in this appeal. On that basis, IPS cannot realistically submit that the Tribunal ignored any relevant factors.

81. Instead, IPS's argument has to proceed on the basis that the Tribunal ought to have given greater weight to these various considerations. We do not consider that that line of argument can succeed, essentially because there is no objective or other reliable basis on which this court can sensibly assess how much weight was given by the Tribunal to any particular factor, or whether any particular factor or combination of factors should necessarily have led to any given conclusion. It is in the nature of an evaluative exercise that different elements, some of which will be in competition with each other, need to be balanced against each other. If a tribunal at first instance has taken the relevant factors into account, it will be extremely difficult for an appellant to persuade this court that the decision below should be overturned, unless it is one that is obviously perverse or unsustainable on any reasonable grounds. In this appeal, IPS's argument gets nowhere near to crossing that threshold.

82. Indeed, there are numerous indicators which strongly support that conclusion. Looking at the circumstances overall, and again without seeking to list all the relevant material, we consider it particularly striking that IPS's annual accounts up to and including the year ended 31 December 2017 consistently described the company's

principal activity as "*consultancy services"* (not "*invoicing services"*), and they consistently showed as the company's turnover the full amount of the payments received from the Recruitment Companies. Whilst IPS sought to persuade us that the directors' subjective understanding of the VAT position was irrelevant (which we accept), the fact remains that the annual accounts are not prepared for VAT purposes. Rather, they are prepared in order to give a true and fair view of the company's financial position. That being the case, this court is entitled to proceed (as was the Tribunal) on the basis that IPS's annual accounts reflected the economic and commercial reality of its principal business activity, just as much as the contractual arrangements did.

83. It is also fair to point out that the voluntary disclosures made by IPS following the 2014 Enquiry, described in paragraphs 15 – 17 of the Tribunal's Decision, involved payments being made to IOMCE on the basis that IPS was supplying staff to the Recruitment Companies.

84. In our judgment, the Tribunal was also entitled to reach the conclusion that IPS's Business Plan supports the analysis derived from the contractual arrangements. Whilst it is true that the Business Plan describes IPS as "*an invoicing billing company"*, and also uses expressions such as "*invoicing structure",* it does so in a context which (as the Tribunal rightly held) clearly suggests that IPS was providing something else. In particular, the Executive Summary in the Business Plan says this:

> "*Income Plus Services Limited has been specifically designed to assist the United Kingdoms* [sic] *recruitment industry as well as the temporary or contract worker by providing a professional and efficient invoicing structure by which a temporary or contract worker can supply his or her professional services into the recruitment industry. By providing a professional, friendly and efficient service combined with unsurpassed levels of customer service Income Plus Services Limited will grow and develop into a market leader"* (our emphasis added).

85. In this context, it is significant (as the Tribunal noted in paragraphs 57 and 61 of the Decision) that the Business Plan uses the expression "*invoicing structure"* not "*invoicing service"* and also that it does so in the context of describing the provision of assistance to the UK's recruitment industry (among other things). It is also significant that, under the heading "*Who are our Customers"* the Business Plan said this:

> "*We have two customers, the Temporary/Contract worker and the Recruitment Companies. The Temporary/Contract Worker is someone who is supplying his or her services on a non permanent basis … Income Plus Services Ltd has the experience, knowledge and can offer a level of customer services unsurpassed by any of our competitors.*"

Having described the Recruitment Companies as "*customers*" it is therefore apparent that IPS was saying that it provided services to the Recruitment Companies and acted as an intermediary between its two customers. This is mirrored in the Business Plan:

> *"… 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 …"*.

86. In our judgment, the Tribunal was also entitled to reach the conclusion that the Welcome Pack issued by IPS contains material supporting the conclusion derived from contractual arrangements. In this context, IPS sought to challenge the Tribunal's finding at paragraph 186 of its Decision that the Welcome Pack was "*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*". In our judgment, that argument fails. The material quoted from the Welcome Pack in paragraphs 67 – 68 of the Decision is indeed unambiguous. Under the heading "*Contract for Services*", it says that "*there is a base agreement*" between IPS and the Contractor "*which describes how* [the Contractor is] *a self-employed Contractor and gives information on how* [the Contractor] *will supply the services, which IPS supply to the client*" (our emphasis added). Nothing could be clearer than that. Whilst IPS drew our attention to various other passages which refer to the provision of invoices, it failed to draw our attention to any material which is capable of vitiating the analysis derived from contractual arrangements.

87. IPS sought to rely (in paragraph 49 of its skeleton in this court) on certain marketing material in support of its argument on appeal. It submitted that the Tribunal's conclusion (in paragraphs 183 – 185 of the Decision) that this material tended to suggest "*something more than an invoicing service*" and that it suggested instead "*a structure in which contractors supply services to IPS which in turn supplies services to recruitment companies in a chain of supply*" was inconsistent with the actual terms of the marketing literature. We reject that argument. The Tribunal rightly recognised that the marketing material was "*not without ambiguity*" (paragraph 185 of the Decision), but that it was "*unambiguous as to the nature of the relationship*" (paragraph 186) between Consultants and IPS; overall it was fully entitled to reach the conclusion it did on the documentary evidence.

88. Also under this heading, IPS advanced an argument by reference to the Tribunal's ruling on the relevance of the regulatory position under UK law relating to recruitment companies. In particular, IPS drew attention to the findings made in paragraph 240 of the Decision, and also in paragraph 254, where the Tribunal held 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.*"

IPS submitted to this court that that conclusion was wrong because:

(1) it was incompatible with the Tribunal's earlier ruling that the regulatory position in the UK was unclear (paragraph 56 of IPS's skeleton in this court);

(2) IPS's operating as an invoicing agent "*could be described as operating "as an intermediary""*(paragraph 57.1 of IPS's skeleton);

(3) the tax benefits on offer were to the Contractor as a self-employed operator (paragraph 57.2 of IPS's skeleton); and

(4) marketing and offering services aimed at relieving administrative burdens on Recruitment Companies "*was entirely consistent with IPS offering invoicing and payment collecting services"* (paragraph 57.3 of IPS's skeleton).

89. There is nothing in this argument. Nor, in our judgment, is there anything in IOMCE's counter-argument that the position under UK law assists in supporting the Tribunal's ruling in this regard. Properly understood, the Tribunal's ruling was not based on any substantive interpretation of the true effect, as a matter of English law, of the regulatory regime applicable to recruitment companies there. Accordingly, the Tribunal's observations in paragraph 254 of the Decision were not inconsistent with the view it had already expressed that the legal position under that regulatory regime was unclear. Furthermore, the views which it expressed were based on its evaluation of the overall thrust of IPS's marketing material, in other words on how IPS presented itself, and not on the basis that IPS's understanding was correct. The Tribunal's evaluation was well within the scope of reasonable decision-making on the basis of all the evidential material before the Tribunal.

90. In conclusion on Ground (5), IPS's argument fails to engage with the nature of the task it is facing on appeal. It has presented a number of respectable arguments which could be (and were) presented at first instance in support of the conclusion that the economic and commercial reality was that IPS was making a supply to the Contractors of Invoicing Services. But the issue in this court is not whether IPS had respectable arguments at first instance. As noted above, the question is whether the Tribunal applied the wrong legal principles (which is not alleged) or reached a conclusion which no reasonable decision-maker could have reached, or ignored relevant factors, or took into account irrelevant factors (none of which it did).

91. As such, we would repeat that this appeal is in essence simply an attempt by IPS to persuade this court to reach a different conclusion from the Tribunal based on all the same materials and the same arguments as were deployed below. This is not a promising line for IPS to take on appeal, because it fails properly to recognise the true nature of the appellate test.

92. In our judgment, having rightly reached the conclusion that the contractual arrangements involved a supply of services by the Contractor to IPS and by IPS to the Recruitment Companies, the Tribunal was fully entitled to reach the conclusion that there was nothing in the surrounding circumstances to vitiate that analysis.

93. For this accumulation of reasons, we do not consider that there is any plausible basis for overturning the Tribunal's Decision under Ground (5). Furthermore, if this court had had to make its own decision *de novo*, we would have reached the same conclusion, essentially for the reasons given by the Tribunal.

GROUND (6)

94. Ground (6) is a wrap-up that adds nothing new to the argument.

CONCLUSION

95. For the reasons given above, we dismiss IPS's appeal. It is therefore unnecessary to uphold the Tribunal's Decision on the basis of the additional argument set out in the Respondent's Notice.

96. Our provisional view, in the absence of submissions, is that IPS should pay IOMCE's costs of the appeal on the standard basis, to be the subject of a detailed assessment.

97. In the absence of agreement between the parties as to ancillary orders within 14 days of the date on which this judgment is handed down, we will determine any remaining issues without a further hearing. Any ancillary applications by any party are to be filed and served within 14 days from the handing down of this judgment together with concise written submissions in support, and any concise written submissions by the responding party are to be filed and served within 14 days thereafter.