59TACD2024

Between

[redacted]

[redacted]

and

The Revenue Commissioners

Respondent

Determination

Contents

Introduction

1. This is an appeal to the Tax Appeals Commission ("the Commission") pursuant to and in accordance with the provisions of section 949I of the Taxes Consolidation Act 1997 ("the TCA 1997") brought on behalf of [redacted] ("the Appellant") against four Notices of Amended Assessment for Corporation Tax ("the amended assessments"), raised under Schedule D Case I, by the Revenue Commissioners ("the Respondent"), in respect of accounting periods ending 31 December 2015 ("FY15"), 31 December 2016 ("FY16"), 31 December 2017 ("FY17") and 31 December 2018 ("FY18") ("the relevant years").

2. The amount of tax at issue, having regard to the amended assessments, is set out in a table in the Statement of Agreed Facts, which the Commissioner sets out below as follows[1]:

Corporation Tax period	**Balance of Tax Payable per the Respondent's Assessment**	**Date of Notice of Amended Assessment**
Period ending 31 December 2015	[redacted]	1 December 2021 (and revised Notice of Amended Assessment issued 17 December 2021)
Period ending 31 December 2016	[redacted]	1 December 2021
Period ending 31 December 2017	[redacted]	1 December 2021
Period ending 31 December 2018	[redacted]	1 December 2021
Total	[redacted]	

3. The amended assessments arise out of transfer pricing adjustments sought to be made by the Respondent to the Appellant's supply of services to its parent, [redacted] ("the parent company"), in accordance with the provisions of section 835C(2)(b) of the Taxes

[1] Booklet of Documents, page 23

Consolidation Act 1997 ("TCA 1997"). The adjustment relates to share based awards ("SBAs") granted by the parent company to employees of the Appellant.

4. The appeal proceeded by way of a hearing that commenced on 21 September 2023 and concluded after seven days. The Appellant and Respondent were both represented by Senior Counsel. In addition to oral submissions, the Commissioner heard sworn oral evidence from a number of witnesses, including expert witnesses for the Appellant and Respondent, as follows:

   (i) [redacted], for the Appellant;

   (ii) [redacted], for the Appellant;

   (iii) [redacted], for the Appellant;

   (iv) [redacted], expert witness for the Appellant;

   (v) [redacted], expert witness for the Appellant;

   (vi) [redacted], expert witness for the Respondent;

   (vii) [redacted], expert witness for the Respondent;

   (viii) [redacted], for the Respondent.

Background

5. The Appellant is a wholly owned subsidiary of the parent company, a [redacted]. The parent company is not tax resident in Ireland. The parent company and the Appellant are associated companies, within the meaning of section 835B TCA 1997. This is not in dispute between the parties.

6. The parent company is a software development company that is engaged in the business of providing [redacted]. [redacted].

7. [redacted]. [redacted]

8. Certain eligible employees of the Appellant participated in a group SBAs scheme whereby certain SBAs were granted to the employees of the Appellant. The parent company did not charge the Appellant for the provision of the SBAs and had no contractual obligation to do so.

9. Pursuant to the intercompany services agreements (hereinafter referred to collectively as "the services agreement") entered into between the Appellant and the parent company, on 14 May 2013 and 1 January 2016 respectively, the Appellant performed sales and marketing and research and development activities for the benefit of the parent company. The parent company engages in the business of [redacted] and the Appellant is supplying services to the parent company as part of this business for which it charges the parent company on a "cost-plus" basis.

10. The Appellant charged a fee to the parent company calculated by reference to its costs, plus a mark-up. The mark-up was [redacted] in FY15 and 10% thereafter for the relevant years. The arm's length margin for mark-up on total costs of [redacted] in FY15 and 10% thereafter for the relevant years is not in dispute between the parties.

11. It is also not in dispute between the parties that the Transactional Net Margin Method ("TNMM") is the appropriate transfer pricing method to be applied, with the Appellant being the tested party for applying that method and the Net Cost Plus ("NCP") is the correct profit level indicator.[2] The Commissioner will deal with these terms and their relevance in due course.

12. The Appellant's financial statements relating to the relevant years included a line item for expenses relating to the SBAs, which were awarded by the parent company to the employees of the Appellant. This is a requirement of Financial Reporting Standard 102 ("FRS 102"). The amount recorded in the Appellant's accounts is the "fair value" of the SBAs. It is not in dispute between the parties that the Appellant's accounts are prepared in accordance with FRS 102 and that the accounts reflect the "fair value" of the SBAs.

13. The document entitled "Exhibit A"[3] to the services agreement, specifically excludes the SBAs accounting expense from the costs used in the calculation of the charges made by the Appellant to the parent company for the services carried out by the Appellant. The Appellant contends that the rationale for this is that no expense was incurred by the Appellant with respect to the SBAs awarded by the parent company. Hence, the Appellant did not include the value of the SBAs awarded by the parent company to the Appellant's

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[2] Booklet of Documents, Tab 7, page 75
[3] Booklet of Documents, Tabs 17 & 18

employees in its costs for the purposes of calculating the fee under the services agreement for the relevant years, as it did not incur any cost associated with the SBAs.

14. It is the Respondent's view, that the Appellant has not demonstrated that the intercompany service fees receivable from the parent company in relation to the relevant years were at arm's length, as the cost of the SBAs should not have been excluded from the Appellant's costs for the purposes of calculating the fee under the services agreement for the relevant years.

15. In a letter dated 18 December 2020,[4] the Respondent notified the Appellant of an audit to be commenced on 8 January 2021, in respect of the Appellant's compliance with Part 35A TCA 1997, for the relevant years.

16. On 30 September 2021,[5] the Respondent issued a preliminary audit findings letter which concluded that Schedule D Case I adjustments were required for the relevant years, in accordance with section 835C(2)(b) TCA 1997, in the sums as aforementioned at paragraph 2 of this Determination.

17. On 1 December 2021,[6] the Respondent wrote to the Appellant in response to the Appellant's comments in letter dated 30 September 2021, and issued Notices of Amended Assessment to the Appellant with additional tax liabilities for the relevant years (the "Amended Assessments").

18. On 17 December 2021,[7] the Respondent issued a revised Notice of Amended Assessment to the Appellant with respect to the FY15, as the previous notice for the FY15 did not accurately reflect the tax previously paid for the period.

19. On 23 September 2016, the Appellant filed its CT1 return with respect to the FY15. The return was not subsequently amended by the Appellant. The revised Notice of Amended Assessment was therefore issued more than four years after the end of the chargeable period in which the Appellant filed its CT1 return for the FY15. It is not in dispute that the amended assessment for the FY15 was raised more than four years after the end of the chargeable period in which the Appellant filed its CT1 return. However, the Respondent argues that is was both appropriate to do so and it had the power to do so, in accordance with sections 959AA and 959AC TCA 1997. This is an issue to be determined in this appeal.

[4] Booklet of Documents, Tab 50
[5] Booklet of Documents, Tab 55
[6] Booklet of Documents, Tabs 63-66
[7] Booklet of Documents, Tab 68

20. By Notice of Appeal dated 30 December 2021,[8] the Appellant duly appealed to the Commission, the Notices of Amended Assessment for the relevant years.

21. On 3 February 2023,[9] consequent to voluminous correspondence that ensued between the parties following the Respondent raising the amended assessments, the Appellant wrote to the Respondent setting out in detail the reasons why it believes there is a fundamental error in the calculation of the assessments for the relevant years which have been raised by the Respondent and the Appellant requested a considered response. The Appellant stated that "*As matters stand we do not understand the basis upon which the Assessment has been calculated.*"[10] The Appellant sets forth its views on the assumption that the cost of the SBAs is one which was a cost of supplying the services which the Appellant provided to the parent company. The Appellant uses a hypothetical scenario to explain its rationale for the error contended.

22. On 8 March 2023,[11] the Respondent replied to the Appellant's correspondence setting out its disagreement with the Appellant and it set out the basis on which the Respondent's adjustments are made. The correspondence states that:

    "*Section 835C(2)(b) TCA 1997 requires an adjustment if the actual consideration receivable for a supply under an arrangement is less than the arm's length amount. The adjustment is made by computing profits or gains or losses "as if the arm's length amount were receivable instead of the actual consideration payable". This is consistent with the authoritative statement of the arm's length principle in paragraph 1 of Article 9 of the OECD Model Tax Convention which requires an adjustment if conditions made or imposed between two associated enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises and the arm's length principle as elaborated in the 2010 OECD TPG*".

23. It appears to the Commissioner that, broadly speaking, three issues arise for decision in this appeal. The fundamental issue in dispute is whether the Appellant was correct to exclude the SBAs expense from its cost base when calculating the intercompany services fees it charged to the parent company. There also arises an issue as to the proper interpretation sections 835C and 835D TCA 1997, with the parties having conflicting views as to the interpretation of the sections and a discrete issue arises in relation to the FY15

[8] Booklet of Documents, Tab 1
[9] Booklet of Documents, Tab 69
[10] Booklet of Documents, Tab 69
[11] Booklet of Documents, Tab 73

and the notice of assessment being raised more than four years after the end of the chargeable period.

24. At the outset, the Commissioner considers it relevant and appropriate to set out the manner in which the Commissioner will deal with the issues in dispute. The Commissioner intends firstly to set out the background to this appeal and the applicable legislative provisions. The Commissioner will then set out a summary of the evidence of the witnesses including the expert witnesses and the legal submissions made by Senior Counsel for both parties to the appeal. The Commissioner then considers it proper to set out the Commissioner's material findings of fact.

25. Thereafter, the Commissioner will proceed into the analysis of the issues, before reaching her Determination. For ease of reference, the Commissioner has broken down her considerations in the analysis section into a series of subheadings namely, the issues, statutory interpretation, section 959AA and 959AC TCA 1997, the admissibility of the expert evidence, accounting standards and section 76A TCA 1997, Transfer Pricing legislation in Ireland and the OECD Guidelines, Transfer Pricing Framework, which the Commissioner has broken down into a number of further sub-headings, the SBAs, which the Commissioner has also broken down into a number of further sub-headings, the [redacted] Plan, the Employment Agreements, The Services Agreement, Functional Analysis, the Transfer Pricing Reports, who bears the cost of the SBAs; the Appellant or the parent company and Consideration v Profit. Finally, the Commissioner sets out her Conclusion and Determination.

Legislation and Guidelines

26. The legislation and Guidelines relevant to this appeal is as follows:-

27. Section 835C TCA 1997, Basic rules on transfer pricing, *inter alia* provides:-

> *(1) Subject to this Part, this section applies to any arrangement—*
>
> *(a) involving the supply and acquisition of goods, services, money or intangible assets,*
>
> *(b) where, at the time of the supply and acquisition, the person making the supply (in this Part referred to as the 'supplier') and the person making the acquisition (in this Part referred to as the 'acquirer') are associated, and*

(c) *the profits or gains or losses arising from the relevant activities are within the charge to tax under Case I or II of Schedule D in the case of either the supplier or the acquirer or both.*

(2)

(a) *If the amount of the consideration payable (in this Part referred to as the 'actual consideration payable') under any arrangement to which this section applies exceeds the arm's length amount, then the profits or gains or losses of the acquirer that are chargeable to tax under Case I or II of Schedule D shall be computed as if the arm's length amount were payable instead of the actual consideration payable.*

(b) *If the amount of the consideration receivable (in this Part referred to as the 'actual consideration receivable') under any arrangement to which this section applies is less than the arm's length amount, then the profits or gains or losses of the supplier that are chargeable to tax under Case I or II of Schedule D shall be computed as if the arm's length amount were receivable instead of the actual consideration receivable.*

(3) *For the purposes of this section the 'arm's length amount' in relation to an arrangement is the amount of the consideration that independent parties would have agreed in relation to the arrangement had those independent parties entered into that arrangement*.

28. Section 835D TCA 1997, Principles for construing rules in accordance with OECD Guidelines, *inter alia* provides:-

(1) In this section -

'Article 9(1) of the OECD Model Tax Convention' means the provisions which, at the date of the passing of the Finance Act 2010, were contained in Article 9(1) of the Model Tax Convention on Income and Capital published by the OECD;

'OECD' means the Organisation for Economic Cooperation and Development;

'transfer pricing guidelines' means the guidelines approved on 13 July 1995 by the Council of the OECD (in this definition referred to as the 'OECD Council') as its Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations –

(a) *supplemented by -*

(i) the report on intangible property and services noted by the OECD Council on 11 April 1996,

(ii) the report on cost contribution arrangements noted by the OECD Council on 24 July 1997, and

(iii) such additional guidance, published by the OECD on or after the date of the passing of the Finance Act 2010, as may be designated by the Minister for Finance for the purposes of this Part by order made under subsection (3),

and

(b) modified by updates approved by the OECD Council on 16 July 2009 and 22 July 2010 and by the revision approved by the OECD Council on 22 July 2010.

(2) For the purposes of computing profits or gains or losses chargeable to tax under Case I or II of Schedule D, this Part shall be construed to ensure, as far as practicable, consistency between –

(a) the effect which is to be given to section 835C, and

(b) the effect which, in accordance with the transfer pricing guidelines, would be given if double taxation relief arrangements incorporating Article 9(1) of the OECD Model Tax Convention applied to the computation of the profits or gains or losses, regardless of whether such double taxation relief arrangements actually apply,

but this section shall not apply for the purposes of construing this Part to the extent that such application of the section would be contrary to the provisions of double taxation relief arrangements that apply to the computation of those profits or gains or losses.

29. Section 81 TCA 1997, General rule as to deductions, *inter alia* provides:-

(1) *The tax under Cases I and II of Schedule D shall be charged without any deduction other than is allowed by the Tax Acts.*

(2) *Subject to the Tax Acts, in computing the amount of the profits or gains to be charged to tax under Case I or II of Schedule D, no sum shall be deducted in respect of -*

(a) *any disbursement or expenses, not being money wholly and exclusively laid out or expended for the purposes of the trade or profession*;

………………..

(n) *without prejudice to the preceding paragraphs any consideration given for goods or services, or to an employee or director of a company, which consists, directly or indirectly, of shares in the company, or a connected company (within the meaning of section 10), or a right to receive such shares, except to the extent -*

(i) *of expenditure incurred by the company on the acquisition of the shares at a price which does not exceed the price which would have been payable, if the shares were acquired by way of a bargain made at arm's length,*

(ii) *where the shares are shares in a connected company, of any payment by the company to the connected company for the issue or transfer by that company of the shares, being a payment which does not exceed the amount which would have been payable in a transaction between independent persons acting at arm's length, or*

(iii) *of other -*

(I) expenditure incurred, or

(II) payment made to the connected company,

by the company in connection with the right to receive such shares which is incurred or, as the case may be, made for bona fide commercial purposes and does not form part of any scheme or arrangement of which the main purpose or one of the main purposes is the avoidance of liability to income tax, corporation tax or capital gains tax;

30. Section 959AA TCA 1997, Chargeable persons: time limit on assessment made or amended by Revenue officer, *inter alia* provides:

(1) *Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period -*

(a) an assessment for that period, or

(b) an amendment of an assessment for that period,

shall not be made by a Revenue officer on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and –

(i) no additional tax shall be payable by the chargeable person after the end of that period of 4 years, and

(ii) no tax shall be repaid after the end of a period of 4 years commencing at the end of the chargeable period for which the return is delivered,

by reason of any matter contained in the return.

(2) Nothing in this section prevents a Revenue officer from, at any time, amending an assessment for a chargeable period -

(a) where the return for the period does not contain a full and true disclosure of all material facts necessary for the making of an assessment for that period,

………………………..

and tax shall be paid or repaid (notwithstanding any limitation in section 865(4) on the time within which a claim for a repayment of tax is required to be made) where appropriate in accordance with any such amendment.

31. Section 959AC TCA 1997, Chargeable persons: Revenue assessment and amendment of assessments in absence of return, etc., *inter alia* provides:-

(2) Notwithstanding section 959AA, where in relation to a chargeable person—

(a) the person fails to deliver a return for a chargeable period,

(b) a Revenue officer is not satisfied with the sufficiency of a return delivered by the person having regard to any information received in that regard, or

(c) a Revenue officer has reasonable grounds for believing that a return delivered by the person does not contain a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period,

then a Revenue officer may, at any time, make a Revenue assessment on the chargeable person for the chargeable period in such sum as, according to the best of the officer's judgment, ought to be charged on that person.

…………………..

(4) In any of the circumstances referred to in subsection (2), a Revenue officer may, at any time, amend a Revenue assessment on, or a self-assessment in relation to, a chargeable person for the chargeable period involved in such manner as the officer considers necessary.

32. Section 959P TCA 1997, Expression of doubt, *inter alia*, provides:_

(2) *Where a chargeable person is in doubt as to the correct application of the law to any matter to be contained in a return required for a chargeable period by this Chapter, which could—*

(a) give rise to a liability to tax by that person, or

(b) affect that person's liability to tax or entitlement to an allowance, deduction, relief or tax credit, then, the chargeable person may—

(i) prepare the return for the chargeable period to the best of that person's belief as to the correct application of the law to the matter, and deliver the return to the Collector-General,

(ii) include a letter of expression of doubt with the return, and

(iii) submit supporting documentation to the appropriate inspector in relation to the matter."

(5) Subject to subsection (6), where a letter of expression of doubt is included with a return delivered by a chargeable person to the Collector-General for a chargeable period—

(a) that person shall be treated as making a full and true disclosure with regard to the matter involved, and

(b) any additional tax arising from the amendment of an assessment for the chargeable period by a Revenue officer to give effect to the correct application of the law to that matter shall be due and payable in accordance with section 959AU(2).

33. OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (2010 version).

34. Irish Revenue Tax and Duty Manual Part 35A-01-01.

Evidence and Submissions

Appellant's Evidence

35. [redacted] ("the Appellant's witness 1") gave evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given by the Appellant's witness 1:-[12]

35.1. The witness confirmed that he is a [redacted] for the EMEA (Europe, the Middle East and Africa) region, but that he is no longer an employee of the Appellant, as since 1 September 2023, he is an employee of the [redacted] subsidiary. The witness confirmed that his role is to manage the day to day operations within the EMEA region covering all tax heads. The witness stated that he reports to the Vice President ("VP") of Tax who is located in the [redacted]. The witness said that when he was employed by the Appellant, he

[12] A full account of the witness's testimony can be found in the Transcript, Day 1

had the same reporting structure and that it is not unusual to report to a colleague in another country. The witness confirmed that he is a Chartered Accountant and a Chartered Tax Advisor, [redacted] The witness stated that initially he worked with [redacted], then with another company before moving to the Appellant in 2019, as [redacted], being promoted to [redacted] in 2021. The witness confirmed that he made a witness statement which is correct.[13]

35.2. The witness testified that part of his role involves transfer pricing matters, ensuring that all EMEA entities comply with transfer pricing requirements in the specific countries and any transfer pricing documentation that is required to be prepared. The witness stated that before he joined the Appellant in 2019, the [redacted] tax team would have dealt with transfer pricing matters, such that he was the first person outside of the [redacted] to deal with taxation matters.

35.3. The witness testified as to the business of the parent company and its subsidiaries. The witness stated that the Appellant has 3 different prongs namely, research and development ("R&D"), sales and marketing and support staff. Reference was made to a table[14] illustrating the different roles in the organisation that have developed over time. The witness stated that the parent company is agnostic in terms of what country an employee works in, having regard to reporting lines. The witness testified that it is accepted that you have a web of reporting lines and interactions with different groups across the globe.

35.4. The witness gave evidence in relation to his experience with transfer pricing principles. The witness stated that he understands transfer pricing in terms of an arm's length price that would be charged between independent parties and the different steps in terms of functional analysis, namely identifying the functions, assets and risks, but that he would not hold himself out to be a transfer pricing expert.

35.5. Reference was made to the services agreement[15]. The witness confirmed that the services agreement excludes the costs of the SBAs from the charge that is being made to the parent company for the services undertaken by the Appellant. The witness testified that he was not an employee of the Appellant at the time the services agreement was drafted, but that he understands that the services

[13] Booklet of Documents, page 135
[14] Booklet of Documents, Tab 99 and Tab 100
[15] Booklet of Documents, Tab 17 and Tab 18

agreement is drafted in this manner, as the Appellant does not consider the SBAs to be a cost incurred by the Appellant. Rather, it is seen as an accounting entry, a notional expense, a cost not incurred and therefore, it should not form part of the cost base to determine the intercompany price that should be charged to the parent company. The witness confirmed that there is no charge from the parent company to the Appellant in respect of SBAs.

35.6. Reference was made to the employee agreements[16] which the witness stated he selected random samples of for the purposes of this appeal. The witness stated that when he was offered employment with the Appellant he would have been issued with an offer letter of employment and a letter recommending him for the SBAs.[17] The witness confirmed that the [redacted] plan[18] would have governed his award of the SBAs and that the SBAs were awarded by the parent company not the Appellant. The witness testified that employees would have been aware of that separation, such that it is the parent company that is listed on the stock exchange and makes an award of the SBAs to employees.

35.7. The witness stated that all employees have a base pay within the benchmark range of salary for their particular role, in addition to other benefits which may include a phone allowance, medical insurance, dental insurance and access to a pension plan.

35.8. The witness testified that depending on performance, employees may be entitled to a refresh award of the SBAs, which would be additional SBAs. The difference from the initial grant is that the SBAs awarded on a refresh basis do not have a one year vesting period, such that they will start vesting from the month after an employee receives the award of the SBAs.

35.9. The witness stated that it is the [redacted] that is responsible for determining an award of the SBAs and any refresh award, based on for example a performance review from the reporting lines, but that there is no one in the Appellant making decisions in relation to the award of SBAs either initially or by way of a refresh award. The witness said that if you move to another subsidiary of the parent company, the SBAs are portable and that they are only lost if you cease employment. The witness confirmed that he has no employment agreement with the parent company and that his employment agreement was

[16] Booklet of Documents, Tab 31 and Tab 34
[17] Booklet of Documents, Tab 30 and Tab 33
[18] Booklet of Documents, Tab 29

with the Appellant and now with the [redacted] subsidiary. In addition, he confirmed that his SBAs have been ported to his new role.

35.10. The witness gave evidence that he would consider the SBAs as part of his overall remuneration package, but is keenly aware that the Appellant is only responsible for paying his salary and other benefits and that the SBAs are coming directly from the parent company. The witness stated that he is aware that employees would treat the SBAs differently, such that some employees would treat the SBAs as additional bonus pay, using it as part of their regular monthly income, selling the SBAs every month to pay their bills, while others would let the SBAs build up and increase over time, until a lump sum of cash is required.

35.11. The witness testified that employees use an equity platform called the [redacted] platform, which employees receive shares into every month. The witness gave evidence that it is a brokerage platform that each employee in receipt of the SBAs has access to and can within that platform, accept a grant of the SBAs, in addition to having an overview of every grant of SBAs and the vesting periods. The witness said if an employee wants to sell the SBAs, the employee would do that through the platform by hitting "sell" on a particular date. This would then result in cash in the platform, which the employee can withdraw by a wire transfer to a bank account. The witness mentioned that when an employee receives the SBAs, the parent company sells half of the SBAs in Ireland to cover taxes, because it is deemed taxable income in Ireland. The witness said that results in the net amount of shares on the platform. The taxes are then pushed down to the Appellant, so that the Appellant, as part of monthly payroll, can remit that tax to the Respondent. The witness stated that any other taxes are a matter for each individual employee.

35.12. The witness testified as to his involvement with the [redacted] transfer pricing reports[19]. Reference was made to the financial statements[20] of the Appellant. The witness testified that the SBAs are recorded in some detail in the financial statements.[21] The witness testified that [redacted] assisted the Appellant in the preparation of the Appellant's financial accounts. The witness reiterated that the SBAs are a notional cost, as from the Appellant's perspective it would not have seen it as an

[19] Booklet of Documents, Tabs 19-22
[20] Booklet of Documents, Tabs 37-40
[21] Booklet of Documents, pages 1028 & 1034

incurred cost, it saw it as an accounting entry which goes into the financial statements.

35.13. The witness was cross examined on his evidence by Senior Counsel for the Respondent. The witness agreed with Counsel that the Appellant had to hire employees and that those employees have to be remunerated. The witness confirmed that he considered the SBAs to be part of his remuneration and that it was a significant portion of the overall remuneration of employees of the Appellant, but said that this would be as a result of the share price increasing over time. It was put to the witness that it was [redacted] of the overall remuneration cost. The witness was asked if an opportunity cost arises from the award of SBAs. The witness stated that he was not an expert in economics.

35.14. It was put to the witness that what has driven the decision to exclude SBAs from the tax base is simply the fact that Irish domestic tax legislation statutorily refuses any taxable deduction for the cost incurred in the SBAs. The witness stated that he did not think that the Appellant excludes the cost of SBAs simply because there is no deduction in Ireland for those costs. Reference was made to the [redacted] Plan.[22]Reference was also made the financial statements wherein it states "Going concern". The witness confirmed that the parent company is its source of income. The witness testified that if a business was in a loss making situation it could become an unsustainable business, but the witness said that the accounts of the Appellant have a positive cash balance and its equity position is positive.

35.15. It was put to the witness that the parent company effectively shores up its reserves in terms of the SBAs contribution, but looking at this from the perspective of a provider of a service to an unconnected party, they would have to charge an amount of consideration for that service commensurate to cover their cost and make some margin to exist. The witness stated that the Appellant's accounts show a loss due to the accounting entries made pursuant to FRS 102 and that the other side of the SBAs accounting entry is to equity, which ultimately leaves the Appellant in a net positive equity position, even though on its profit and loss account it shows a loss.

35.16. Reference was made to correspondence dated 13 April 2021 from the Respondent.[23]It was put to the witness that the term "statutory adjustment" is

[22] Booklet of Documents, Tab 29
[23] Booklet of Documents, Tab 51

misleading and that statutory adjustment means there is legislative basis for it. The witness stated that it refers to accounting standards, rather than statutory in terms of tax legislation.

35.17. It was put to the witness that the issue that is being raised by the Respondent is that when a comparison was done for transfer pricing purposes, the Appellant adjusted its own figures to take out the SBAs and the concern of the Respondent was that the Appellant might not be comparing like with like. The witness stated that on 4 May 2021,[24] the Respondent was advised that none of the comparable companies had SBAs, which was based on the financial data reflected in the [redacted]. The witness stated that with the benefit of hindsight it was incorrect, but that the statement was not incorrect, in that it was based on what was in the [redacted] and that database did not accurately reflect the stock-based compensation that was in the comparable companies. The witness stated that the [redacted] is a database that [redacted] use when performing a benchmarking exercise and where they obtain financial information which allows them to benchmark ranges that are included in the transfer pricing reports and it is prepared by a third party not [redacted]

36. [redacted] ("the Appellant's witness 2") gave evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given by the Appellant's witness 2:-[25]

36.1. The witness confirmed that her witness statement[26] contained in the documents is correct. The witness stated that she joined the [redacted] subsidiary [redacted], and is currently the [redacted], [redacted].

36.2. The witness stated that the parent company has more than doubled in size and this is in the context of a huge organisational wide change, [redacted]. The witness testified that the parent company takes quite a flexible approach to hiring and the intention is that it allows the best talent for the role to be sourced, regardless of where the person is based.

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[24] Booklet of Documents, Tab 52
[25] A full account of the witness's testimony can be found in the Transcript, Day 2
[26] Booklet of Documents, Tab 11

36.3. The witness gave evidence that she is based in [redacted], but holds other responsibilities across the region and multiple other regions. The witness said that it is not uncommon to have the same role hosted in external job portals in different locations. The witness said for example, when her role was advertised it was posted in both in Ireland and [redacted]

36.4. The witness testified that the primary focus for her and her team is managing the base pay programmes, such that she is responsible for benchmarking the market to determine the fair and competitive market rate in the [redacted] regions. The witness stated that the reason for that is every country has a different cost of labour, so the competitive rate of a software engineer, for example, in Ireland would look different from the competitive rate for a software engineer in [redacted]. Therefore, her team benchmarks for each labour market that it operates in.

36.5. The witness testified that in relation to SBAs, benchmarking is done separately, not by her team, but in the [redacted], as the SBAs programme has direct oversight by the [redacted] of the parent company. The witness stated that for example, the 2022 benchmarking process for the SBAs was carried out by an external third party, which considered for example; what other software or technology peer companies were doing and factors such as the burn rate, which measures the stock dilution. The witness reiterated that she has no role in benchmarking the SBAs and that her team benchmarks the base pay programme on its own. The witness testified that when her team benchmarks the base pay programme for each labour market, it is compared to what competitors within that market pay. The witness stated that it is an apple to apple comparison, such that base pay is compared to competitor's base pay, within each labour market.

36.6. The witness gave evidence in relation to the process for hiring a new employee. The witness stated that the Manager would work with a recruiter to determine if the offer should be based on a value that is lower or higher within the range for that role. The witness confirmed that her team determines an appropriate range of base pay for every role and it is put into a system called [redacted]. The witness stated that the business leader for the function would be part of the approval chain and the business leader for most of the functions are based in the [redacted]. The witness stated that is also where the [redacted] is for approval of the SBAs. The witness gave the example of her role, wherein she might be based in [redacted], but she does not report to [redacted] management, as there is no [redacted] management. The witness said that her Manager is based in the [redacted], as the reporting line is within each function.

36.7. The witness testified that another distinction between the SBAs and base pay is that SBAs offer employees the opportunity to benefit when share prices increase. So, for example, at one point the share price was [redacted] per share and over the last couple of years that share price has increased to as high as [redacted] per share. The witness said that what this means is that an employee, who is holding on to a number of shares, is able to benefit from the appreciation of the share price and that would be the upside of the SBAs. The witness testified that the second point is that the SBAs encourage a longer term view, because there is a vesting period for the SBAs. The witness said that when an employee is granted the SBAs the employee must remain in employment for a period of time, in order to get the full value of the grant. The witness confirmed that if an employee moves to a different country, SBAs do not change, but that the base pay would be reviewed as a new country represents a different labour market and different labour markets tax different pay levels.

36.8. The witness gave evidence that the parent company has awarded no SBAs to consultants. However, the witness said that she is aware of SBAs having been awarded to a consultant without an employment contract in another company, wherein the consultant was an independent contractor.

36.9. The witness testified that in relation to refresh awards, this occurs at the beginning of the year, when Managers are given a potential pool of SBAs and depending on an individual's performance and contribution for the year, the Manager could allocate a refresh award. The recommendation goes through different levels of management approval and at each level of management review and approval, the Manager could make any adjustment needed to balance out the overall allocation for the entire organisation against the budget they have, with the final approval being with the leadership team in the [redacted] The recommendation then goes to the [redacted] for final approval.

36.10. The witness was cross examined on her evidence by Senior Counsel for the Respondent. The witness confirmed that the Employment Agreement and the SBAs Agreement are issued nearly contemporaneously. The witness stated that every role has a stock range and that range will differ depending on the job level or role. The witness said that an individual's performance only impacts future grants of the SBAs.

36.11. The witness was asked how the [redacted] team would know the employees in the Appellant and the witness confirmed that every employee would have an employment contract and their records would be in the [redacted] system. The witness testified that the [redacted] system is used to feed data into the SBAs administration portal that administrators use for the SBAs programme. The witness stated that the parent company, as a global company, relies on technology to ensure that they are able to identify employees in different subsidiaries across the globe.

36.12. It was put to the witness that the SBAs form [redacted] of the overall remuneration package. The witness stated that she could not comment on that as it is not a metric that she would have, but that the cost of SBAs would fluctuate and it would fluctuate due to factors outside of the parent company's control. The witness stated that the value of the SBAs is heavily dependent on the stock price and the stock price is driven by market factors that the parent company cannot control. The witness agreed that in terms of the compensation package, which includes the SBAs, it is pitched at a level that is competitive to attract and retain employees.

36.13. The witness testified that each year guidance is released by the parent company on SBAs, as it is balancing competitiveness and ensuring that it is managing the burn rate and preserving shareholder value. The witness stated that this is part of the role of the [redacted] and why they have direct oversight over the administration of the SBAs.

37. [redacted] ("the Appellant's witness 3") gave evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given by the Appellant's witness 3:-[27]

37.1. The witness confirmed that [redacted]. The witness stated that she is an [redacted] and is responsible for the accounting books and the financial reporting for all [redacted]. The witness stated that previously, she held [redacted]. The witness confirmed that following appointment to her role [redacted] including the Appellant. The

[27] A full account of the witness's testimony can be found in the Transcript, Day 3

witness testified that the finance team is distributed globally. The witness confirmed that her witness statement[28] is correct.

37.2. The witness confirmed that whilst she is now responsible for the audited financial statements for the Appellant, she was not involved in the preparation of the financial statements for the relevant years. Reference was made to the financial statements[29] under the category of "Administration Expenses", which relates to the SBAs. The witness said that the SBAs are included in the Appellant's financial statements, because this is what is required by FRS 102. The witness stated that as this is a payment made by another group entity to employees, based on the individual contracts with those employees, it makes sense to categorise them as salaries.

37.3. The witness was cross examined on her evidence by Senior Counsel for the Respondent. The witness confirmed that she had no involvement in the preparation of the financial statements during the relevant years, but that the financial statements for the period that she is responsible for are prepared in the same manner. The witness said that the SBAs are included as this expense, because it is required to do that under FRS 102, regardless of who actually settles that cost.

37.4. Reference was made to the Financial Statements,[30] wherein it states "Going Concern". It was put to the witness that the Appellant would only be able to continue in its operational existence with the continuing support from its parent. The witness agreed and confirmed that the Appellant is a fully owned subsidiary of the parent company and the parent company is the Appellant's only customer. The witness stated that the "Going Concern" assessment is done not only against the support of the parent company, but also the condition of the market, the industry and the financial position of the reporting entity.

37.5. In re-examination, the witness was asked whether in the four countries mentioned that she has responsibility for namely, [redacted] were costs associated with the SBAs recorded in the accounts of the local entities. The witness stated that those countries do not record the SBAs as an expense because the financial standards in those jurisdictions do not require that the SBAs are included in the financial statements. The witness confirmed

[28] Booklet of Documents, Tab 10
[29] Booklet of Documents, Tab 37-40
[30] Booklet of Documents, Tab 37-40

that those countries do not include the SBAs in their costs for the services provided to the parent company and that they all show a profit in their accounts.

38. [redacted] ("the Appellant's expert witness 1") gave expert evidence on behalf of the Appellant. The Commissioner sets out hereunder a summary of the evidence given the Appellant's expert witness 1:-[31]

38.1. The witness confirmed in summary his qualifications and experience to date, namely that he has a [redacted] The witness confirmed he has prepared an Expert Witness Report for the purposes of this appeal.[32]

38.2. The witness testified that a centrally important step in any economic analysis of an intercompany transaction is to understand the nature of the underlying economic relationships that have been established between the two entities and then to consider the economic characteristics of the transaction between the two parties.

38.3. The witness gave evidence as to a hypothetical scenario he produced in ease of explanation, namely that there is an Irish company that incurs €100 of cost and a separate company in the US, which provides SBAs to the employees of the Irish company at a cost is €20. Therefore, the Irish company incurs a cost of €100 and the company in the US incurs a cost of €20 in relation to the SBAs. The

[31] A full account of the witness's testimony can be found in the Transcript, Day 3
[32] Booklet of Documents, Tab 13

objective of the employees is to create services that are then sold by the Irish company to the company in the US.

38.4. The witness stated that there is no way that the Irish company, at arm's length, assuming a mark-up of 10%, can generate €132 of income without incurring €120 of cost, because if the Irish company incurs a revenue of €132, but has to bear an expense only of €100, its profits would now be €32, which actually represents a mark-up of 32% on cost, which, under the terms of the example, is three times the arm's length return. The witness stated that connected to this excess profit that the Irish company is now earning, is the fact that the company in the US, that actually bore €20 of expense is receiving no compensation for having borne that expense, and so the company in the US suffers a loss.

38.5. The witness testified that in order to understand how this economic relationship would be priced at arm's length, it is important to recognise that there are two economic elements to this relationship. In the current scenario, the entity in the position of the Irish company, as well as the entity in the position of the US company are bearing the expenses associated with creating the services, but secondly, the resulting services are then being sold by the Irish company to the US company. The witness stated that the economic question that arises in this context is if these two parties were operating independently at arm's length, what would the terms of the conditions be under which these two economic transactions would occur.

38.6. The witness gave evidence that it is useful to separate the two elements of these transactions to understand the implications of each i.e. separate the way in which the services were financed from the sale of the resulting services to a customer. The witness referred to the first scenario where they jointly incur expenses in order to create services and the resulting services are sold to an unrelated third party, unconnected to either the company in the US or the Irish company. The witness then proceeded to illustrate this hypothetical as it applies to the within scenario on a flipchart. The contents of the flipchart are contained at **Appendix A** to this Determination.

38.7. The witness gave evidence that a transfer pricing analysis is typically referred to as a functional analysis. The exercise is to understand not only the functions played by the relevant parties in the intercompany transaction, but also the economic risks they bore as a result of their participation in that transaction and any assets they may have deployed to make that transaction happen. The witness stated that it is an analysis of the functions, assets and risks and from an economic perspective, economists are guided by Transfer Pricing Guidelines or regulations that any analysis they perform or answers they reach regarding the appropriate arm's length terms in a transaction must reflect their economic assessment of functions, risks and, where relevant, assets of the parties engaged in the transaction.

38.8. The witness testified that from an economic perspective the pertinent question when considering who is incurring an expense is to ask, who is bearing the risk associated with that expense being incurred. The witness said that as an example, in the transaction between the parent company and the Appellant herein, the witness infers as a matter of economic reasoning that it is the shareholders of the parent company that are bearing the economic risks associated with having issued the SBAs, because by issuing the SBAs those shareholders have diluted their own fractional ownership in the firm in the expectation that the employees of the Appellant, incentivised by these SBAs, will produce a level of performance, services and output that would add more to the value of the parent company than the dilution, in the slice in the pie. The witness testified that it is the parent company that is at risk for the expense associated with the SBAs and, therefore, it is the parent company that is entitled to earn a profit mark-up for having incurred that risk.

38.9. The witness gave evidence that it is his understanding that the SBAs were issued to and served the purpose of incentivising the employees of the Appellant and in that sense there is a connection between the issuance of the SBAs and the services rendered under the services arrangement. The witness testified that in addition, he understood that the employees of the Appellant were not entitled by virtue of their employment to receive the SBAs, they were qualified to receive the SBAs if the parent company determined that doing so would incentivise the employees and the parent company then evaluated those who received the SBAs to see if they turned out to be a good investment when making further decisions down the road.

38.10. The witness gave evidence that in his experience, companies, and in particular technology companies, often issue stock options or restricted stock in their company's shares to non-employees who also contribute effort to the firm, such as consultants for example. The witness stated that this is not uncommon among technology companies. The witness stated that there is no upfront cost to the issuing of the SBAs and the nature of such compensation arrangements, especially for early stage technology companies who rely not just on their own employees, but also on third party consultants, are such that companies issue these kinds of shares to consultants precisely to induce, an effort that is aligned with the company's own goals. The underlying economic principle is the same.

38.11. The witness was cross examined on his evidence by Senior Counsel for the Respondent. It was put to the witness that a firm will normally only want to supply goods or services when it is profitable to do so. The witness agreed, but stated that with the caveat that if it is sufficiently profitable over the course of time that it adds positive value to the business, such that profits in the future more than offset losses in the near term, the businesses will still undertake it. It was put to the witness that no award of SBAs has been made to consultants of the parent company. The witness stated that the underlying economic principle is the same. The witness testified that it is in the demonstrated interest of companies if they have stock to issue, to be able to incentivise labour contributions from those who are not their employees, by giving them an incentive to align their interests with those of the company. The witness stated as an economic matter, the witness does not see why such an incentive system would not be market practice that you would observe.

38.12. It was put to the witness that the hypothetical example does not have any bearing upon what happened herein. The witness disagreed and stated that based on the instructions that he was given and the facts he has seen in this case, it is his understanding that the parent company issued SBAs of its own stock to provide incentives and compensation for the service workers of the Appellant and that the intention behind that was to incentivise them to provide services.

38.13. It was put to the witness that if the parent company did not provide the SBAs to the Appellant then the Appellant, in order to be in a position to provide the services has to make up the difference. The witness agreed but only to the extent the employees find the SBAs to be valuable. It was put to the witness that in terms of the risk for both parties, the Appellant, having their employees, held a risk that they would have to continue and provide for those employees if the parent company did not provide the SBAs. The witness stated that if the parent company were to terminate this arrangement, the economics of the Appellant would change. The Appellant would now have to find other means to incentivise their work force. The witness stated that now they would be incurring the entire cost of that work force themselves and they in turn could sell their services to other customers and charge a market price for it. The witness stated that in the examples of €132, by having borne the entire expense, the Appellant would then get to deduct that entire expense from the €132, as a result of which once again they would be earning an arm’s length return of €12.

38.14. The witness agreed that the consideration paid by a customer who has no involvement in the transaction other than purchasing services would pay €132, such that if your total input costs are €120, the margin is going to be €12, consideration is going to be €132 and the profit that would be achieved in the company providing the service, on the basis that it has its costs of €120, will be €12. The witness stated that a company that incurs a cost of €120 would indeed expect revenue of €132 and, therefore, a profit of €12.

38.15. The witness was asked if there is a way in which the Irish company, at arm's length, assuming a 10% mark-up, can generate €132 of income without incurring €120 of cost. The witness stated no, because if the Irish company incurs a revenue of €132, but has to bear an expense only of €100, its profits would now be €32 which actually presents a mark-up of 32% on cost, which, under the terms of the example, is three times the arm's length return and concomitant with this excess profit that the Irish entity is now earning, is the fact that the other entity that actually bore €20 of expense, is receiving no compensation for having borne that expense and so the other entity suffers a loss.

38.16. Reference was made to the Appellant’s loss making situation and it was put to the witness that it would pose difficulties for the company, for instance, in terms of making a dividend or raising finance. The witness said not necessarily given the nature of the losses. The witness testified that it was his understanding that the reason the company was reporting a statutory loss is that for statutory accounting purposes, it was reflecting a cost for which it had not received a compensating revenue and thus, for statutory financial purposes it was indeed incurring a loss.

38.17. The witness was asked if it is correct to say that economists operate on the assumption that the objective of business is to maximise their profits. The witness stated that he would say that, in more general terms, the objective of a business is to maximise its value, which reflects its profit, not just in the present year, but the stream of profits it expects to make over time.

39. [redacted] ("the Appellant's expert witness 2") gave expert evidence on behalf of the Respondent. The Commissioner sets out hereunder a summary of the evidence given by the Appellant's expert witness 2:-[33]

39.1. The witness testified that he is a [redacted].

39.2. The witness gave evidence that the OECD Guidelines are used by many different jurisdictions to set the overarching framework for the transfer pricing rules in domestic legislation. [redacted]

39.3. The witness made reference to his expert report[34] prepared for the purposes of appeal herein and confirmed that he will only deal with the contents of his report from paragraph 69[35] onwards, in order to avoid repetition with the Appellant's expert witness 1.

39.4. The witness explained both comparability analysis and comparability adjustments. The witness stated that a comparability analysis is a framework set down by the OECD Guidelines which is a nine-step process that allows taxpayers to demonstrate their compliance with the arm's length principle and it is what practitioners use also, in terms of analysing the transfer pricing arrangements of

[33] A full account of the witness's testimony can be found in the Transcript, Day 4
[34] Booklet of Documents, Tab 14
[35] Booklet of Documents, page 236

a group. The witness gave evidence that his report is focussed on the transfer pricing study done by [redacted] and, in particular, the application of the TNMM, which is one of the agreed transfer pricing methods. There are five methods. The witness said that he understood that what is not in dispute is the TNMM and the range of 5% to 15%, but what is in dispute is the correct cost base to which the mark up of 5% to 15% is applied to.

39.5. The witness testified that the comparability analysis or benchmarking study carried out by [redacted] identifies independent companies providing similar services to that of the Appellant. The witness stated that he agreed that the analysis shows that a mark-up of between 5 and 15% is generally reasonable and he said that would be consistent with his own experience, having undertaken many similar benchmarking studies and in addition, public sources of information around the levels of mark-ups, such as those produced by the EU Commission.

39.6. The witness gave evidence that in terms of the fundamental question as to what is the arm's length return for the Appellant, his view is that the benchmarking study does not assist in answering that question. The witness stated that the way in which the analysis works is that the profits of those independent comparable companies is identified and it is expressed as a mark-up on their total costs. That is how the 5% to 15% is derived. The witness stated that it only helps to identify what is the relevant mark-up to apply to the cost base.

39.7. The witness testified that taking the examples, if the total cost of providing the services are €120 and that the arm's length mark-up is 10%, that 10% applied to the €120 leads to a total return of €132, that has been discussed, but for the Appellant, it has costs incurred of €100 and this goes to the issue in dispute, as to what is the correct cost base that the Appellant should be assessed on, whether it is €120 or whether it is €100.

39.8. The witness stated that the costs incurred by the Appellant are €100 and a mark-up of 10% is applied to that. The witness said that the distinction with the independent comparable companies that have been identified is that they are either companies that do not have SBAs within their compensation base or where they are companies that have SBAs within their compensation base, that the financial results are those of the top company. So for the comparable companies the total costs, is the costs incurred. Whereas for the Appellant there is a distinction, the costs incurred are the €100. The witness stated that the purpose of the TNMM is to identify an arm's length profit.

39.9. The witness testified that the Respondent has calculated this such that, the Appellant in effect bears the €20. The total cost to the Appellant was €120 and therefore, the Appellant should earn a mark-up of 10% on the €120, being a consideration of €132. The witness stated that his view of the arrangements, as they are structured, is that the total costs of the services are €120, but that the Appellant bears €100 of the costs related of those services, the parent company bears €20 of the costs relating to those services and therefore, it would be appropriate for Ireland to earn a reward on the €100 of costs that it incurs and that is in effect what the Appellant did in its tax return. The witness stated that the comparability analysis does not assist in answering the question as to whether it should be €100 or €120.

39.10. The witness was cross examined by Senior Counsel for the Respondent. The witness stated that he understands that it has been accepted for the purposes of this appeal that there is a cost to the SBAs, but that the cost is incurred by the parent company. The witness stated that he has addressed if there is a cost to the SBAs in his report and reference was made to paragraph 73[36] of the witness's expert report.

39.11. It was put to the witness that it costs the Appellant €120 to remunerate its employees. The witness stated that he disagreed, because it costs the group €120 to remunerate those employees, €100 paid by the Appellant and €20 paid by the parent company. The witness was asked what are the costs of the Appellant providing the services as it does in Ireland and the witness stated €100. On further questioning the witness stated that it was his view, that the costs associated with providing the services are €120, €100 borne by the €20 borne by the parent company.

39.12. The witness testified that in effect, the way the Respondent's assessment operates is that ultimately the Appellant is paying tax on €12 of profit, plus the €20 of costs borne by the parent company related to the SBAs, which in his view is a non-arm's length outcome, for the Appellant to pay tax on the €32.

[36] Booklet of Documents, pages 237 and 238

Appellant's Submissions

40. Senior Counsel made submissions on behalf of the Appellant. A summary of the submissions made is set out hereunder by the Commissioner:-[37]

    40.1. The Appellant filed a 'full and true return' for the FY15 and the four year time limit for which section 959AA TCA 1997 provides, applies. The Appellant completed the CT1 form which the Respondent prescribed on a full and true basis, in accordance with laws and guidance in existence during the relevant years and following the advice received by a leading transfer pricing expert, [redacted] The Appellant furnished transfer pricing reports relating to the Appeal Period when requested in accordance with section 835F TCA 1997.

    40.2. Reference was made to the Judgments in *Revenue Commissioners v Hans Droog* [2016] IESC 55 ("*Hans Droog*"), *Hanrahan v. Revenue Commissioners* [2022] IEHC 43 ("*Hanrahan*"), *Stanley v The Revenue Commissioners* [2017] IECA 279 ("*Stanley*") and *McNamara v Revenue Commissioners* [2023] IEHC 15 ("*McNamara*").

    40.3. The parent company did not charge the Appellant for the provision of the SBAs and had no contractual entitlement to do so. Exhibit A[38] to the services agreement specifically excluded any SBAs accounting expense from the costs used in the calculation of the charges made by the Appellant to the parent company for the services and no expense was incurred by the Appellant with respect to any SBAs awarded by the parent company. As a result, the Appellant did not include the value of the SBAs awarded by the parent company to the Appellant's employees in its costs for purposes of calculating the fee under the services agreement for the relevant years.

    40.4. The Appellant's financial statements relating to the relevant years did include a line item for expenses relating to the SBAs which were awarded by the parent company to the employees of the Appellant. This was a requirement of FRS 102, in accordance with which the amount which is recorded in the Appellant's accounts is the "fair value" of the awards. In correspondence dated 14 March 2023 and 20 March 2023,[39] the Appellant and the Respondent agreed that the SBAs were calculated and recorded in compliance with FRS 102. On this basis,

[37] A full account of the Appellant's submissions can be found in the Transcript, Day 5
[38] Booklet of Documents, Tabs 17 & 18
[39] Booklet of Documents, Tabs 74 & 75

both parties agree that the costs of the SBAs recognised in the Appellant's financial statements represented the fair value of the SBAs (calculated on the grant date) and recognised over the period during which the awards vest.

40.5. The adjustment for which section 835C (2) TCA 1997 provides, is an adjustment of profit, not consideration (income). The Appellant submits that where section 835C(2)(b) TCA 1997 applies, what is required is an adjustment of profits so as to ensure that the Appellant earns the same profits as a comparable arm’s length supplier would have earned if it had priced the services on a correct arm’s length basis.

40.6. To make an adjustment in the manner suggested by the Respondent, by the full amount of the additional consideration which it is said would derive from the cost of issuing the SBAs, but to provide no allowance for the hypothetical cost itself is to produce a result that it is entirely at odds with the purpose of the OECD Guidelines and the express statutory requirement that the Irish legislative scheme should be construed in a manner consistent with those principles.

40.7. The raison d’etre of transfer pricing is to ensure the appropriate allocation of profits amongst jurisdictions within the same group of companies. The relevant question for transfer pricing purposes is whether the SBAs issued by the parent company created an economic cost for the Appellant. The Appellant submits that for the purposes of this appeal, the SBAs created an economic cost for the parent company, but that cost was not charged to and did not burden the supplies made by the Appellant. The accounting treatment adopted by the Appellant pursuant to FRS 102 does not alter the position.

40.8. The relevant question is whether the costs which were incurred by the parent company ought properly to form part of the cost of the services which the Appellant supplied back to the parent company. At a very simple level, it can be readily demonstrated that the costs in question did not impact the cost of the services supplied by the Appellant, since the Appellant paid nothing to the parent company for the SBAs which were issued.

40.9. More fundamentally, the parent company alone agreed with the employees that it would issue the SBAs in the circumstances defined by the scheme and the parent company was thereafter contractually obliged to do so with no recourse to the Appellant. However, it is submitted that not only is this what the contracts provide, but it also reflects the reality that the Appellant is not liable to pay any sums referable to the SBAs, because those costs are not costs in the true sense.

40.10. The parent company needs to be able to attract and retain key talent and it is in the parent company's interests that it can do so effectively. In order to do so the parent company makes the SBAs available to individuals who work for it or for its subsidiaries. The award of the SBAs to staff is not correlated to the performance of the Appellant nor to the services which the Appellant provides to the parent company, but is linked to the performance of the individuals themselves. Therefore, that the cost which the parent company incurs is a cost specific to that business in the conduct of its activities and is not a cost that burdens the services which the Appellant undertakes to provide.

40.11. The OECD Guidelines require that in applying the TNMM with a cost-based profit level indicator, only the costs that were actually incurred by the Appellant should be considered to form part of its cost base to be marked up. In applying this rationale and to ensure the correct cost base was considered for transfer pricing benchmarking purposes, [redacted] in the transfer pricing reports removed the expense pertaining to the SBAs that appears in the Appellant's financial statements in accordance with FRS 102. Both the Appellant's expert witnesses 1 and 2 confirmed that this was appropriate from an economic perspective[40] and the Appellant's expert witness 2 has confirmed that the approach taken by [redacted] was appropriate from a transfer pricing perspective.[41]

40.12. The Appellant's expert witness 2 points out in his Expert Report that "*the issue of the comparability adjustments does not answer the fundamental question of whether SBAs should be included in the cost base to which a mark-up is applied.*[42]*"* The comparability analysis is directed towards identifying the appropriate level of mark-up to be applied to particular costs but tells us nothing as to the costs which are to be included in that calculation.

40.13. The economic sensitivity analysis performed by [redacted] and reviewed by the Appellant's expert witness 2, demonstrates that even if the comparability adjustments identified by the Respondent had been taken into account, the Appellant's mark up on costs would have remained within the interquartile range of arm's length result, thus further demonstrating that the Respondent's adjustment was neither warranted nor required. As noted by the Appellant's expert witness 2 "*as the parties are agreed on the arm's length nature of the mark-up of* [redacted] *in 2015 and 10%, any potential comparability adjustments to the*

[40] Booklet of Documents, Tabs 13 & 14
[41] Booklet of Documents, Tab 14, pages 241-242
[42] Booklet of Documents, Tab 14, page 237

comparable service providers are not matters to displace what is an agreed position of the parties as to the arm's length nature of the mark-up of [redacted] *and 10%*".Therefore, while the Appellant's comparability adjustments were reasonable, they are essentially moot in any event.

40.14. As the Appellant has not incurred the cost of issuing the SBAs it has no deductibility under section 81 TCA 1997. The Respondent has expressed the view in correspondence that "*the deductibility of the [SBA] expenses under section 81(2)(n) TCA 1997 (which the Appellant did not in any event claim) is outside the scope of the Appeal*". This submission misses the point. The Appellant is not seeking a corporation tax deduction for an expense that it did not incur, but is simply arguing for the proper application of transfer pricing principles and adjustments. If section 81(2)(n) TCA 1997 is relevant for any purpose, it is to confirm that had the Appellant incurred such expenses then such expenses would have been deductible i.e. there is no statutory prohibition against deducting such costs. This is potentially significant as the statutory prohibition against the deductibility of the expenses incurred by a taxpayer is considered in *Kontera Technologies -v- Tax Assessor Office Tel Aviv* 3 [CA 943/16] (*"Kontera*").[43]

40.15. The decision of the Supreme Court of Israel in *Kontera* was decided on the basis of the domestic legislation in force in Israel and by reference to the specific facts of the case. It is not clear from the Judgment precisely what services were being provided over and above the fact that they were research and development, but it is evident from the decision that the interquartile range of arm's length charges was 4.5% to 15.3% and that Kontera was charging a mark-up of 7.5%. Ultimately, the Court held that the costs of issuing the shares (under a scheme document which we do not have) should have been included in Kontera's cost base. However, the Court noted at paragraph 64 that:

> "*No one disputes over the idea that the cost of the allocation of options to the employees as part of a cost plus deal is an expense in the production of income as defined in clause 17 of the Order. Therefore, generally speaking it would be deductible*."[44]

40.16. However, as set out at paragraphs 59-65 of the Judgment, there existed jurisdiction specific rules in accordance with which employee share option schemes of the type considered in that case were to be administered. It was on

[43] Booklet of Authorities, Tab 46
[44] Booklet of Authorities, Tab 46, page 1321

account of a specific prohibition that the right to deduction was refused and in order to emphasise the point, the Court stated at paragraph 65 that:

> "*It is to be emphasized, if the taxpayers would have chosen allocating through the Labour income plan [i.e. a different statutory scheme] no one denies that they would have been permitted to deduct the included cost from their taxable income….*"[45]

40.17. The Respondent's assessment is such, that the Appellant in effect bears the €20 of the SBAs cost, so that the total cost to the Appellant was €120 and therefore, the Appellant should earn a mark-up of 10% on the €120, being a consideration of €132. The Appellant is deemed to have incurred an actual economic cost arising from the SBAs and the service fee of the Appellant should be increased to provide a cost-plus markup on the SBAs expense as well, but its costs should not be adjusted for the SBAs expense, so that the Appellant's operating profit increases by the full revenue associated with the SBAs expense. This is wholly illogical and no transfer pricing concept, principle or rule has yet been cited to support this proposition

40.18. The fundamental question with which the Appeal Commissioner and the OECD transfer pricing rules are concerned, is what is the appropriate amount of profit on which the Appellant should be taxed arising out of these transactions.

40.19. Whilst section 835C TCA 1997 refers to the "consideration payable" or "consideration receivable", it too requires the calculation of the arm's-length "profit" which would be chargeable to tax and section 835D TCA 1997 confirms that for the purpose of computing those profits there must be consistency, so far as possible, with the OECD Guidelines.

40.20. It is wholly contrary to the arm's length principle to expect, in an arm's length situation, the parent company to bear the cost of issuing the SBAs and then to pay the Appellant the same amount for issuing those SBAs plus a mark-up on that cost.

40.21. Reference was made to the decision in *Cameco Corporation -v- The Queen* [2018] TCC 195.[46] The OECD standard requires that the taxpayer is obliged to show that it has at all times acted reasonably in conducting its transfer pricing.

[45] Booklet of Authorities, Tab 46, page 1321
[46] Booklet of Authorities, Tab 45

40.22. Even if one assumes that the Respondent is correct in arguing that there is a cost in issuing the SBAs, correct in arguing that this cost is a cost of providing the service, correct in arguing that there should be an adjustment made and correct in arguing that it is appropriate to allocate a mark-up to this cost, the adjustment which follows must be an adjustment to reflect the additional profit, as opposed to consideration, which an arm's length third party would have realised from this transaction.

40.23. The Respondent's own guidance on transfer pricing[47] confirms that transfer pricing rules are in place to ensure that an appropriate amount of taxable profits are earned on transactions between associated enterprises and which states that:

> "*Transfer pricing legislation concerns transactions between associated persons and ensures that taxable profits or gains cannot be understated, or allowable losses overstated, because the prices charged in or the conditions of such transactions are not at arm's length.*"

Respondent's Evidence

41. [redacted] ("the Respondent's expert witness 1") gave expert evidence on behalf of the Respondent. The Commissioner sets out hereunder a summary of the evidence given by the Respondent's expert witness 1[48]:-

41.1. The witness confirmed that he studied [redacted] The witness made reference to his Expert Report prepared for the purposes of this appeal.[49]

[47] Booklet of Authorities, Tab 23, Tax and Duty Manual Part 35A-01-01, page 6
[48] A full account of the witness's testimony can be found in the Transcript, Day 4
[49] Booklet of Documents, Tab 16

41.2. The witness stated that he understood it is agreed that FRS 102 was correctly applied by the Appellant. Reference was made to paragraph 3.2 of the witness's expert report[50] and Counsel for the Respondent asked the witness to elaborate on why accounting standards require that SBAs be debited to the profit and loss account of the Appellant, even where there is no actual cash outlay to the party issuing the shares.

41.3. The witness stated that the rationale for the standard FRS 102, which is based on the International Financial Reporting Standard which was developed by very eminent accounting technicians, began back in the 1990s when in Silicon Valley a number of US "hi-tech" and IT companies started to offer their employees share-based payments, because they could not attract employees if they did not offer a really good package deal which included, benefits in kind, pension costs, as well as wages and salaries. The witness testified that if these firms did not offer those share-based payments, they would not be in a position to recruit employees. The witness gave evidence that the companies were generally start-up companies, not charging what would be a true and fair expense through their profit and loss account. The witness testified that if you were to compare that company with a company that actually does pay its wages and salaries in full and does not offer share-based payment, the two were not comparable. Therefore, the accounts could not show a true and fair view.

41.4. The witness stated that the problem that accountants face is that they must reflect the economic reality or the commercial reality of what is occurring and that often means that that means accountants conflict with the legal form.

41.5. The witness stated that the standard setters came out with a very firm conclusion that accountants needed to charge through the real cost of employing staff in those companies and that was done by insisting that all companies which offer those share-based payments, must put a charge through their profit and loss account and show also an extra amount in their reserves, what is called an equity reserve, to reflect the fact that they also have extra capital in their accounts as well. The witness stated that here, it is an incurred cost, but not an immediate cash cost. The witness stated that it will involve cash costs in the future, but it is an incurred cost at present, which had to be incurred to attract staff.

[50] Booklet of Documents, page 289

42. [redacted] ("the Respondent's expert witness 2") gave expert evidence on behalf of the Respondent. The Commissioner sets out hereunder a summary of the evidence given by the Respondent's expert witness 2:-[51]

42.1. The witness stated that he has been a [redacted]

[redacted] [redacted]. The witness made reference to his CV[52] at Appendix B to his report.

42.3. The witness made reference to the three questions that the Respondent had asked him to address[53] and the witness's conclusions to those questions are set out also in his exert report[54]. The witness stated that he was aware that since he wrote his report events have moved somewhat. The witness testified that the bottom line is that his view as an economist is that the answer in the numerical hypothetical scenario that has been used throughout is €132, €120 and €12.

42.4. The witness testified that he agreed with 99% of the testimony of the Appellant's expert witness 1. The witness stated that as an Economist, the way Economists think about costs is what causes or generates those costs. The witness said that it is the Appellant's activity in Ireland and the services agreement in Ireland that causes all of the cost of €120. The witness stated that when thinking about the

[51] A full account of the witness's evidence can be found in the Transcript, Day 4
[52] Booklet of Documents, Tab 15, page 277
[53] Booklet of Documents, Tab 15, pages 267, 271 & 275
[54] Booklet of Documents, Tab 15, page 275

services in Ireland, the totality of the costs, revenue, risks and profit are €132, €120 and €12 and are caused by that agreement.

42.5. The witness said why the costs that are caused by this activity would not simply fall where they are generated and for most Economists, the starting point is they would fall where they are generated. The witness said that is the efficient way to measure and think about costs and make decisions on the basis of those costs.

42.6. The witness gave evidence that there could be all the analysis in the world to demonstrate that the arm's length price of an apple is €25, but if the local supermarket sells it for €1 that is the arm's length price of an apple, because that is the readily available market price. The witness stated that he agreed with the testimony of the Appellant's expert witness 1, wherein he stated in response to the question; what did he think the parent company would have to pay if it did not work with the Appellant, but engaged a different provider, that the costs would be €120 for the Appellant, the parent company would have to pay €132 and the profit would be €12. The witness stated that whichever way it is looked at the market price is €132, the cost of the service is €120 and there is a profit of €12.

42.7. The witness stated that however, in his opinion, there are two wrinkles. The witness said that the first being that the parent company provided the SBAs to the employees of the Appellant and it did not charge for them. Then there is a services agreement, which the witness said he believed, at arm's length, would not happen, such that the parent company would not provide the SBAs to an independent company. The witness said that there are alternative options that replicates much of the effects of the SBAs if the Appellant was not receiving the SBAs from the parent company, such as wages, salary, and bonus.

42.8. The witness said the second wrinkle is that if the SBAs did happen in the actual transaction, and we must assume it is an arm's length transaction, then what occurs is one of the scenarios that the Appellant's expert witness 1 set out, that the parent company would provide the SBAs and would charge €20 for that, because that is the cost of the SBAs. The Appellant would pay the €20 and the €20 would then go into the cost base, because it is the cost of doing business for the services agreement and we would still be at €132, €120 and €12. The witness stated that he does not think that this is necessarily an economics issue, as it is always €132, €120 and €12.

42.9. The witness testified that the lesson to draw from the comparability exercise, is that none of these companies receive SBAs from a third party. Now these companies were selected because they were felt to be good comparators. The witness said that this is his first wrinkle, such that at arm's length the parent company would not provide SBAs to an independent company. The witness testified that the comparators are not helpful, as the Appellant only has a partial cost and the amount of cost excluded is very different to the amount of cost that is excluded from the Appellant, so it is not comparable.

42.10. The witness testified that at arm's length he would not expect an independent company to continue to sustain losses, such that if a company incurs costs of €120, but is being paid less than €132, the arm's length price, then the company would do business elsewhere.

42.11. The witness was cross examined on his evidence by Senior Counsel for the Appellant. The witness was asked to clarify the documentation[55] he considered in the course of preparing his report, in particular he was asked whether he had sight of correspondence that issued from the Appellant's advisors[56]to the Respondent on 3 February 2023, in circumstances where his expert report is dated 19 April 2023.[57] The witness stated that he was quite sure that he was not provided with that correspondence, prior to completing his report. The witness considered the correspondence at the hearing of the appeal.

42.12. The witness confirmed that the appropriate costs that have to be analysed are €120, the appropriate income to be analysed is €132, and with the result that the appropriate profit is €12. The witness was asked about his evidence that "economists think about what causes or generates costs" and where in the OECD guidelines it states that is a relevant consideration. The witness confirmed that it is not in the OECD guidelines.

42.13. The witness testified that he saw an additional risk for the Appellant, namely that the SBAs are not guaranteed. That means that at arm's length the Appellant is trying to run a business where a significant portion of its costs are at the discretion of somebody else. The witness said that this is a risky position to be in and why he thinks that at arm's length, the Appellant would provide its own equivalent to the SBAs.

42.14. It was put to the witness that his complete risk analysis is (a) the parent company bears the risk, (b) the risk for the Appellant is if the parent company stops bearing

[55] Booklet of Documents, Tab 14, page 276
[56] Booklet of Documents, Tab 69
[57] Booklet of Documents, Tab 15

the risk, so that analysis presupposes that the parent company bears the risk and the risk to the Appellant is that the parent company will stop doing so. The witness agreed that if the Appellant does not take on that risk, the risk lies with the parent company.

42.15. The witness stated that he has not seen the provision of SBAs to the employees of other companies in payment, but that when he did come across it, it tended to have two characteristics, namely a consultant, for example a retiring director, who goes through a transition period or a contractor or consultant that is providing very, very high value advice. The witness testified that routinely, he has never come across the provisions of SBAs to the employees of a separate company.

42.16. Reference was made to Appendix 8 of the expert report of the Respondent's expert witness 1[58] wherein, the expert witness refers to a document entitled "Extracts from KPMG Share based Payments IFRS 2 Handbook (November 2018)". Reference was made to the chapter in the Handbook that is dedicated to SBAs being given to non-employees. It was put to the witness that it is such a common practice as to require the publication of accounting standards on the matter and the dedication of a full chapter in the KPMG Handbook on SBAs with non employees[59].

42.17. Reference was made to the movement of the Appellant's share price and the graphs illustrating same in the documents entitled [redacted].[60] It was put to the witness that extraordinary growth in the share price would result in a high percentage of the SBAs as remuneration when one compares the value of the SBAs to the salary being paid.

42.18. The witness agreed that the issue between the parties is the costs to which the 5% to 15% range is applied. The witness agreed that the comparability analysis cannot assist in deciding who is right about whether it is €100 or €120.

42.19. The witness stated that he understood that the accounting loss arises from the fact that the SBAs are treated as an expense in the accounts and that there is no recharge agreement in respect of the SBAs, such that while there is an accounting expense there is a realised profit. The witness confirmed that if all ties were broken then the Appellant would have a revenue of €132, a cost of €120

[58] Booklet of Documents, Tab 16
[59] KPMG Share based Payments IFRS 2 Handbook, Chapter 11- Share-based payment transactions with non-employees
[60] Booklet of Documents, Tabs 77, 78 & 79

and a profit of €12. So, it would incur a cost of €20 and that cost would inform and feed into its revenue potential, because whilst the accounting expense is €120, the actual expense is €100 and the income is €110. So in cash terms, it is profitable. The witness stated that from an accounting perspective, it has costs of €120 and income of €110; but in the real world it has costs of €100 and income of €110.

42.20. The witness stated that using those numbers, the accounting expenses of this hypothetical entity are €120, but the incurred expenses in the Appellant's case is €100, because €20 is just an accounting entry that looks like it is an expense but it is not actually paid to anyone. The Appellant's realised profits in that example are €10 even though it is showing an accounting loss, because the income is €110 and the expenses are €120.

42.21. The witness testified that at the moment in the actual transaction neither the revenue nor the cost line of the Appellant is the arm's length figure and the answer is to adjust both, with the result that there's an overall net increase of €2 in the hypothetical scenario.

43. [redacted] ("the Respondent's witness") gave evidence on behalf of the Respondent. The Commissioner sets out hereunder a summary of the evidence given by the Respondent's witness:-[61]

43.1. The witness confirmed that he has been a [redacted] The witness confirmed that he was familiar with the Appellant and was involved with the Appellant when it was selected for audit, up to when the Notices of Amended Assessment issued.

43.2. The witness testified that the Respondent issued an audit notification letter[62] on 18 December 2020, but prior to that, it would have completed a transfer pricing risk appraisal. The witness stated he was involved in part of the final sign off for the audit. The witness made reference to an audit meeting with the Appellant that he did not attend and documentation being furnished by the Appellant following that meeting. The witness said that for the FY15, the initial amended assessment

[61] A full account of the witness's testimony can be found in the Transcript, Day 4
[62] Booklet of Documents, Tab 50

that was raised on 1 December 2021, was updated on 17 December 2021, due to an administrative error[63] on the Respondent's part.

43.3. The witness stated that in relation to the FY15 and the four year time limit for raising the assessment, he was not satisfied with the sufficiency of the return[64] having regard to any information received, such as the tax return, the financial statements, the [redacted] transfer pricing reports and all correspondences received during the audit. The witness testified that he also considered that he had reasonable grounds for believing that the return delivered by Appellant did not contain a full and true disclosure of all material facts necessary for the making of assessment for the chargeable period.[65]

43.4. The witness testified that the basis for his view was the Corporation Tax Computation prepared by [redacted][66] for the relevant years. The witness stated that the findings of the Respondent are set out in the Respondent's correspondence to the Appellant dated 30 September of 2021.[67]

43.5. The witness testified that he was not satisfied that it was appropriate to disregard the SBAs from the calculation of the cost base to which a mark-up was applied. The witness stated that a key aspect of this is that the transfer pricing document prepared by [redacted] did not support the arm's length nature of the consideration receivable in the period, because it compared a mark-up on the costs of the Appellant that excluded SBAs and compared this to third parties that had employee remuneration included within the results, so it was not a like for like comparison. The witness gave evidence that based on this comparison, it showed that the actual consideration receivable by the Appellant was not arm's length consideration in the period. The witness said that he did the calculation to work out the arm's length consideration receivable and that he identified that there were Schedule D Case I adjustments required under section 835C (2)(b) TCA 1997 for the relevant years.

43.6. The witness gave evidence that for the FY15, adding together the total costs of [redacted], plus the arm's length mark-up of [redacted], which is [redacted], he got a figure of [redacted]. The witness testified that is what the Respondent considers is the arm's length consideration receivable. The witness testified that

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[63] Booklet of Documents, Tab 68
[64] Transcript Day 4, page 139
[65] Transcript Day 4, page 140
[66] Booklet of Documents, Tabs 58-62
[67] Booklet of Documents, Tab 55

the actual financial statements for 2015[68] show that the actual consideration receivable is [redacted] and if subtracted from [redacted], the witness stated he gets back to the same number, which is the calculation of the required adjustment in the sum of [redacted]

43.7. The witness gave evidence that he was not satisfied with the return nor any information received in that regard, which included the [redacted] transfer pricing report, which when looked at, as a like for like comparability analysis, showed that the tax return and that trading profit before capital allowances figure was deficient by a material amount, which is the adjustment mentioned of [redacted] for the FY15. The witness testified that he was of the view that he had reasonable grounds for believing that a full and true disclosure of all material facts necessary for the making of the assessment was not made by virtue of the deficiency in the disclosure and also no expression of doubt was submitted by the Appellant when filing their original tax return.

43.8. The witness was cross examined by Senior Counsel for the Appellant. The witness confirmed that it was his view that the amount of tax returned was deficient by a material amount and therefore, he was not satisfied as to the sufficiency of the return delivered.

43.9. The witness was asked is that the position of the Respondent, namely that it can form the view that it is not satisfied with the amount of tax declared and on that basis declare the return insufficient. The witness stated that it is and that the comparability analysis supports that position. The witness confirmed that the comparability analysis was not provided as part of the return, nor was it required to be included.

43.10. The witness confirmed that he cannot identify any box on the return that was not ticked by the Appellant, but stated that the trading profit before capital allowances was incorrect in his view and that the turnover figure was incorrect on an arm's length basis, based on the comparability analysis.

43.11. The witness confirmed that he is not stating that the audited financial statements are incorrect. It was put to the witness that what he is stating is that if he received a return that set out all of the information required, together with an audited set of financial statements, but if he formed a view that the amount of tax was

[68] Booklet of Documents, Tabs 37 & 41

understated, then he could raise an assessment at any time. The witness stated that it was backed up by a comparability analysis.

43.12. It was put to the witness that instead of referring to sufficiency, the Respondent's power is to raise an assessment if it is not satisfied that the return is correct. The witness stated that is correct.[69]

Respondent's Submissions

44. Senior Counsel made submissions on behalf of the Appellant. A summary of the submissions made are set out hereunder by the Commissioner:-[70]

44.1. The Respondent takes issue with the admission into evidence of the expert reports delivered on behalf of the Appellant. The expert reports purport to give evidence on the interpretation and application of matters of Irish domestic law and thereby usurp the function of the Appeal Commissioner. It is well-established that evidence of Irish law is not admissible. Reference was made to the decisions in *O'Brien v Clerk of Dáil Eireann* [2016] 3 I.R. 384, *Deloitte v The Commissioners for Her Majesty's Revenue & Customs* [2016] UKFTT 479 (TC)(" *Deloitte")* and *Blackrock Holdco 5 LLC v Commissioners for Her Majesty's Revenue and Customs* [2020] UKFTT 443 (TC). It was submitted that the decisions establish that "*the interpretation of the [OECD] Guidelines is a matter of law*" and was "*for the Tribunal and not an expert witness*". In addition, the intermingling of matters of law and evidence prejudices the fair hearing of the matter for the reasons explained in *Deloitte.*

44.2. There is one core issue in this appeal namely, with respect to the relevant years, whether the amount of the consideration receivable by the Appellant from the parent company under the services agreement was less than the arm's length amount required pursuant to section 835C(2)(b) and (3) TCA 1997. There are two sub issues arising, firstly, whether the Appellant was required to include in the calculation of its costs of providing the intercompany services the SBAs identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant and secondly, if the Appellant was required to include the items identified in the statutory financial statements of the Appellant in respect of the SBAs, whether a

[69] Transcript Day 4, page 151
[70] A full account of the Respondent's submissions can be found in the Transcript, Day 6

mark-up should be applied to those amounts attributable and, if so, of what amount.

44.3. Therefore, the main issue in contention is whether the amounts attributed to the SBAs, set out in the Appellant's statutory financial statements, should be included in their total costs for the purpose of determining arm's length consideration. The exclusion of amounts attributable to the SBAs from the cost base to which the mark-up was applied, resulted in the Appellant receiving less than an arm's length amount of consideration under the services agreement for the purposes of section 835C(2)(b) TCA 1997.

44.4. In the event that the issues are decided in favour of the Respondent, such that if the Appellant was required to include the items identified in the statutory financial statements of the Appellant in respect of the SBAs in the calculation of its costs of providing the intercompany services, the question arises whether the Appellant is entitled to a deduction, reduction or adjustment in respect of the expense for the SBAs debited to its financial statements.

44.5. In terms of the transfer pricing analysis, the issues between the parties on this appeal are reasonably narrow. It is common ground that the TNMM is the appropriate transfer pricing method; the Appellant is the tested party for applying that method; Net Cost Plus is the correct profit level indicator; and if the SBAs are to be included in the Appellant's total costs for the purposes of determining the arm's length consideration due to it, the appropriate arm's length margin for mark-up on total costs is [redacted] for FY15 and 10% for remaining relevant years.

44.6. The difference between the cost base which was compared by [redacted] is economically significant and materially affects the conditions of the arrangement being examined. In the Appellant's case, the SBAs represented around [redacted] of the total wages and salaries costs of the Appellant in the relevant period. The Appellant's sole source of revenue was the fees earned under the services agreement and, therefore, the total cost of employee remuneration is attributable to the cost of providing the services under those agreements. It follows that the exclusion of amounts attributable to the SBAs awarded by the parent company, which is a material element of the cost of remunerating the Appellant's employees, from the calculation of arm's length consideration renders the Appellant's comparison unreliable.

44.7. The inclusion of amounts attributable to the SBAs granted by the parent company in the Appellant's cost base reflects the established accounting treatment of such costs under FRS 102. The reason why accounting standards such as FRS 102 require companies to recognise the SBAs as an expense is that only by charging that cost to the profit and loss account can the financial statements show a true and fair view of the operating expenses incurred in creating the related turnover of the entity.

44.8. The services agreement falls within the definition of an “arrangement” and the arrangements that are to be priced throughout the relevant period are the services agreement. An independent enterprise contracting at arm’s length would not realistically enter into a transaction year on year if it could expect to consistently make a loss.

44.9. From an economic perspective, the Appellant’s total cost of providing the services pursuant to the services agreement includes the total remuneration package of its employees. If, for example, in an arm’s length situation, the SBAs were not available, the Appellant would be obliged to replace that aspect of its remuneration package, so as to attract and retain the staff that would enable it to provide the services it is required to deliver pursuant to the services agreement. Thus, any comparison of the costs for the Appellant of providing its services with the costs of a comparable company in an uncontrolled transaction must take account of the amounts attributable to SBAs. The services under the services agreement cannot be provided unless the Appellant has the necessary employees.

44.10. When you compare the financial statements of the Appellant with the financial statements of the accepted comparators, you come up with negative results, because the consideration is not at arm's length. The [redacted] “sensitivity analysis” does not reflect a correct application of the comparability analysis required by the OECD Guidelines and does not support the comparability adjustment which the Appellant wishes to make to its own financial results. They are comparing to independent entities and in those independent entities' accounts they have accounted for all their costs. If the cost had been included we would see distorted results for the mark up on total cots (“MTC”).

44.11. The hypothetical simplified mathematical example of the logic underlying the Appellant’s position, to illustrate the perceived difficulty in the Respondent’s approach, is confused and misleading. If it is the case that the Appellant’s total cost base, including total remuneration costs is €120 and the arm’s length mark-up would be 10%. Therefore, the amount of €132 would be the arm’s length amount of consideration receivable. Reference was made to the Respondent's own calculations using the hypothetical amounts on a flipchart enclosed at **Appendix B** to this Determination.

44.12. While it is correct that the amount of the Appellant's taxable profits are in issue, the TCA 1997 clearly provides that the adjustment to profits flows from the substitution of the arm's length amount in place of the "actual consideration". The Appellant's approach, which invites the Appeal Commissioner to bypass the mechanism required by the TCA 1997 and determine the profit divorced from the arm's length amount of consideration, is entirely misconceived.

44.13. In the hypothetical scenario using the mark-up, the Respondent adjusts the consideration to give rise to a MTC that would equate with either [redacted] or 10% in the other years which is the amount of €22. The Respondent increases up the consideration to give rise to an arm's length MTC. The actual consideration receivable was €110 and the arm's length consideration receivable were one to carry out the MTC on the total costs involved in providing the service, the uplift is €22, bringing it to €132.

44.14. In 2015, the adjustment that is carried out is to adjust the consideration that is reflected in the financial statements, as to the consideration that would have been received had the services been provided on an arm's length basis and that is what the adjustment is. In accordance with section 835C TCA 1997, if the consideration is less, then the arm's length consideration is used and that is where the deficit of €22 arises. The consideration is increased to reflect the arm's length consideration and it is as simple as that. Determining the arm's length amount of consideration is the only question raised by the statute and it is to that question that the OECD Guidelines provide guidance.

44.15. There is no definition of taxable profit within the TCA, but the Respondent understands that it means the Case I Schedule D profit of the Appellant which is calculated after adjustments.

44.16. If the consideration is €132 and the cost is €120, the profit is €12. That is agreed[71]. The issue is not between €12 and €10, rather the issue is between €12 and minus €10. There is €22 at issue between the parties.

71 Transcript, Day 6 page 180

44.17. Reference was made to *NCL Investments Ltd. v HMRC* [2022] 1 W.L.R. 1829 ("NCL") The Court allowed the company the deduction because it was an expense incurred wholly and exclusively for the purpose of the trade, in terms of the accounting treatment. Unlike Section 81(2)(n) TCA 1997, there was no statutory prohibition on the deduction. Section 81(2)(n) TCA 1997 does not permit a company to claim a tax deduction for SBAs in respect of which it has not paid anything. Reference was made to the Appellant's corporate tax computation[72] under the heading "B2 Expense adjustments", where there is a figure of [redacted] added back and that is under section 81(2)(n) TCA 1997. The Appellant was not required to add this amount back in as a result of section 81(2)(a) TCA 1997, it was required to add it back as a result of section 81(2)(n) TCA 1997. So when the adjustment to consideration takes place, the deduction has already been claimed. The Appellant has added back the amount and all that is required is an adjustment to the consideration. In doing so, that has the effect of increasing the taxable profits by €22, thus increasing it from a minus €10 to a plus €12. However, when you increase the €22, it increases the €10 to €32 and all that is required is an increase to consideration. The case supports the position that section 81(2)(n) TCA 1997 applies to the Appellant's position.

44.18. The Appellant's contention is that Article 9(1) of the OECD Model Tax Convention requires an adjustment to taxable profits rather than consideration. It does not. It requires consideration of the conditions imposed and it is agreed that conditions is consideration. The profits are then calculated on the basis of the profits which would have accrued but for those conditions and are then taxed accordingly. This is consistent with the approach in section 835C TCA 1997. In addition, paragraph 1.6 of the OECD Guidelines supports the position that profits are adjusted by reference to the conditions. There is absolutely no conflict between section 835C TCA 1997 and Article 9(1). The profit adjustment flows from the replacement of the actual consideration with the arm's length amount in the computation.

44.19. For the purpose of transfer pricing, the issue is whether, at arm's length, an independent service provider would charge a price for its services having regard to its total costs, including its total employee remuneration costs. The legislation and the OECD Guidelines are concerned with the pricing of transactions between associated enterprises. It requires an upward adjustment of the price or consideration for an arrangement and the tax consequences follow. The

[72] Booklet of Documents, Tab 41, page 1141

definition of arm's length principle shows that the whole focus is on the price, the consideration for providing the services.

44.20. In respect of that fee arrangement in the services agreement, it is not an arm's length pricing arrangement. It is a tax-geared pricing arrangement agreed between connected parties. That is made very clear by paragraph 3 of Exhibit A to the services agreement.

44.21. Reference was made to paragraph 1.2 and 1.3 of the OECD Guidelines.[73] The very nub of the issue is, whether it was appropriate, in terms of the TNMM, for the Appellant to adjust its figures to exclude the SBA cost before it compared its figures to the comparators. That is a fundamental flaw, because they are not then comparing like with like.

44.22. Whether it is a cost to the parent company or whether it is a cost to the Appellant is irrelevant. The point is that it is a recognised cost incurred in providing the services, which are the controlled transaction. The services agreement and the SBAs each have a different economic logic, which requires keeping them separate. They are not linked. The Appellant could not provide the services in Ireland unless all those staff were paid for, that is the cost of doing business in Ireland.[74] The employee's remuneration includes both salaries and other benefits provided by the Appellant and the SBAs provided by the parent company. Both parts of the remuneration are, however, the remuneration for performing their duties of employment with the Appellant.[75]

44.23. Reference was made to the decision in *Canada v Glaxo SmithKline* [2012] 3 SCR[76], which was referred to by the Appellant. The decision concerned whether two transactions needed to be considered together or separately. The transaction that you need to focus on is, simply, what the provision of the services by the Appellant and that is the services agreement. The SBAs are not part of it, the tested party is the Appellant and the transaction arrangement is the provision of the services. Both experts agreed that in order to provide the services the costs had to be €120, an agreed margin was 10%, and therefore a total of €132. That is the focus.

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[73] Booklet of Authorities, Tab 22
[74] Transcript, Day 6, page 70
[75] Transcript, Day 6, page 136
[76] Booklet of Authorities, Tab 44

44.24. The SBAs are entirely within the discretion of the parent company and it was very clear from the evidence that the parent company is responsible for the SBAs and it did not involve the Appellant.

44.25. Reference was made to the decision in *Cameco Corporation -v- The Queen* [2018] TCC 195.[77] There is no basis in fact on which a consideration of reasonableness in this appeal could lead to a different outcome. While the OECD Guidelines recognise that transfer pricing is not an exact science, if the Respondent is correct and the Appellant omitted some [redacted] of its employee remuneration expense from its cost base for the purpose of calculating the mark-up on total costs, the result would amount to a very material distortion and could not, on any analysis, be described as a "reasonable estimate" of an arm's length amount.

44.26. Reference was made to the decision in *NCL Investments Ltd v HMRC* [2022] 1 W.L.R. 1829[78] in relation to the deductibility of expenses.

44.27. The Respondent's witness was not satisfied with the sufficiency of the tax return delivered by the Appellant. Therefore, section 959AC(2)(b) TCA 1997 was applicable. Moreover, the Respondent's witness determined that there were reasonable grounds for believing that the return delivered by the Appellant for that tax year did not contain a full and true disclosure of all material facts necessary for making an assessment for FY15 in light of the requirements of section 835C TCA 1997, as the said return considerably understated the trading profits before capital allowances disclosure by [redacted]. In this regard, no expression of doubt was filed by the Appellant in respect of FY15. Therefore, section 959AC (2)(c) TCA 1997 and section 959AA (2)(a) TCA 1997 are applicable.

44.28. In that regard, reference was made to the decisions in *Stanley*, *Hans Droog*, *Hanrahan* and *McNamara*.

Material Facts

45. Having read the documentation submitted, and having listened to the oral evidence and submissions given at the hearing of the appeal, the Commissioner makes the following findings of material fact:-

[77] Booklet of Authorities, Tab 45
[78] Booklet of Authorities, Tab 41

45.1. In addition to the findings of material fact, the Commissioner finds that the facts as set out in the document entitled “Statement of Agreed Facts” at paragraphs 1 to 4 inclusive of that document and which is attached herein in **Appendix C** to this Determination are also material facts found.

45.2. The Appellant is a wholly owned subsidiary of the parent company, a [redacted]. The parent company is not tax resident in Ireland.

45.3. The parent company and the Appellant are associated companies within the meaning of section 835B TCA 1997.

45.4. The parent company is a [redacted].

45.5. [redacted].

45.6. At the end of 2018, the parent company had [redacted] employees, with the total number of employees in the group being [redacted] of which the Appellant had [redacted] employees.

45.7. Pursuant to the services agreement entered into between the Appellant and the parent company, on 14 May 2013 and 1 January 2016, the Appellant performed sales and marketing and contract research and development activities for the benefit of the parent company and charged a fee to the parent company calculated by reference to its costs plus a mark-up.

45.8. The parties are in agreement that the services agreement provides for a mark-up of [redacted] for the year 2015 and 10% for the remainder of the relevant years.

45.9. Individuals employed by the parent company or one of its subsidiaries, whose role meets the relevant criteria, become eligible to participate in the parent company’s SBAs scheme.

45.10. The purpose of the SBAs awarded by the parent company is to incentivise employees or third parties.

45.11. The Compensation Committee in the [redacted] is solely responsible for the award of SBAs to the Appellant’s employees.

45.12. The award of the SBAs by the parent company to the Appellant’s employees is a separate and distinct agreement to the employee’s contract of employment with the Appellant.

45.13. The SBAs are awarded by way of an equity side letter and SBA agreement with the parent company.

45.14. The [redacted] Plan governs the award of the SBAs by the parent company. The purpose of the SBAs is to "*…encourage and enable the officers, employees, Non-Employee Directors and other key persons (including Consultants) of [the parent company](the "Company") and its Subsidiaries upon whose judgment, initiative and efforts the Company largely depends for the successful conduct of its business to acquire a proprietary interest in the Company. It is anticipated that providing such persons with a direct stake in the Company's welfare will assure a closer identification of their interests with those of the Company and its stockholders, thereby stimulating their efforts on the Company's behalf and strengthening their desire to remain with the Company*".

45.15. The [redacted] preceded the [redacted] Plan [redacted]

45.16. The Compensation Committee in the [redacted] is solely responsible for benchmarking SBAs.

45.17. In 2022, the parent company engaged a third party to assist in benchmarking awards, having regard to the burn rate and maintaining shareholder value.

45.18. The appropriate range for an award of the SBAs for a role, any decision to provide a refresh award of the SBAs and guidance on the level of the SBAs for any year is determined by the Compensation Committee and the parent company only.

45.19. It is common practice for the SBAs to be issued to consultants or third parties to incentivise them as suppliers of a service to an entity.

45.20. To date, the parent company has not made an award of the SBAs to a consultant or non employee of the Appellant.

45.21. Under the KPMG Share based payments IFRS 2 handbook, share based payments to non employees are dealt with in Chapter 11. There is an entire chapter dedicated to issuing the SBAs to non employees.

45.22. The base pay and benefits of employees are benchmarked separately to SBAs. Base pay and benefits are benchmarked having regard to where an employee works and that labour market, but has no regard to the SBAs.

45.23. The parent company provides a platform called [redacted], whereby an employee can view information relating to the SBAs and can sell the SBAs.

45.24. The cost of the SBAs fluctuates and are dependent on external market forces as the SBAs are linked to the share price.

45.25. The parent company is agnostic in terms of where its employees work and its teams and reporting structures are distributed globally.

45.26. There is no management committee in the Appellant in Ireland that deals with the award of the SBAs.

45.27. There is no recharge agreement between the parent company and the Appellant for the SBAs issued to the Appellant's employees.

45.28. The Appellant's financial statements relating to the relevant years include a line item for costs relating to the SBAs which were awarded by the parent company to the employees of the Appellant, due to a requirement of FRS 102.

45.29. In correspondence dated 14 March 2023 and 20 March 2023, the Appellant and the Respondent agreed that the SBAs were calculated and recorded in compliance with FRS 102. On this basis, both parties agree that the SBAs expense recognised in the Appellant's financial statements represented the fair value of the SBAs (calculated on the grant date) and recognised over the period during which the awards vest.

45.30. The fair value of the SBAs does not include the administrative costs associated with the award of the SBAs.

45.31. The fair value of the SBAs was measured by reference to the Black-Scholes pricing model, which from an accounting perspective follows industry norms.

45.32. The Appellant did not include the cost of the SBAs awarded by the parent company to the Appellant's employees in its costs for the purposes of calculating the fee under the services agreement for the relevant years.

45.33. The agreed transfer pricing method is the TNMM, using the net cost plus as the profit level indicator.

45.34. The risk and decision making in relation to the award of the SBAs to the Appellant's employees lies with the parent company in the [redacted], not with the Appellant.

45.35. The cost of the SBAs awarded to the Appellant's employees is incurred by the parent company and not the Appellant.

45.36. It is agreed that the MTC or Net Cost Plus ("NCP") stipulated in the services agreement namely, [redacted] in FY15 and 10% for the relevant years thereafter, represent arm's length mark-ups for the Appellant's services.

45.37. The amended assessment for the FY15 was raised on 1 December 2021, but an amended assessment for the FY15 was reissued on 17 December 2021 due to an administrative error.

Analysis

46. It is trite law that the appropriate starting point for the analysis of the issues is to confirm that in an appeal before the Commission, the burden of proof rests on the Appellant, who must prove on the balance of probabilities that an assessment to tax is incorrect. This proposition is now well established by case law; for example in the High Court case of *Menolly Homes Ltd v Appeal Commissioners and another* ("*Menolly Homes*") [2010] IEHC 49, at paragraph 22 of the Judgment, Charleton J. states that:

> *"The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable".*

47. The Commissioner also considers it useful herein to set out paragraph 12 of the Judgment of Charleton J. in *Menolly Homes,* wherein he states that:

> "*Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute…"*

The issues

48. The parties prepared a "Statement of Issues"[79] prior to the hearing of the appeal. During the hearing of the appeal the Appellant narrowed its appeal points[80] as set out in the Appellant's Outline of Arguments. The Appellant submitted that for the purposes of this appeal, the Appellant would proceed on the assumption that the SBAs do have a cost for transfer pricing purposes, such that when the parent company issued the SBAs, that entailed a cost to the parent company equal to the fair value of the SBAs at that point in time, which is what is recorded in the Appellant's accounts in accordance with FRS 102.

[79] Booklet of Documents, Tab 5

[80] Transcript, Day 3, pages 5, 6 and 7.

49. The Appellant submitted that the matter is incredibly complex, in circumstances where one expert's view is that the SBAs do have a cost and which opinion is backed up by other renowned academics and an article from the Harvard Business Review and on the other hand an expert's view that the SBAs do not have a cost for economic purposes. Thus, the Appellant takes the view that it is not a point that it intends to pursue any longer in this appeal and that it is content that for the purposes of this appeal, it would proceed on the assumption that the SBAs do have a cost for transfer pricing purposes. The Commissioner is grateful to the Appellant for narrowing the issues in this regard.

50. Thus, it is the opinion of the Commissioner that the issues now arising for determination in this appeal may be set out as follows:-

    (i) Was the Appellant correct to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant;

    (ii) If the Appellant was incorrect to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant, what, if any, adjustment is required;

    (iii) The interpretation of sections 835C and 835D TCA 1997;

    (iv) With respect to FY15, whether the Respondent was precluded from raising an amended assessment having regard to section 959AA and 959AC TCA 1997.

51. The Appellant submits that for the purposes of this appeal, the SBAs created an economic cost for the parent company, but that cost was not charged to and did not burden the services made by the Appellant. The difference between the parties is as to the costs which ought to have been included in the calculation of the arm's length return and specifically, whether the Appellant was required to include in the calculation of the appropriate arm's length return, the cost which the parent company incurred in issuing the SBAs to employees of the Appellant.

52. The Appellant's appeal relates to the interpretation of sections 835C and 835D TCA 1997. The Appellant contends that the legislative provisions require an adjustment to profit, whereas the Respondent contends that what is required is an adjustment to consideration. The Appellant submits that there is no difference to the outcome whether one considers profit or consideration, it suggests the answer is the same, and the corollary being that the

Appellant accounted for the correct amount of tax on the transactions.[81] The relevance of this is developed further in the Commissioner's analysis, thus at this remove, it is suffice to state only the differing positions of the parties herein.

53. The Commissioner notes that throughout the hearing, the parties and experts proceeded to explain their opinions and viewpoints using certain hypothetical scenario amounts, as opposed to the actual amounts at issue and which can be seen referenced throughout this determination as the amounts of €10, €12, €22, €120 and €132. These simple numbers were used to illustrate the application of the principles of transfer pricing, so that the issues were not clouded by the various numbers associated with the relevant years and in order that the focus would remain on the applicable economic principles and legislative provisions.

54. It is the opinion of the Commissioner that it is appropriate to proceed to analyse the issues in this appeal, having regard to the hypothetical amounts. The benefits of using the hypothetical numbers is that it creates consistency when explaining the economic and legislative principles at issue herein. The Commissioner does not want to risk any confusion by translating the hypothetical amount to the actual amount. The Commissioner is grateful to the parties for the documents created illustrating how the hypothetical amounts translate to the Appellant's books and records, which the Commissioner has enclosed at **Appendix D** to this determination. This document can be used as a guide when referencing the hypothetical amounts into the actual financial amounts of the Appellant. The Commissioner is also grateful to the parties and expert witnesses for their use of the flipchart which was subsequently reduced to a pdf document, which the Commissioner has enclosed at **Appendix A and B** to this determination. The use of the flipchart was helpful throughout the hearing of the appeal, which provided to the Commissioner and the parties a constant visual aid of the numbers which were repeatedly being referred to in the evidence and submissions by the parties to the appeal.

55. The Commissioner notes that the Appellant also posited an analogy of the baker and a mill owner.[82] The Commissioner considers it useful to set that analogy out herein. The Appellant used the example wherein a baker in Ireland buys flour from a mill owner in the US. The mill owner in the US grows the grain, mills the grain, produces the flour and delivers the flour to the baker in Ireland. There is no doubt that if Ireland sells a loaf of bread to a third party, it would be at a cost of €132, because Ireland would incur its own

[81] Transcript Day 1, page 78
[82] Transcript, Day 7, page 16

costs of €100, then it would have to pay €20 for the flour, and there would be a 10% mark-up.

56. The question arises; what is the amount the baker, at arm's length, would be entitled to demand from the mill owner, in circumstances where the mill owner has provided the baker with the flour at no cost. The Appellant submits that the services agreement is the agreement between the baker in Ireland and the mill owner in the US, which says that the baker will charge to the mill owner the total cost of making the bread plus a mark-up, but that it should not include the accounting entry that he had to put in his books for the value of the flour that was used in making the bread. That is a perfectly rational and arm's length provision.

57. The Appellant submits that the Respondent's case is twofold, firstly that the legislation requires you to find that when the mill owner pays only €110 for the bread, after having provided the flour, that does not represent an arm's length price, because everyone else who does not supply flour has to pay €132 and secondly, according to the baker's accounts, he is losing money all of the time as there is a cost of €20 for the flour in the accounts. The Appellant submits that this approach ignores reality, which is such that it only costs the baker €100 to make the bread and the baker sells the bread for €110 and that it is only due to the requirements of FRS 102 that the baker must put a notional expense relating to the flour in its accounts, that the accounts represent a loss. Importantly, there is no loss to the baker, no economic loss, no financial loss, just an accounting loss. The Commissioner notes that the Appellant submits that the purpose of the analogy is to show that there is reality to the circumstances herein and that the mill owner is acting as an arm's length third party when it provides the flour to the baker. The mill owner bears the risk.

58. The Appellant submits that the fundamental principle of transfer pricing is that it seeks to ensure an appropriate allocation of profit as between connected enterprises. The Appellant states that the OECD Guidelines seek to ensure that when connected parties engage in transactions with each other, the tax authorities in each jurisdiction can tax the appropriate amount of profit in each jurisdiction. The means by which this is achieved is by ensuring that with respect to any given transaction the supplier makes an arm's length profit. It is important, therefore, that the OECD Guidelines are consistently applied, so as to avoid mismatches in their application between competing OECD member states.

59. The Appellant states that when assessing the profits which the Appellant earned through the supply of services to the parent company, the question is whether the profit earned comes within the arm's length range of profits which a comparable arm's length third party

would expect to earn in comparable circumstances. The Respondent argues that it is consideration that is to be adjusted in accordance with section 835C TCA 1997 and the TCA 1997 clearly provides that the adjustment to profits flows from the substitution of the arm's length amount in place of the "actual consideration". The Respondent states that there is no conflict between section 835C (2)(b) TCA 1997 and Article 9(1) of the OECD Model Tax Convention. The profit adjustment flows from the replacement of the actual consideration with the arm's length amount in the computation.

60. The parties are agreed that the TNMM should be applied but the question arises, whether on an application of the TNMM it is appropriate to include the cost of the SBAs, in the calculation of the arm's length return. The entire purpose of the TNMM is to identify the profit which an arm's length third party would make from a transaction on the basis of identifying the costs which it would incur and the mark-up it would apply. The Appellant states that in circumstances where the parent company bears the cost of the SBAs, the OECD Guidelines require that in applying the TNMM with a cost-based profit level indicator, only the costs that were actually incurred by the Appellant should be considered to form part of its cost base to be marked up.

61. The Appellant contends that to ensure the correct cost base was considered for transfer pricing benchmarking purposes, [redacted] in their transfer pricing reports removed the expense pertaining to the SBAs that appears in the Appellant's financial statements in accordance with FRS 102. Both the Appellant's expert witness 1 and the Appellant's expert witness 2 confirmed that that this was appropriate from an economic and a transfer pricing perspective also.[83]

62. The Respondent's position is fundamentally based on their assertion that the expenses relating to the SBAs in the Appellant's accounts, cannot be excluded and that the Appellant has not demonstrated that the intercompany service fees receivable form the parent company during the relevant years were at arm's length. The Respondent's correspondence to the Appellant dated 1 December 2021, states that:

> "*The only relevant consideration is whether the exclusion of the expense for share based payments in the service fee calculations would be consistent with the arm's length conditions between comparable independent enterprises based on a comparability analysis*."[84]

63. At this remove, the Commissioner considers it logical to next deal with the principles of statutory interpretation.

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[83] Booklet of Documents, Tabs 13 & 14
[84] Booklet of Documents, Tab 58

Statutory Interpretation

64. Both Senior Counsel made comprehensive submissions as to the principles of statutory interpretation. Therefore, the Commissioner considers it appropriate to initially set out herein, the jurisprudence establishing the well settled principles of statutory interpretation relating to taxation statutes.

65. In relation to the approach that is required to be taken in relation to the interpretation of taxation statutes, the starting point is generally accepted as being the Judgment of Kennedy CJ. in *Revenue Commissioners v Doorley* [1933] I.R. 750 at page 765 wherein he held that:

> "*The duty of the court, as it appears to me, is to reject an a priori line of reasoning and to examine the text of the taxing act in question and determine whether the tax in question is thereby imposed expressly and in clear and unambiguous terms...for no person or property is to be subjected to taxation unless brought within the letter of the taxing statute, i.e. within the letter of the statute as interpreted with the assistance of the ordinary canons of interpretation applicable to the Acts of Parliament….*"

66. In relation to the relevant decisions applicable to the interpretation of taxation statutes, the Commissioner gratefully adopts the following summary of the relevant principles emerging from the Judgment of McKechnie J. in the Supreme Court in *Dunnes Stores v The Revenue Commissioners* [2019] IESC 50 and the judgment of O'Donnell J. in the Supreme Court in *Bookfinders v The Revenue Commissioners* [2020] IESC 60, as helpfully set out by McDonald J. in the High Court in *Perrigo Pharma International Designated Activity Company v McNamara, the Revenue Commissioners, the Minister for Finance, Ireland and the Attorney General* [2020] IEHC 552 ("*Perrigo*") at paragraph 74:

> "*The principles to be applied in interpreting any statutory provision are well settled. They were described in some detail by McKechnie J. in the Supreme Court in Dunnes Stores v. The Revenue Commissioners [2019] IESC 50 at paras. 63 to 72 and were reaffirmed recently in Bookfinders Ltd. v The Revenue Commissioner [2020] IESC 60. Based on the judgment of McKechnie J., the relevant principles can be summarised as follows:*
>
> > *(a) If the words of the statutory provision are plain and their meaning is self-evident, then, save for compelling reasons to be found within the Act as a whole, the ordinary, basic and natural meaning of the words should prevail;*

(b) Nonetheless, even with this approach, the meaning of the words used in the statutory provision must be seen in context. McKechnie J. (at para. 63) said that: "… context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that";

(c) Where the meaning is not clear but is imprecise or ambiguous, further rules of construction come into play. In such circumstances, a purposive interpretation is permissible;

(d) Whatever approach is taken, each word or phrase used in the statute should be given a meaning as it is presumed that the Oireachtas did not intend to use surplusage or to use words or phrases without meaning.

(e) In the case of taxation statutes, if there is ambiguity in a statutory provision, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language;

(f) Nonetheless, even in the case of a taxation statute, if a literal interpretation of the provision would lead to an absurdity (in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole) then a literal interpretation will be rejected.

(g) Although the issue did not arise in Dunnes Stores v. The Revenue Commissioners, there is one further principle which must be borne in mind in the context of taxation statute. That relates to provisions which provide for relief or exemption from taxation. This was addressed by the Supreme Court in Revenue Commissioners v. Doorley [1933] I.R. 750 where Kennedy C.J. said at p. 766:

> *"Now the exemption from tax, with which we are immediately concerned, is governed by the same considerations. If it is clear that a tax is imposed by the Act under consideration, then exemption from that tax must be given expressly and in clear and unambiguous terms, within the letter of the statute as interpreted with the assistance of the ordinary canons for the interpretation of statutes. This arises from the nature of the subject-matter under consideration and is complementary to what I have already said in its regard. The Court is not, by greater indulgence in delimiting the area of exemptions, to enlarge their operation beyond what the statute, clearly and without doubt and in express terms, except for some good reason from the burden of a tax thereby imposed generally on that description of subject-matter. As the imposition of, so the exemption from, the tax must be brought within the letter of the taxing Act as interpreted by the established canons of construction so far as possible."*

67. The Commissioner is of the view that in relation to the approach to be taken to statutory interpretation, *Perrigo*, is authoritative in this regard, as it provides an overview and template of all other Judgments. It is a clear methodology to assist with interpreting a statute. Therefore, the Commissioner is satisfied that the approach to be taken in relation to the interpretation of the statute is a literal interpretative approach and that the wording in the statute must be given a plain, ordinary or natural meaning as per subparagraph (a) of paragraph 74 of *Perrigo*. In addition, as per the principles enunciated in subparagraph (b) of paragraph 74 of *Perrigo*, context is critical.

68. Furthermore, the Commissioner is cognisant of the recent decision in *Heather Hill Management Company CLG & McGoldrick v An Bord Pleanála, Burkeway Homes Limited and the Attorney General* [2022] IESC 43 ("*Heather Hill*") and that the approach to be taken to statutory interpretation must include consideration of the overall context and purpose of the legislative scheme. The Commissioner is mindful of the dicta of Murray J. at paragraph 108 of his decision in *Heather Hill*, wherein he states that:

> *"it is also noted that while McKechnie J. envisaged here two stages to an inquiry – words in context and (if there remained ambiguity), purpose- it is now clear that these approaches are properly to be viewed as part of a single continuum rather than as separated fields to be filled in, the second only arising for consideration if the first is inconclusive. To that extent I think that the Attorney General is correct when he submits that the effect of these decisions - and in particular Dunnes Stores and Bookfinders – is that the literal and purposive approaches to statutory interpretation are not hermetically sealed".*

69. Where there is an ambiguity in a tax statute it must be interpreted in the taxpayer's favour. In *Bookfinders*, O'Donnell J. explained that this rule against doubtful penalisation, also described as the rule of strict construction, means that if, after the application of general principles of statutory interpretation, there is a genuine doubt as to whether a particular provision creating a tax liability applies, then the taxpayer should be given the benefit of any doubt or ambiguity as the words should be construed strictly "*so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language*".

70. If there is any doubt, then a consideration of the purpose and intention of the legislature should be adopted. Then, even with this approach, the statutory provision must be seen in context and the context is critical, both immediate and proximate, but in some circumstances perhaps even further than that.

71. There is abundant authority for the presumption that words are not used in a statute without meaning and are not superfluous, and so effect must be given, if possible, to all

the words used, for the legislature must be deemed not to waste its words or say anything in vain. In particular, the Commissioner is mindful of McKechnie J's dictum in *Dunnes Stores* at paragraph 66, wherein he states that:

> *"each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning."*

72. The Commissioner will now in accordance with the guidance of statutory interpretation as summarised in *Perrigo* go through the various steps. The Commissioner must give the words their ordinary, basic and natural meaning and that should prevail. Then, even with this approach, the statutory provision must be seen in context and the context is critical, both immediate and proximate, but in some circumstances perhaps even further than that. Nonetheless, whatever approach is taken, as confirmed in *Perrigo*, the Commissioner must give each word and phrase used in the statute a meaning, as it is presumed that the Oireachtas did not intend to use words or phrases without meaning.

73. The purpose of interpretation is to seek clarity from words which are sometimes necessarily, and sometimes avoidably, opaque. However, in either case, the function of the Court or Tribunal is to seek to ascertain the meaning of the words. The general principles of statutory interpretation are tools used for clear understanding of a statutory provision. It is only if, after that process has been concluded, a Court or Tribunal is genuinely in doubt as to the imposition of a liability, that the principle against doubtful penalisation should apply and the text given a strict construction so as to prevent a fresh and unfair imposition of liability by the use of oblique or slack language.

74. The Commissioner is mindful of the recent decision of the Supreme Court in *O'Meara v the Minister for Social Protection, Ireland and the Attorney General* [2024] IESC 1. At pages 8 and 9 of the Judgment, Hogan J. when dealing with the interpretation of the constitutional provisions at issue, states that:

> "*18. The search for meaning, therefore, is not for the subjective understanding of the drafters. What counts is the objective meaning of the words, not least given that the People in 1937 must be taken to have adopted the Constitution by reference to that objective meaning when they were voting in a plebiscite on whether to adopt that document. This process involves "the application of the relevant canons of interpretation, to ascertain what intention is evinced by the actual statutory words used.": Director of Public Prosecutions v. Flanagan [1979] IR 265 at 282 per Henchy J. While these comments were made in the*

context of statutory interpretation, they apply a fortiori in the context of the words of a constitutional text.

19. *In the case of the interpretation of an ordinary word such as "woman", the canons of interpretation are perfectly clear. It is, after all "…the cardinal rule of…. interpretation that in the absence of some special reason, a word should be given its ordinary or natural meaning in its context": Keane v. Irish Land Commission [1979] IR 321 at 324, per Henchy J. The rationale for this was well explained by the same judge in another judgment delivered about this time, Wilson v. Sheehan [1979] IR 423 at 429, where Henchy J. observed:*

> *"The reason for that rule is that when statutes or other public or formal documents directed to the public at large…. are being interpreted, it is to be assumed, in the absence of a counter-indication, that the words used in such documents have been used in their popular rather than in any specialised or technical sense."*

………………..

21. *And judged by that objective meaning of this ordinary word, it is plain that the unadorned reference to "woman" in Article 41.2 is not confined to a married woman. Save, perhaps, for a minority of lawyers and other specialists, what voter reading the text of the draft Constitution in advance of the plebiscite of 1 July 1937 could have supposed that the generic and ordinary word "woman" ("an bhean") would later be judicially interpreted as being confined to married women only in the absence of some unambiguous textual provision supporting this specialised interpretation of this word?"*

75. For the purposes of this appeal, the substantive issue involves the interpretation of sections 835C and 835D TCA 1997. The OECD guidelines are also important to the determination of this appeal, which the Commissioner will deal with hereunder in due course.

Sections 959AA and 959AC TCA 1997 – The 2015 Amended Assessment

76. The Commissioner considers it appropriate to next address the competing arguments in relation to the raising of an assessment by the Respondent outside of the four year period. This is a discrete and separate issue for determination in this appeal.

77. The documentary evidence establishes that the Appellant filed its return for **financial year 2015 ("FY15")** on 23 September 2016. The Commissioner observes that the

Appellant's return was filed by way of the prescribed CT1 form and shortly thereafter, it filed with the Respondent, its statutory accounts in relation to FY15. Of note, the [redacted] comparative analysis was not filed with the return, nor was there a requirement to do so. The requirement on the Appellant was to file its return accompanied by its statutory accounts, which it did so in accordance with its obligations.

78. It is not in dispute between the parties that the amended assessment for FY15 was raised outside of the four year time period provided for in section 959AA TCA 1997. The amended assessment for the FY15 was raised on **1 December 2021**. This is a material fact found by the Commissioner and not in dispute.

79. However, the Appellant argues that there are no legitimate grounds based on the facts herein, upon which the Respondent can raise an amended assessment outside of the statutory time limit prescribed by section 959AA TCA 1997. The Appellant submits that it made a full and true disclosure. Therefore, the four year time limit for which section 959AA TCA 1997 provides, applies.

80. The Appellant submits that it "*completed the CT1 form, which the Respondent prescribed, on a full and true basis, in accordance with laws and guidance in existence during the Assessment Period and following the advice received by a leading transfer pricing expert,* [redacted] *The Appellant furnished transfer pricing reports relating to the Appeal Period when requested in accordance with section 835F TCA 1997. The Appellant did not subsequently re-open the return".*[85]

81. The Respondent contends that it is justified in raising the amended assessment outside of the time limits prescribed, in circumstances where there was not a full and true disclosure of all material facts in relation to the return made by the Appellant. In addition, the Respondent takes issue with the sufficiency of the return made by the Appellant.

82. The Respondent submits that "*a Revenue Officer was not satisfied with the sufficiency of the tax return delivered by the Appellant having regard to the trading profits before capital allowances disclosure of* [redacted] *and the information received from the Appellant during the FY15 audit…Therefore, section 959AC(2)(b) TCA 1997 was applicable".*[86]

83. In addition, the Respondent submits that "*a Revenue Officer determined that there were reasonable grounds for believing that the return delivered by the Appellant for that tax year did not contain a full and true disclosure of all material facts necessary for making an assessment for FY15 in light of the requirements of section 835C TCA 1997. The said*

[85] Booklet of Documents, Tab 6, pages 30 & 31
[86] Booklet of Documents, Tab 7, page 114

return understated the trading profits before capital allowances disclosure by [redacted]. *In this regard, no expression of doubt was filed by the Appellant in respect of FY15. Therefore, section 959AC(2)(c) TCA 1997 and section 959AA(2) was also applicable.”*[87]

84. Section 959AA(1) TCA 1997 provides *inter alia* that where a chargeable person has delivered a return for a chargeable period and has made in the return **a full and true disclosure of all material facts** necessary for the making of an assessment for the chargeable period, a notice of amended assessment “*shall not be made by a Revenue officer on the chargeable person after the end of 4 years commencing at the end of the chargeable period in which the return is delivered and no additional tax shall be payable by the chargeable person after the end of that period of 4 years”*.

85. Section 959AC TCA 1997 is also notable in this context and provides *inter alia* that notwithstanding *section 959AA*, where in relation to a chargeable person a Revenue officer is not satisfied with the **sufficiency of a return** delivered by the person having regard to any information received in that regard, or a Revenue officer has **reasonable grounds** for believing that a return delivered by the person does not contain a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, “*then a Revenue officer may, at any time, make a Revenue assessment on the chargeable person for the chargeable period in such sum as, according to the best of the officer’s judgment, ought to be charged on that person*”.

86. The Commissioner was directed by Counsel for both parties to the case law relating to the raising of an assessment outside of the four year time limit prescribed by legislation and the question of full and true disclosure. The Respondent pointed out to the Commissioner that there are no decisions of the Superior Courts that relate to **section 959AC (2)(b) TCA 1997** and the requirement as to “*the sufficiency of a return*”. The decisions of the Superior Courts relate to the interpretation of “*full and true disclosure*” which the Commissioner considers hereunder. Moreover, the decisions deal with the statutory scheme prior to the enactment of section 959AA and 959AC TCA 1997 or analogous provisions. The significant difference between section 959AA TCA 1997 and section 955 TCA 1997, is that section 955 TCA 1997 did not contain the provision now inserted into section 959AC TCA 997 that enables the Respondent to raise an amended assessment at any time where a Revenue officer has “reasonable grounds” for believing that a return delivered by a taxpayer does not contain a full and true disclosure of all material facts necessary for the making of an assessment. Nevertheless, the Respondent

[87] Booklet of Documents, Tab 7, page 115

agreed that the legal principles emanating from the case law in relation to a "full and true disclosure" are relevant to the legislative provisions in this appeal.[88]

87. The concept of "full and true disclosure" was considered by the Supreme Court in the decision in *Hans Droog*. Mr Justice Clarke considered the matter of section 955 and section 956 TCA 1997 and stated that:-

> "*The substance of that provision is to protect a tax payer who makes a "full and true disclosure" of all relevant "facts". In such a case no further assessment can be made after the relevant four year period and, importantly, no additional tax is to be paid and no tax is to be repaid by reason of any matter contained in the return. There are, of course, the exceptions contained in subs. (b) but none of these apply in the circumstances of this case*.
>
> *It is easy to understand the reasoning behind that provision. Where a tax payer has made a "full and true" disclosure of all relevant facts, the Oireachtas must have considered that it would have been significantly unfair to allow Revenue to reopen the amount of tax due after the relevant four year period……………...*
>
> *it follows that, at least in general terms, Sections 955 and 956 are designed to prevent the re-opening of the tax affairs of a tax payer in respect of the types of tax covered by Part 41 outside of a four year period except in circumstances where the original return was, or was reasonably suspected to be, fraudulent or negligent. Even if such a reasonable suspicion exists no ultimate exposure to adverse tax consequences can be placed on the tax payer concerned unless it is ultimately established that the relevant return was in fact not full and true in its disclosure"*

88. The question of true and full disclosure was again considered by Ms Justice Stack in the High Court in *Hanrahan.* In that case, the Revenue Commissioners argued that the failure of the taxpayer to tick certain boxes in his capital gains tax return in a 2004 tax return amounted to a failure to a make a full and true disclosure. These boxes would have indicated that the asset at issue had been acquired from a connected party and whether the disposal was at market value as opposed to the acquisition cost. Stack J. considered that the issue then is whether the appellant made in the relevant returns a full and true disclosure of all material facts such as would permit him to rely on the time limit in section 955(2) TCA 1997. Stack J. held that the ticking of boxes in a tax return was "critical information" and stated that:

[88] Transcript, Day 6, page 215

"*I entirely accept the argument of Revenue that ticking of the boxes across from these phrases in the relevant section of the 2004 tax return was critical information and the very fact that the standard form assessment requires the chargeable person to indicate if either of these statements were applicable by the ticking of the relevant box demonstrates the importance of these issues, as the form specifically provided for that information to be given.*"

89. The most recent decision on the matter is *McNamara.* However, the Judgment in *McNamara* does not deal with the question of what is required in order to deliver a 'full and true disclosure of all material facts" since the taxpayer is recorded as having accepted that this had not occurred.

90. The Commissioner considers that the decision of Mr Justice Peart in the Court of Appeal in *Stanley* is an important relevant authority. In *Stanley,* the Court of Appeal was considering the meaning of an analogous requirement under the Capital Acquisition Tax ("CAT") legislation, namely, that the beneficiary deliver a "correct relevant return". The Court of Appeal unanimously rejected the High Court's decision that a return was not a "correct relevant return" merely because it did not declare the amount of tax which the Revenue Commissioners said was due.

91. The Appellant argued that "*if the trial judge is correct in his interpretation of the relevant statutory provisions, the protection intended by the Oireachtas to be given to the taxpayer by the four year time limit for the raising of a notice of assessment by Revenue is illusory and meaningless, since it would apply only in cases where the taxpayer assessed his/her CAT liability in a sum which Revenue at some undefined point in time considers to be correct. It is urged that this cannot have been the intention of the legislature, since such a person does not need the protection intended to be provided by the time limit since where his assessment is correct no notice of assessment would be issued by Revenue. It would be meaningless and illusory, in the appellant's submission, and it is submitted that the trial judge fell into error when he stated that "an assessment may issue outside the four year limitation period if the return made by the tax payer is found to be incorrect…"*

92. Of note, in *Stanley*, the Respondent took the view that the Appellant did not deliver a correct return, and therefore, the four year time limit did not apply. The Respondent considered that the return was not considered to be a correct return by reason of the fact that the amount of tax shown to be payable was incorrect, because the Capital Gains Tax credit was wrongly claimed as a deduction.

93. At paragraphs 37, 38, 43 and 44 of the Judgment in *Stanley*, Peart J. states that:

"*37. The legislative provisions give the Revenue a reasonable period to examine the return and self assessment and raise a different assessment if they consider appropriate and also give certainty to tax payers so that they can order their tax affairs. Without that protection, there could be no way of knowing whether a donee's own self-assessment of CAT liability made on an otherwise correct return is accepted by Revenue, or whether perhaps five, ten, fifteen or even more years down the road a notice of assessment might, so to speak, issue out of the blue, not only in respect of a liability to tax which the Revenue have decided arises, but also exposing the taxpayer to the prospect of substantial interest and penalties going back to the date on which the return was delivered. It is reasonable and a matter of fundamental fairness that a state body such as the Revenue Commissioners, who exercise statutory powers, should be subject to some restraint in the form of time limits within which to exercise their considerable powers to raise assessments of tax, particularly where those assessments may also give rise to a liability for additional interest and even penalties going back to the date of delivery of the CAT return*.

38. If the Revenue Commissioners' interpretation of the relevant statutory provisions is correct it must mean, as the appellant submits, that the intention of the Oireachtas to provide for such a protection has been rendered nugatory or illusory by the use of words whose plain and ordinary meaning fail to express that intention, or are at least ambiguous or unclear, and where the recognised canons of construction cannot come to their rescue. I have already referred to Revenue's submission that no ambiguity exists and that the words used do indeed express the intention of the Oireachtas, namely, where the tax payer has made an assessment of CAT liability which turns out not to be correct in the opinion of the Revenue Commissioners, the time limit will not apply because the tax payer has been found not to have delivered a "correct return", and they rely on the fact that "neglect" as used in s. 49(6B) CATCA includes where a tax payer has not delivered a correct return. They submit that there need have been no culpability on the part of the tax payer in the delivery of an incorrect return. All that is necessary for the dis-application of the time limit of four years is that the self-assessment on the return as delivered has been found to be incorrect as to the calculation of CAT.

……………………

43. A correct relevant return is one which complies with the requirements of s. 49(6A)(b) and hence s.46(2)(a), which as already set forth, requires that the tax payer "deliver to the Commissioners a full and true return of:-……………..

44. The matters required to be inserted into the return are provided for in Parts 1 – 7 of the prescribed I.T 38. One can see that from the manner in which those Parts are worded and constructed. Provided that the tax payer has fully and correctly completed those Parts, omitting no relevant detail that ought to be provided therein, he/she will have complied with the requirements of s. 46(2)(a). The next required step to be taken in accordance with s. 46(2)(b) is to self-assess the CAT which the tax payer "to the best of [his/her] knowledge, information and belief, ought to be charged". That requirement does not mean that this figure must coincide with the figure that Revenue in due course considers to be the correct figure, but is simply the amount which the tax payer honestly believes is the amount of tax which "ought to be paid". The wording of subsection (b) makes it clear that it is not what was referred to in submissions as "the out-turn" which determines whether there has been compliance with s. 46(2)(b). Provided that the assessment of CAT specified in Part 8 is the amount which the tax payer considers to the best of [his/her] knowledge, information and belief, ought to be charged, then there has been compliance with the requirement in that subsection. It is worth noting in the present case that the assessment of CAT on the I.T. 38 return was one which was made by the appellant's tax consultants. It is reasonable to assume that when he self-assessed his CAT liability at nil, he did so in reliance upon his expert tax advisers' advice, and that this assessment was therefore made to the best of his knowledge, information and belief. At all events, the Revenue have never contended to the contrary so far as the taxpayer's knowledge, information and belief are concerned"

94. Counsel for the Appellant herein submits that not only would the Respondent's construction of the word "sufficient" render the four year time limit illusory, it would render nugatory section 959AD TCA 1997, which allows assessments to be raised outside of four years where there is fraud or neglect and the question arises why would you require fraud or neglect if all you need to establish is that the return is wrong.

95. The Commissioner heard evidence from the Respondent's witness, the Revenue officer who raised the amended assessment for the FY15. Of note, his evidence was that he was not satisfied that there was a full and true disclosure and he was not satisfied with the sufficiency of the return. He stated that he was relying on both sections 959AA and 959AC TCA 1997, in this regard. He testified that in relation to the sufficiency of the return, he was not satisfied with the "profit before capital allowances figure" based on the information received which included the [redacted] transfer pricing report, "*which when looking at, in my view, a correct like for like comparability analysis, it showed that the tax return and that trading profit before capital allowances figure was deficient by a material amount,*

which is the adjustment which I previously mentioned of [redacted]*'*[89] The witness further testified that "*given the deficiency in the disclosure, I was of the view that I had reasonable grounds for believing that a full and true disclosure of all material facts necessary for the making of the assessment was not made by virtue of the deficiency in the disclosure. And also I had regard for the fact that an expression of doubt was not submitted by the taxpayer when filing their original tax return*."[90]

96. Counsel for the Respondent submits that in terms of the requirement for a full and true disclosure, the Revenue officer gave evidence that there was not a full and true disclosure of all material facts and submitted that when a company which comes within Part 35A of the Taxes Consolidation Act, i.e. a multinational dealing with another related entity, "*they are obligated to comply with that section, that part of the Act and they must submit their returns on the basis that an arm's length or a consideration equivalent to the arm's length would be included.*"[91]

97. It was further submitted by Counsel for the Respondent that the thrust of the case, is that did not occur, and the evidence of the Revenue officer was that there was a fundamentally incorrect comparability analysis carried out in the transfer pricing report which sought to justify the figures as presented. When that came to his attention, when he had sight of the transfer pricing reports after the audit commenced, he formed the view that the Appellant's turnover and its consideration and consequently, what would become taxable profits were significantly understated from an arm's length perspective.

98. The Respondent submits that when a company comes within Part 35A TCA 1997, it must ensure that its corporation tax return, reflects an arm's length consideration.[92] It was submitted that there has been a failure to furnish a return that contained a full and true disclosure of all material facts and material facts include the turnover figure that is meant to represent an arm's length level. The Respondent contends that it is reflected in the accounts, that the Appellant was in a loss making position and there was a decision made to exclude the SBAs, which the Respondent states defies section 835C TCA 1997, the transfer pricing portion of the TCA that the Appellant was obliged to abide by. The Respondent submits that there was quite a material understatement of the consideration and consequently, what would become taxable profit by the Appellant.[93]

[89] Transcript Day 4, page 146
[90] Transcript, Day 4, page 146
[91] Transcript Day 6 page 219
[92] Transcript Day 6, page 222
[93] Transcript Day 6, page 223

99. Furthermore, the Respondents contends that the evidence was that not only was there a failure to make a full and true disclosure, but also that there was an insufficiency in the return having regard to the information received by him, namely the transfer pricing reports of [redacted], which the Revenue officer felt were fundamentally flawed. Counsel for the Respondent submitted that the Revenue officer was well within his entitlement to raise the assessment, albeit that it was outside the four year time limit, but he was so permitted, pursuant to 959AA and 959AC TCA 1997.

100. Applying the law to the facts of this appeal, the Commissioner will now consider whether there was a "full and true disclosure" and the "sufficiency of the return" separately, as they are two distinct provisions that the Respondent relies upon to justify its power to raise the assessment for FY15, outside of the four year time limit.

101. Thus, in general terms, sections 959AA and 959AC TCA 1997 are designed to prevent the reopening of the tax affairs of a taxpayer, outside of a four year period, unless it is ultimately established that the relevant return was in fact not full and true in its disclosure. The Commissioner is mindful of the decision in *Droog* and the following passage which states that: "*The substance of that provision is to protect a tax payer who makes a "full and true disclosure" of all relevant facts*. *In such a case no further assessment can be made after the relevant four year period and, importantly, no additional tax is to be paid and no tax is to be repaid by reason of any matter contained in the return*"

102. The Commissioner is satisfied that there no evidence of the Appellant failing to provide a true and full disclosure. The Appellant completed the prescribed CT1 Form of the Respondent. In addition, the Commissioner observes that the return contained the Appellant's audited statutory financial statements prepared by its accountants [redacted]. Of importance, it was put to the Respondent's witness in cross examination that he has not "*pointed to any box on the return that was not ticked, you haven't pointed to any information given on the return other than the profit, the taxable profit which was incorrect or misleading.*"[94]

103. The Commissioner is satisfied that no evidence was adduced that the Appellant failed to tick a box on the return or provided information that was incorrect or misleading. Notably, the evidence of the Revenue officer was that he is not making the case that "*the audited financial statements are not correct.*"[95] It appears to the Commissioner that the basis upon which the Revenue officer considers that there is not a full and true disclosure of all

[94] Transcript Day 4, page 148
[95] Transcript Day 4, page 148

material facts, is that he disagrees with the financial statements such that "*the turnover figure was incorrect on an arm's length basis and based on the comparability analysis.*"[96]

104. In *Hanrahan*, the Revenue Commissioners argued that the ticking of boxes was critical information and the very fact that the standard form assessment requires the chargeable person to indicate certain matters by the ticking of the relevant box demonstrates the importance of these matters. The Commissioner notes that the evidence of the Revenue officer, in relation to his assessment of a full and true disclosure of all material facts, that "*given the deficiency in the disclosure, I was of the view that I had reasonable grounds for believing that a full and true disclosure of all material facts necessary for the making of the assessment was not made by virtue of the deficiency in the disclosure. And also I had regard for the fact that an expression of doubt was not submitted by the taxpayer when filing their original tax return".*[97] Yet there exists no evidence herein of a failure on the part of the Appellant to complete the form in the manner prescribed, which included its statutory audited accounts being furnished with that return which had been audited by independent auditors. The evidence is the Appellant submitted its CT1 with its statutory accounts for the FY15 on 23 September 2016. Thereafter, in December 2021 an amended assessment is raised. In *Stanley*, Peart J. concluded that "*It is reasonable to assume that when he self-assessed his CAT liability at nil, he did so in reliance upon his expert tax advisers' advice, and that this assessment was therefore made to the best of his knowledge, information and belief*". The Commissioner is satisfied that this is analogous to the situation herein.

105. Additionally, the Commissioner observes that the testimony of the Revenue officer was the he was not satisfied with the sufficiency of the return. The Commissioner notes the dictionary meaning submitted by the Respondent and its argument that an incorrect approach was taken in the comparability analysis that gave rise to a very significant understatement. Counsel for the Appellant put to the Revenue officer that "*instead of referring to sufficiency, your power is to raise an assessment if you are not satisfied that the return is correct*." The Commissioner notes that the Revenue officer agreed.[98]

106. The Commissioner is of the view that this was the very issue that the Court had to decide in *Stanley*. In *Stanley*, the legislation specifically required that the return had to be correct, as opposed to sufficient which is the requirement herein. Nevertheless, the Commissioner considers that the decision is useful in terms of interpreting section 959AC(2)(b) TCA 1997. The Commissioner notes that the Respondent submits the Oxford English

[96] Transcript Day 4, page 148
[97] Transcript Day 4, page 146
[98] Transcript Day 4, page 151

Dictionary meaning of "sufficiency" is defined as: "*The condition or quality of being sufficient for its purpose for the end in view, or adequacy*". The Appellant argues that "correct" is a far clearer use of language than "sufficient" and if "correct" does not mean correct, "sufficient" cannot mean correct.

107. The Commissioner is satisfied that the Respondent's case is that the return was insufficient due to the fact that the Respondent disagreed with the amount assessed by the Appellant on foot of its return. The Commissioner is satisfied that the words in section 959AC(2)(b) TCA 1997 are plain and their meaning self-evident such that it is capable of interpretation, having regard to the plain and ordinary meaning of the words and there is no ambiguity. For the same reasons, that Peart J. held in *Stanley* that it cannot possibly be what "correct" means, the Commissioner finds that it cannot be what sufficient means. The Revenue officer's evidence was that he disagreed with the amount assessed. The Commissioner is satisfied that the requirement for a sufficient return does not mean that the figure assessed by the Appellant must coincide with the figure that the Respondent in due course considers to be the correct figure, but is simply the amount which the tax payer honestly believes is the amount of tax which "ought to be paid".

108. A taxpayer who provides a full and true disclosure of all material facts relevant to their own self-assessment of tax has discharged their obligation in delivering the return. In *Stanley*, the return is not rendered incorrect or incomplete on account of the fact that the Respondent wish to assess the taxpayer for a greater amount or on an alternative basis or on the basis that they require further facts to do so. It is precisely in order to allow the investigation and attainment of those additional facts that the Respondent has a four-year period from the end of the year of assessment in which the return is delivered in order to raise their assessment.

109. The question is whether a taxpayer need only include in the return the information relevant to his/her own assessment of the tax due on the return or whether he/she must furnish to the Respondent the facts which the Respondent would require in order for them to raise an assessment for a higher amount. The Commissioner is satisfied that it is not the legislative intent, that the taxpayer must anticipate the information which the Respondent might require in any subsequent consideration of the matter and provide it with their return in order to be protected by the four-year time-limit. The conclusion reached by the Court of Appeal in *Stanley* supports the foregoing approach, albeit that it was dealing with another Act.

110. The legislative provisions provide the Respondent with a reasonable period to examine the return and raise a different assessment if it considers appropriate. This gives certainty

to a tax payer, so that the taxpayer can order their tax affairs. The Commissioner is satisfied that if the Respondent disagreed with the amount assessed by the Appellant on foot of its return, it was required by law to issue a notice of amended assessment not later than four years from the end of the year of assessment in which the return is delivered, as the return was a full and true disclosure of all material facts and moreover, the return delivered was sufficient.

111. If the Commissioner is wrong in her finding in this regard, the Commissioner considers that any findings made in relation to the substantive issue and which relate to the FY16, FY17 and FY18 will be equally applicable to FY15.

Admissibility of Expert Evidence

112. The Respondent raised objections to the admission into evidence of the Expert Reports of the Appellant's expert witness 1 and the Appellant's expert witness 2. The Respondent contends that the expert reports purport to give evidence on the interpretation and application of matters of Irish domestic law and thereby usurp the function of the Appeal Commissioner. It is well-established that evidence of Irish law is inadmissible.[99]

113. The basis of the Respondent's objection is that it considers that large portions of both reports opine on matters of law. The Respondent submits that expert economic evidence is admissible in respect of this to the extent that the experts opine on whether independent enterprises would include or exclude such amounts in pricing similar transactions, but that statements on what the relevant test is are legal submissions and are thus, inadmissible. The Respondent contends that its own expert witness, the Respondent's expert witness 2, gives a view as to what is an arm's length position, but does not get into an analysis of interpreting matters of law.

114. The Respondent argued that from its perspective, it is prejudiced as there are two lengthy expert reports that get into discursive issues of legal opinion and that it is not feasible for Counsel for the Respondent to cross-examine the experts on all aspects of their reports. The Respondent states that cross-examination should be limited to matters of fact, not matters of law, but the Respondent is worried that if something is not questioned, it is therefore in some way accepted, and that is a very major concern of the Respondent.

115. Reference was made to section 949C(1) TCA 1997 which provides that:

"*The Appeal Commissioners may—*

[99] Booklet of Documents, Tab 7, page 66

(a) allow evidence to be given orally or in writing,

(b) admit evidence whether or not the evidence would be admissible in proceedings in a court in the State, or

(c) exclude evidence that would otherwise be admissible where—

> *(i) the evidence was not provided within the time allowed by a direction,*
>
> *(ii) the evidence was provided in a manner that did not comply with a direction, or*
>
> *(iii) they consider that it would be unfair to admit the evidence."*

116. Reference was made to the decisions in *O'Brien v Clerk of Dáil Éireann* [2016] 3 I.R. 384,[100] *O'Carroll v Diamond* [2005] 4 I.R. 41, [101] *Deloitte v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKFTT 479 (TC) *("Deloitte")*[102] and *Blackrock HoldCo 5 LLC v Commissioners for Her Majesty's Revenue and Customs ("Blackrock")* [2020] UKFTT 443 (TC), [2022] UKUT 199 (TCC)[103] The case law sets out the well settled principles that expert evidence is not admissible in respect of any matter of domestic law. In the decision in *O'Carroll v Diamond*, Mr. Justice Hardiman stated that:

"*The input of parties on matters of law is to be by submission and not by evidence*[104]."

117. The Respondent submits that the intermingling of matters of law and evidence prejudices the fair hearing of the matter for the reasons explained in *Deloitte*[105]*.* Moreover, the Respondent submits that the experts go further than that and seek to analyse aspects of the guidelines and to put their own construct on those. The Respondent states that the *Deloitte* decision encapsulates a lot of the concern that the Respondent has in this regard.

118. It is posited by the Respondent that there is a weighing up exercise in terms of possible unfairness to the Respondent if the reports were admitted in evidence. In that regard, reference was made to section 949AC(c)(iii) TCA 1997 which states that: "*The Appeal Commissioners may…… (c)exclude evidence that would otherwise be admissible where— (iii)they consider that it would be unfair to admit the evidence."* In terms of unfairness, the Respondent submits that it arises by the Respondent effectively having to deal with legal arguments on the part of an expert that arise from the report.

[100] Booklet of Authorities, Tab 28
[101] Booklet of Authorities, Tab 25
[102] Booklet of Authorities, Tab 38
[103] Booklet of Authorities, Tab 39 & 40
[104] Booklet of Authorities, Tab 25
[105] Booklet of Documents, Tab 7, page 68

119. Counsel for the Appellant submitted that “it is not economics in a vacuum”.[106] It is the economic principles as set out in the OECD Guidelines. The expert witnesses say what the principles are and then set about trying to apply those principles. The Appellant submits that it would be unhelpful if the experts were to just apply principles without anchoring them in the OECD Guidelines and that it is quite right and proper for the Appellant’s experts to state what the OECD Guidelines say, and on that basis, this is how they think the principles apply.

120. The Appellant made reference to the decision in *Deloitte* and submitted that paragraphs 9 to 15 of that decision are relevant to approaching this matter when this issue arises, not in advance of the hearing as it did in *Deloitte*, but during the course of a hearing. Moreover, Counsel for the Appellant referenced paragraph 15 in *Deloitte* and the decision of *Hoyle -v- Rogers* in the Court of Appeal in England and Wales which at paragraph 53 of that decision states:

> *"53. Insofar as an expert's report does no more than opine on facts which require no expertise of his to evaluate, it is inadmissible and should be given no weight on that account. But, as the judge also observed, there is nothing to be gained, except in very clear cases, from excluding or excising opinions in this category. I agree with what he said in para 117 of his judgment:*
>
> *“Such an exercise is unnecessary and disproportionate especially when such statements are intertwined with others which reflect genuine expertise and there is no clear dividing line between them. In such circumstances, the proper course is for the whole document to be before the court and for the judge at trial to take account of the report only to the extent that it reflects expertise and to disregard it in so far as it does not. As Thomas LJ trenchantly observed in Secretary of State for Business Enterprise and Regulatory Reform v Aaron [2008] EWCA Civ 1146 at para 39:*
>
> *“It is my experience that many experts report views on matters on which it is for the court to make its decision and not for an expert to express a view. No modern or sensible management of a case requires putting the parties to the expense of excision; a judge simply ignores that which is inadmissible.””*

121. Following submissions being made, the parties submitted to the Commissioner that there is agreement that the Respondent will not be expected to cross-examine the Appellant's experts on issues of law or relating to their interpretation of the OECD Guidelines and that the Appellant will not make any point alleging that the Respondent failed to put any

[106] Transcript, Day 2, page 95

issue to the witnesses, such that there would be no prejudice arising to the Respondent therefrom. Moreover, in making closing legal submissions each side will identify the legal principles at issue, the portions of the OECD Guidelines and the TCA 1997 which they rely on and will apply those to the economic evidence. The Respondent confirmed that there is no longer objection to the Appellant's expert reports being admitted with that caveat.[107]

122. The Commissioner indicated from the outset, when the objection was raised by the Respondent, that the Commissioner considered that the appropriate manner in which to proceed is for the Commissioner to consider the reports and determine what is admissible or not, in the normal course, rather than any consideration of excluding the expert reports in their entirety (or large portions of same).

123. The Commissioner is mindful of the recent decision in *Duffy v McGee & Another* [2022] IECA 254 ("Duffy")[108] wherein evidence of the expert acting for the defendant, had given rise to concern on the part of the High Court which found the evidence proffered by the expert could not be described as independent or unbiased. His specialism was in the space of toxicology, yet his report, among other matters, expressed views on legal issues and doctrines, questioned whether the plaintiffs were telling the truth and purported to give his opinion on psychiatric reports and medical reports which were exchanged, even though these areas were not within his discipline. The High Court proceeded to entirely exclude his evidence on this basis. On appeal, Mr Justice Noonan in the Court of Appeal, held that the High Court was correct to exclude the evidence, and found that the report prepared by the expert contained "red-flags" and that the expert had seriously abused his position. The expert had also relied on two papers which the Court described as "industry generated" and which had not been peer reviewed. The Court found the expert had made no attempt to consider any alternative scenario in respect of some strongly disputed facts, and simply took his clients' instructions at face value. Noonan J. held that:

> *"I am satisfied the trial judge was perfectly correct to exclude Dr Thompson's evidence in its entirety. There was in this case such an abject failure to comply with the most basic obligation of an expert, namely, to be objective and impartial, as to render all of Dr Thompson's evidence inadmissible."*

124. The Commissioner is satisfied that the Appellant's experts herein, did not fall into such significant failure as to warrant the entirety of the Appellant's expert reports being declared inadmissible. The Commissioner is satisfied that she can proceed to consider

[107] Transcript Day 2, page 109, line 1-2
[108] *Duffy v McGee & Another* [2022] IECA 254

the reports and decide what is admissible or not, in addition to the weight to attach to the opinions therein. Moreover, the Commissioner found the evidence of the expert witnesses in this appeal to be credible and they assisted the Commissioner greatly with regard to the issues to be considered in this appeal. The role of an expert is to assist the Court or Tribunal, but must not usurp the role of the Judge or Commissioner herein, as the ultimate decision maker. It is for the Commissioner to assess the adequacy and persuasiveness of the expert's evidence.

125. The Commissioner notes that the Appellant's expert witness 1, the Appellant's expert witness 2 and the Respondent's expert witness 2 expressed similar views in terms of their evidence, with the Respondent's expert witness 2 stating that he was 99% in agreement with the testimony of the Appellant's expert witness 1. The Commissioner considers that the evidence of the Respondent's expert witness 1, in relation to the accounting treatment, was uncontroversial.

Accounting standards and section 76A TCA 1997

126. International Financial Reporting Standards ("IFRS") and Generally Accepted Accounting Practices "GAAP") consist of "accounting standards". Accounting standards set out the detailed accounting rules for recognising and measuring income and expenses, assets and liabilities in a company's financial statements. Accounting standards provide a standardised way of describing the company's financial performance, thus allowing comparisons over time and between companies.

127. Section 76A TCA 1997 consists of five subsections which set out the methodology for computing a company's Case I and Case II profits. This section provides that, for the purposes of Case I or Case II, a company's taxable profits are to be computed in accordance with generally accepted accounting practice subject to any adjustment required or authorised by law. It is the profits of the company's trade or profession which are assessable to tax under Case I and Case II of Schedule D, not the accounting profits of the company itself. Subsection 1 contains the general rule of following the financial statements as computed under IFRS or GAAP in preparing the company's taxable profits, unless subject to any adjustment required or by law.

128. The Appellant's accounting treatment of the SBAs is not in dispute between the parties. The Appellant's financial statements for the relevant years have been prepared in accordance with FRS 102. The Respondent's expert witness 1 testified that for the relevant years, the Appellant recorded SBAs in accordance with section 26 of FRS 102. The witness testified that "*despite the fact that the SBC remuneration is settled by [the*

parent company] and not [the Appellant], the Appellant is required to charge an expense to the profit and loss account under Section 26.1A and this has been complied with".[109] The witness gave evidence that "*it is my opinion, therefore, that the company has correctly reported the SBC as an operating expense in arriving at its profit and loss for each of the four years ended 31st December 2018 and recorded the corresponding entry within equity*".[110]

129. Moreover, the Respondent's expert witness 1 testified that "*Accounting standards require SBC to be included as an operating expense in the profit and loss account of the Appellant even if there is no actual cash outlay to the party issuing the shares (i.e. [the parent company]) as otherwise the operating expenses would be understated and the profits overstated and thus fail to provide a true and fair view. SBC is both an alternative and an addition to cash based employee remuneration*".[111]

130. The Commissioner considers the uncontroverted evidence of the Respondent's expert witness 1 to be uncontroversial and it assisted her in considering the rationale for the accounting treatment of the SBAs issued by the parent company and recorded in the Appellant's accounts. The Commissioner notes that it is on the basis that the SBAs are provided to the Appellant's employees that FRS 102 applies and consequently, it must account for that expense in its profit and loss account, despite the SBAs being issued by the parent company and not the Appellant.

131. The evidence of the Appellant's witness 3 is that the SBAs are included in the Appellant's financial statements, because this is the exactly what is provided for in FRS 102. The Appellant's witness 3 stated that it does not matter whether the SBAs are settled by the reporting entity or by another entity within the group, it is required to be included as an expense in the financial statements of an entity which receives the services related to that, so services from employees who receive the SBAs.[112]The Appellant's witness 1 testified that it was his understanding that the expense is then excluded from the cost of the services provided to the parent company, as the SBAs are not seen as a cost incurred by the Appellant, it as an accounting entry, a notional expense and, therefore, as a cost not incurred it should not form part of the cost base to determine the intercompany price that should be charged to the parent company.[113]The Appellant's witness 1 testified that

[109] Booklet of Documents, Tab 16, page 288
[110] Booklet of Documents, Tab 16, page 289
[111] Booklet of Documents, Tab 16, page 292
[112] Transcript, Day 3, page 18, line 1-15
[113] Transcript, Day 1, page 120, line 14 – 25

the accounts of the Appellant reflect a positive cash balance and its equity position is positive.[114]

132. Of note, the Appellant's witness 3 testified that other EMEA countries under her remit for example in [redacted], do not have to account for the SBAs in their financial accounts as the accounting standards used therein, do not mandate it. The witness confirmed that these entities do not include the cost of the SBAs in their cost base for intercompany services and are not showing a loss in their financial statements.[115]

133. The Appellant submits that despite the assertions of the Respondent, the Appellant was profitable every year, as what it has is accounting losses, because of an accounting entry. It is submitted that the Appellant does not have actual losses, because it does not have an actual expense, in other words it does not have economic losses, because it did not incur the economic expense.

134. The Appellant's expert witness 1 testified that it was his understanding that the reason the Appellant was reporting a statutory loss is that, while it was receiving revenues that covered only its own incurred costs namely, salary, bonus and other staff incurred costs, it was for financial accounting purposes, having to reflect as an expense the deemed accounting charge for the SBAs which was issued by the parent company. In other words, for statutory accounting purposes it was reflecting a cost for which it had not received a compensating revenue and thus, for statutory financial purposes it was indeed incurring a loss.[116] He testified that the "*question that market participants or investors would look at is, what is the true economic cash-flow of the business as against its statutory financial profit or loss? And to the extent that the underlying business operations of the company are generating positive cash flow, they would still be willing to invest in the company.*"[117]

135. The Appellant's expert witness 2 testified that it was also his understanding that accounting loss arises from the fact that the SBAs are treated as an expense in the accounts.[118]

136. The Commissioner considers it useful to address why the Appellant's accounting operating profits were significantly negative when its profits, on which it paid taxes, were positive. The Appellant recognised the SBAs accounting expense each year in its audited

[114] Transcript, Day 1, page 169, line 21-25
[115] Transcript, Day 3, page 28, line 5-21
[116] Transcript, Day 3, page 130-131
[117] Transcript, Day 3, page 130
[118] Transcript, Day 4, page 113

financial statements. The Appellant's expert witness 1 addresses these matters in his expert report and states that "*Since its intercompany revenues from the parent company were computed on a measure of costs that did not include SBA accounting expenses, [the Appellant] did not receive any revenue to cover these expenses. Therefore, [the Appellant] reported a substantial operating loss in its statutory financial statements, driven by significant SBA accounting expenses for which [the Appellant] did not earn any revenues (or "income")*"[119]. The Appellant's expert witness 1 sets out his understanding of the Appellant's profits for the relevant years at Table 1[120] in his expert report. The Commissioner notes that a similar explanation as to the Appellant's losses in its accounts was provided by the Appellant's witness 1 and the Appellant's witness 3.

137. The Commissioner is satisfied that it is not in dispute that the SBAs expense recognised in the Appellant's financial statements represented a fair value of the SBAs. The fair value of the SBAs was measured by reference to the Black-Scholes pricing model, which from an accounting perspective follows industry norms. This is not in dispute between the parties.

138. Moreover, the Commissioner is satisfied that the accounting treatment of the Appellant is not determinative of the issues in this appeal and that the SBAs expense is reflected in the Appellant's financial accounts, in accordance with FRS 102.

Transfer Pricing Legislation in Ireland and the OECD Guidelines

139. Formal transfer pricing legislation was introduced in Ireland for the first time through the Finance Act 2010 for accounting periods commencing on or after 1 January 2011 in respect of transactions, the terms of which were agreed on or after 1 July 2010. Ireland's transfer pricing legislation is set out in Part 35A TCA 1997.

140. The Finance Act 2019 introduced significant changes expanding the scope and application of the rules, with section 27 of that Act substituting this new Part 35A and updating the legislation to refer to the 2017 OECD Transfer Pricing Guidelines. The transfer pricing rules were further updated by the Finance Act 2021, which inserted a new section 835E which provides for an exclusion from the application of the transfer pricing rules to the computation of non-trading income in certain circumstances. The Finance Act 2022 amended the definition of 'transfer pricing guidelines' in section 835D to refer to the updated Transfer Pricing Guidelines published by the OECD in January 2022.[121]

[119] Booklet of Documents, Tab 13, page 157
[120] Booklet of Documents, Tab 13, page 157
[121] Notes for Guidance - Taxes Consolidation Act 1997 Finance Act 2023 edition Part 35A Transfer Pricing, Revenue Commissioners

141. The transfer pricing legislation applies to any "arrangement" involving the supply and acquisition of goods, services, money or intangible assets. For these purposes, "arrangement" is very broadly defined and it captures any kind of agreement or arrangement whether it is, or is intended to be, legally enforceable.

142. The transfer pricing legislation applies where the supplier and acquirer in question are "associated". Two persons are associated if one person participates in the management, control or capital of the other, or the same person participates in the management, control or capital of each of the two persons. However, the first person is participating in the management, control or capital of the other person only if that other person is a company controlled by the first person. The transfer pricing rules will, therefore, necessarily involve at least one corporate entity. The transfer pricing rules do not apply in a single corporate entity. Therefore the transfer pricing rules do not apply in determining the pricing as between the head office of a company and a branch of that company. For the purposes of this appeal, the Appellant and the parent company are associated and this is not in dispute.

143. The Irish transfer pricing legislation should be construed to ensure, as far as practicable, consistency with the OECD Guidelines. Broadly, the transfer pricing rules require domestic and international transactions between associated persons to be entered into at arm's length. Where an arrangement between associated entities is made otherwise than at arm's length, an adjustment can be made to the Irish company profits. There is dispute as to whether an adjustment is made only to profit as contended for by the Appellant or to consideration and thereafter profit as a result, as contended for by the Respondent.

144. Irish tax legislation requires that the profits or gains of a trade carried on by a company must be computed in accordance with GAAP, subject to any adjustment required or authorised by law.

Transfer Pricing Framework

OECD Guidelines

145. The Commissioner considers it useful at this point, to set out a number of paragraphs of the OECD Guidelines referred to and relied on by the parties during the course of the appeal.

146. The purpose of the **arm's length principle** is set out at paragraph 6 of the Preface of the OECD Guidelines which states that:

"*6. In order to apply the separate entity approach to intra-group transactions, individual group members must be taxed on the basis that they act at arm's length in their transactions with each other. However, the relationship among members of an MNE group may permit the group members to establish special conditions in their intra-group relations that differ from those that would have been established had the group members been acting as independent enterprises operating in open markets. To ensure the correct application of the separate entity approach, OECD member countries have adopted the arm's length principle, under which the effect of special conditions on the levels of profits should be eliminated".*[122]

147. The primary purpose of the **OECD Guidelines** is set out at paragraph 15 of the Preface of the OECD Guidelines which states that:

"*15. OECD Member countries continue to endorse the arm's length principle as embodied in the OECD Model Tax Convention (and in the bilateral conventions that legally bind treaty partners in this respect) and in the 1979 Report. These Guidelines focus on the application of the arm's length principle to evaluate the transfer pricing of associated enterprises. The Guidelines are intended to help tax administrations (of both OECD member countries and non-member countries) and MNE's by indicating ways to find mutually satisfactory solutions to transfer pricing cases, thereby minimising conflict among tax administrations and between tax administrations and MNEs and avoiding costly litigation. The Guidelines analyse the methods for evaluating whether the conditions of commercial and financial relations within a MNE satisfy the arm's length principle and discuss the practical application of those methods*."[123]

148. The Commissioner notes that the fundamental principle that underlies the guidelines is the arm's length principle. The arm's length principle is an international standard that OECD member countries have agreed should be used for determining transfer prices for tax purposes. It is the standard that would be applied between two independent parties each operating in accordance with their own profit maximising interests and is set forth in **Article 9(1)** of the OECD Model Tax Convention which states that:

"[when] conditions are made or imposed between … two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions,

[122] Booklet of Authorities, page 64
[123] Booklet of Authorities, page 66

have not so accrued, may be included in the profits of that enterprise and taxed accordingly."[124]

149. Of note, is paragraph 1.3[125] and paragraph 1.6[126] of the OECD Guidelines which state that:

> "*1.3 When transfer pricing does not reflect market forces and the arm's length principle, the tax liabilities of the associated enterprises and the tax revenues of the host countries could be distorted. Therefore, OECD member countries have agreed that for tax purposes the profits of associated enterprises may be adjusted as necessary to correct any such distortions and thereby ensure that the arm's length principle is satisfied. OECD member countries consider that an appropriate adjustment is achieved by establishing the conditions of the commercial and financial relations that they would expect to find between independent enterprises in comparable transactions under comparable circumstances.*
>
> *1.6 By seeking to adjust profits by reference to the conditions which would have obtained between independent enterprises in comparable transactions and comparable circumstances (i.e. in "comparable uncontrolled transactions"), the arm's length principle follows the approach of treating the members of an MNE group as operating as separate entities rather than as inseparable parts of a single unified business. Because the separate entity approach treats the members of an MNE group as if they were independent entities, attention is focused on the nature of the transactions between those members and on whether the conditions thereof differ from the conditions that would be obtained in comparable uncontrolled transactions. Such an analysis of the controlled and uncontrolled transactions, which is referred to as a "comparability analysis", is at the heart of the application of the arm's length principle"*.

150. The Commissioner is satisfied that the arm's length principle stipulates that the terms at which related parties transact with each other, and the profits arising from these terms, should reflect the terms and related profit outcomes in comparable transactions conducted by unrelated or independent entities in a market setting.[127] Moreover, by attributing income to entities within an affiliated group in a fashion similar to how income would be distributed between unrelated parties in market transactions, the arm's length principle ensures that entities within the group receive incomes that properly reflect the

[124] Booklet of Authorities, page 79
[125] Booklet of Authorities, page 78
[126] Booklet of Authorities, page 79
[127] 2010 OECD Guidelines, paragraph 1.6

market values of their economic contributions to the group's collective activity.[128] In this regard, the Commissioner notes that there should be a comparison of the results of the related party transaction in question to the results of comparable transactions between uncontrolled parties under comparable circumstances.

151. The OECD guidelines are a basis for resolving transfer-pricing matters between member countries that may have differing internal transfer-pricing rules and regulations. In doing so, the guidelines advise that "*transfer pricing is not an exact science but does require the exercise of judgment on the part of both the tax administration and taxpayer.*"[129]

152. The Commissioner notes that in providing guidance for applying the arm's length principle in making comparisons, paragraph 1.36 of the 2010 OECD Guidelines provides that:

> "*1.36…in making these comparisons, material differences between the compared transactions or enterprises should be taken into account. In order to establish the degree of actual comparability and then to make appropriate adjustments to establish arm's length conditions (or a range thereof), it is necessary to compare attributes of the transactions or enterprises that would affect conditions in arm's length transactions. Attributes or 'comparability factors' that may be important when determining comparability include the characteristics of the property or services transferred, the functions performed by the parties (taking into account assets used and risks assumed), the contractual terms, the economic circumstances of the parties, and the business strategies pursued by the partie*s.

153. The OECD Guidelines describe transfer pricing methods that can be used to assess whether transactions between associated enterprises are at arm's length. The methods are described are (a) Traditional Transaction Methods, and (b) Transactional Profit Methods. The Commissioner will deal with the chosen method, namely the TNMM, hereunder, subsequent to her consideration of the statutory scheme herein.

The statutory scheme – Section 835 TCA 1997

Section 835C TCA 1997

154. The profit which the Appellant earned from the services provided by the Appellant are within the charge to tax under Case I of Schedule D. Section 835A to section 835H of Part 35A TCA 1997 sets out the Irish transfer pricing legislation and the obligations to be met within the scope of the transfer pricing rules.

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[128] Booklet of Documents, Tab 13, page 159
[129] 2010 OECD Guidelines, paragraph 1.13

155. While Part 35A was substantially amended by Finance Act 2019 with effect from 1 January 2020, and later by Finance Act 2021 with effect from 1 January 2022, when the Commissioner is addressing the various applicable sections hereunder, she is dealing with the provisions as they were in force during the relevant period, prior to amendment.

156. It is agreed that the Appellant and the parent company are "associated" for the purposes of section 835B TCA 1997.[130] The Commissioner has found this to be a material fact.

157. Section 835C(1) TCA 1997[131] stipulates that the transfer pricing rules apply "*to any arrangement.*" The Commissioner is satisfied that the "arrangements" which are to be priced throughout the relevant period are the services provided under the services agreement.

158. Section 835C(2) TCA 1997 sets down the basic rule for transfer pricing. In the circumstances herein, section 835C(2)(b) TCA 1997 applies, which states that:

> "*<u>if the amount of the consideration receivable</u> (in this Part referred to as the ' actual consideration receivable') under any arrangement to which this section applies <u>is less than the arm's length amount</u>, then the <u>profits</u> or gains or losses <u>of the supplier</u> that are chargeable to tax under Case I or II of Schedule D <u>shall be computed as if the arm's length amount were receivable instead of the actual consideration receivable</u>*". [Emphasis added]

159. Section 835C(3) TCA 1997 defines the "arm's length amount" and provides that the arm's length amount in relation to an arrangement is:

> "*the amount of the consideration that independent parties would have agreed in relation to the arrangement had those independent parties entered into that arrangement*".

160. The underlying premise is that related party transactions should take place at arm's length. The arm's length principle is the international standard that OECD member countries have agreed should be used for determining transfer prices for tax purposes. An analysis of controlled and uncontrolled transactions, which is referred to as a "comparability analysis", is at the heart of the application of the arm's length principle. The Commissioner will deal with the matter of comparability analysis in more detail hereunder in this determination.

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[130] Booklet of Authorities, Tab 6
[131] Booklet of Authorities, Tab 7

Section 835D TCA 1997

161. Importantly, section 835D(2) TCA 1997[132] builds on the section 835C TCA 1997, with what the Commissioner considers to be additional and necessary interpretative guidance which states that:

> *(2) For the purpose of computing profits or gains or losses chargeable to tax….. this part shall be construed to ensure, as far as practicable, consistency between -*
>
> *(a) the effect which is to be given to section 835C, and*
>
> *(b) the effect which, in accordance with the transfer pricing guidelines, would be given if double taxation relief arrangements incorporating Article 9(1) of the OECD Model Tax Convention applied to the computation of the profits or gains or losses, regardless of whether such double taxation relief arrangements actually apply.*"[133]

162. Section 835D TCA 1997 specifically refers to Article 9(1) of the OECD Model Tax Convention. Article 9(1) of the OECD Model Tax Convention provides that:

> "*Where… conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any <u>profits which would, but for those conditions</u>, have accrued to one of the enterprises, <u>but, by reason of those conditions, have not so accrued</u>, <u>may be included in the profits</u> of that enterprise and <u>taxed accordingly</u>"*.[134] [Emphasis added]

163. The term "transfer pricing guidelines" is defined in section 835D TCA 1997 as meaning the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (22 July 2010) ("the OECD Guidelines"). Moreover, Article 9(1) of the OECD Model Tax Convention is specifically defined in section 835D TCA 1997 as meaning:- "*the provisions which, at the date of the passing of the Finance Act 2010, were contained in Article 9(1) of the Model Tax Convention on Income and Capital published by the OECD.*"[135]

164. It follows that the determination of the appropriate "arm's length amount" for the purposes of a given arrangement is a core issue in the application of Part 35A. In terms of statutory construction, the Commissioner is satisfied that during the relevant years, Part 35A TCA

[132] Booklet of Authorities, Tab 8
[133] Booklet of Authorities, Tab 8
[134] Booklet of Authorities, Tab 22, page 79
[135] Booklet of Authorities, Tab 8

was required to be construed in a manner which would ensure consistency between section 835C TCA 1997 and Article 9(1) of the OECD Model Tax Convention.

165. Having regard to section 835D TCA 1997, the Commissioner is satisfied that the clear statutory intent is that Part 35A should be interpreted to ensure consistency between section 835C TCA 1997 and Article 9(1). The Commissioner considers that there exists no ambiguity to section 835D(2) TCA 1997 and the section is capable of a literal interpretative approach having regard to the plain and ordinary meaning of the words, in context. Of note, the Respondent's own guidance in relation to the application of section 835D TCA 1997 states that *"[t]he section effectively ensures that the OECD guidance is applied in Irish law*".[136] Objectively viewed, the Commissioner is satisfied that this is the intention of section 835D(2) TCA 1997.

Interpretation of section 835C(2)(b) TCA 1997 - an adjustment to consideration or profit

166. Having considered section 835D TCA 1997 and looking back now to consider the provisions of section 835C TCA 1997 in light of section 835D TCA 1997, the Commissioner notes the words in section 835C(2) TCA 1997 that:

> "*if the amount of the consideration receivable………..is less than the arm's length amount, then the* ***profits****…….that are chargeable to tax shall be* ***computed*** *as if the arm's length amount were receivable instead of the actual consideration receivable*".

167. The Commissioner is satisfied that on a plain and ordinary reading of the section the "*arm's length amount*" of consideration under an arrangement refers to the amount of consideration that independent parties dealing at arm's length would have agreed. The Commissioner notes that section 835C(3) defines "arm's length amount" and states that:

> "*for the purposes of this section the 'arm's length amount' in relation to an arrangement is the amount of the consideration that independent parties would have agreed in relation to the arrangement had those independent parties entered into that arrangement*".

168. The Commissioner considers that section 835C(2)(b) TCA 1997 refers equally to both consideration and profit. The Commissioner is satisfied that there exists no ambiguity, such that the words are plain and their meaning self-evident and the section is capable of a literal interpretation in accordance with subparagraph (a) in *Perrigo*. The Commissioner is satisfied that she must also consider the words in context as required by subparagraph (b) in *Perrigo*. Moreover, the Commissioner is satisfied that having

[136] Notes for Guidance - Taxes Consolidation Act 1997 Finance Act 2023 edition Part 35A Transfer Pricing, Revenue Commissioners December 2023

regard to recent judicial guidance on statutory interpretation, "*what counts is the objective meaning of the words*".[137]

169. The section mandates that if the consideration receivable in a transaction is less than the arm's length amount, then the profits that are chargeable to tax <u>must be computed</u> as if the arm's length amount of consideration is receivable (rather than the actual consideration received). The Commissioner considers that the operative words in the sentence are profits and computed. The word computed in this context is a verb and the Oxford English Dictionary meaning of the word "compute" is to determine by arithmetical or mathematical reckoning; to calculate, reckon, count. The Commissioner is satisfied that the section is telling the reader that the profits chargeable to tax must be calculated having regard to the arm's length consideration that should have been received.

170. The Respondent argues that the section mandates that consideration is adjusted in order to calculate the taxable profit that would have been due. However, the Commissioner is satisfied that the section does not contain the word "adjust" or the like, and it is not permissible for the Commissioner to read words into a statute.

171. Furthermore, both sections 835C and section 835D TCA 1997 refer to the computation of profit chargeable to tax. The references in section 835D TCA 1997, reinforce this interpretation, such that it provides that section 835C TCA 1997 must be interpreted in accordance with Article 9(1) of the OECD Model Tax Convention, which in turn states that it is profits that are adjusted by reference to the conditions which would have obtained between independent enterprises in comparable transactions and comparable circumstances, and which profits are then taxed accordingly.

172. The Commissioner is satisfied that the words require that consideration is evaluated, but an adjustment is made to profits for the purposes of taxation, having regard to the requirements in section 835D(2) TCA 1997 and their application to 835C TCA 1997. The Respondent's argument that it is consideration that is adjusted is incorrect as this is not what is provided by the statute. It is the profits that are to be computed, having regard to the consideration that should have been received. Both Article 9(1) and the OECD Guidelines are consistent that it is an adjustment to profit that is required. The transfer pricing rules contained in section 835C TCA 1997 are to be construed in such a way as to ensure, as far as possible, consistency with Article 9(1) of the OECD Model Tax Convention. The Commissioner notes that the Respondent's own guidance in relation to

[137] O'Meara v The Minister for Social Protection, Ireland and the Attorney General [2024] IESC 1, paragraph 18, Judgment of Mr. Justice Gerard Hogan delivered the 22nd day of January 2024

the application of section 835D TCA 1997, which states that: *"[t]he section effectively ensures that the OECD guidance is applied in Irish law*".[138]

173. The object of statutory interpretation is always to give effect to the intent of the legislature. The meaning of the words used in a statutory provision must be understood in the context in which they are used. To interpret section 835C TCA 1997 in the manner contended for by the Respondent, would be a departure from the OECD Guidelines and affront to the intention and purpose of section 835D TCA 1997, the purpose of which is to ensure consistency between section 835C and Article 9(1). As stated, the Commissioner is mindful of the dicta of Murray J. in *Heather Hill*, in particular wherein he states that "*the literal and purposive approaches to statutory interpretation are not hermetically sealed".*

174. The Commissioner is satisfied that on an plain and ordinary reading of the words "*the profits… that are chargeable to tax shall be computed as if the arm's length amount were receivable instead of the actual consideration receivable"* read in accordance with what is mandated by section 835D TCA 1997, namely that it is construed in a manner consistent with Article 9(1), the meaning of the words in context are that it is the profits that are to adjusted.

175. The Respondent argues that Article 9(1) does not require an adjustment to taxable profits, rather it requires consideration of the conditions imposed and it is agreed that conditions is consideration. The Respondent states that the profits are then calculated on the basis of the profits which would have accrued, but for those conditions and are then taxed accordingly and that this is consistent with the approach in section 835C TCA 1997. In addition, the Respondent argues that paragraph 1.6 of the OECD Guidelines is supportive of the position that profits are adjusted by reference to the conditions and there is absolutely no conflict between section 835(2)(b) TCA 1997 and Article 9(1). The profit adjustment flows from the replacement of the actual consideration with the arm's length amount in the computation.

176. As stated, the Commissioner is satisfied that there exists no ambiguity and the sections are capable of a literal interpretation. The Commissioner is satisfied that on a plain and ordinary reading of the legislative provisions, in context, such that the intention of sections 835C and 835D TCA 1997, is to address a situation whereby if arm's length consideration is not receivable, then it is the **profits** that are to be **computed**, having regard to the arm's length consideration that should have been received. It is true to state that section 835C TCA 1997 is concerned with arm's length consideration. However, in accordance

[138] Notes for Guidance - Taxes Consolidation Act 1997 Finance Act 2023 edition Part 35A Transfer Pricing, Revenue Commissioners December 2023

with section 835D TCA 1997 the words *"..then the profits or gains or losses of the acquirer that are chargeable to tax shall be computed as if the arm's length amount were payable….*", considered in context, provide that it is profit that is to be recalculated/computed or adjusted for tax purposes, as opposed to consideration.

177. It is clear to the Commissioner that Article 9(1) is unambiguously focussed on determining the profit, despite the suggestion by the Respondent that it is focused on consideration. It was agreed by the parties for the purposes of interpretation that the word "conditions" in Article 9(1) is to be interpreted as consideration. The Commissioner heard evidence from the Appellant's expert witness 1, the Appellant's expert witness 2 and the Respondent's expert witness 2 who were all in agreement that the OECD rules require an adjustment to profit.

178. The statutory construction is such that it ensures that when properly read, it is the profits that are to be adjusted, not the consideration for the services rendered. The Commissioner considers that this is the intention of the legislative scheme. Whilst consideration is considered, it is not adjusted, rather it is the profit that may be adjusted or computed to use the wording of the statute. The statute contains no words to the effect that it is consideration that is to be "computed" or "adjusted".

179. The OECD guidelines make it clear that any required adjustment to profits should be considered in light of matters such as the interquartile range. On the Respondent's argument, the interquartile range is of no relevance. The interpretation contended for by the Respondent is both anomalous and implausible.

180. The Commissioner is satisfied that in accordance with the legislative scheme, it is the profits for Case I or II of Schedule D which are required to be adjusted by section 835C(2) TCA 1997.

The Transactional Net Margin Method - TNMM

181. In order to determine the arm's length outcomes for an intercompany transaction, it is necessary to identify independent entities transacting comparable products.[139]The TNMM seeks directly to benchmark the net (or operating) profits (relative to an appropriate base such as costs, revenues or assets) earned by independent firms whose functions, risks and assets in market transactions with unrelated parties are comparable to those of affiliated entities engaged in intercompany transactions.[140]

[139] Booklet of Documents, Tab 13, page 160
[140] Booklet of Documents, Tab 13, page 163

182. The Commissioner observes that based on its analysis, [redacted] concluded that the TNMM was the most appropriate method to test the Appellant's profits from its intercompany service transactions with the parent company. The Commissioner notes the 2018 [redacted] report wherein it outlines the rationale for the choice of method and states that *"[t]he TNMM was selected as the most appropriate method to test the arm's length nature of the Covered Transactions. None of the other transfer pricing methods were considered more appropriate. The TNMM is less sensitive to differences in comparability than the other transfer pricing methods*".[141]

183. Hence, the TNMM was used herein and the Commissioner considers this to be a material fact, not in contention between the parties. The parties are in agreement that the TNMM is the most appropriate method to test the Appellant's profits during the relevant years and that the MTC or NCP was the most appropriate net profit indicator for evaluating the arm's length profits of the Appellant under the TNMM, "*as it is appropriate to use in the context of the provision of intercompany services*".[142]

184. The Commissioner notes that the Appellant's expert witness 1 explains the choice of net profit indicator, such that potentially comparable firms used in a TNMM analysis are likely to differ in their operating scale from each other and from the tested party, so it is important to express their net profits as a ratio of a base such as revenues, costs, or assets that appropriately reflects the scale of each firm's activity. These ratios are referred to as net profit indicators.[143]

185. The Commissioner notes the useful example of the MTC provided by the Appellant's expert witness 1 in his report wherein he states that *"[s]uppose a company incurs a cost of €100 in delivering certain services to a client. Further, suppose that given the typical profit margins observed for such services, the company should earn a profit from these services representing 10% of the company's costs. This percentage represents a mark-up on total costs, or MTC".*[144]

186. The Commissioner understands from the Appellant's expert witness 2 that where net cost plus is used as the profit level indicator ("PLI"), the objective is to identify the profits earned by the independent comparable service providers relative to their costs. In so doing, it is necessary to ensure the cost base of the comparable companies and tested

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[141] Booklet of Documents page 422
[142] Booklet of Documents page 423
[143] Booklet of Documents, Tab 13, page 166
[144] Booklet of Documents, Tab 13, page 168-169

party are measured in the same way, so as to ensure consistency in the denominator used in the net cost plus calculation.[145]

187. The Commissioner notes the opinion of the Appellant's expert witness 1 in this regard, wherein he states that *"[t]he mere fact that an entity recognizes certain expenses in its financial statements under the applicable accounting standards does not imply that these expenses should be included in the base of a cost plus or TNMM analysis. The central question is whether these expenses reflect an economic cost borne by the tested party."*[146]

188. The Appellant engaged [redacted] to perform a transfer pricing analysis to determine if the Appellant's operating profits from the provision of services to the parent company were consistent with the arm's length standard for the relevant years. The Commissioner has considered the Transfer Pricing reports ("the TP reports") prepared by [redacted].[147]The Respondent takes issue with the TP reports in terms of the manner in which the comparability exercise was undertaken. This is dealt with in detail by the Commissioner later in her determination.

189. The Commissioner understands from the evidence adduced, that in order to determine the range of arm's length MTCs associated with the Appellant's services, [redacted]identified sets of firms performing activities comparable to those performed by the Appellant for the parent company. For each comparable firm, [redacted] computed the weighted average MTC in the three fiscal years prior to the year for which the Appellant's outcome was being tested and it came to a number of conclusions, *inter alia* that the MTCs stipulated in the services agreement and earned by the Appellant were within the arm's length MTCs range earned by comparable firms during the Audit Period and it was appropriate to exclude the SBAs accounting expense from the base of costs on which the Appellant was entitled to earn a profit mark-up at arm's length. The TP reports note that the costs are borne by the parent company and not the Appellant and accordingly, the SBAs accounting expense did not reflect a cost incurred by the Appellant, and that the profit mark-up the Appellant earned at arm's length should reflect only the costs it incurred.

190. The Respondent contends that it was not appropriate to exclude the costs of the SBAs. The Appellant contends that the Respondent implied that there was something untoward or mischievous going on in the transfer pricing reports[148]. Having considered the reports and the evidence of the experts herein, the Commissioner does not consider the

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[145] Booklet of Documents, Tab 14, page 238
[146] Booklet of Documents, Tab 13, page 167
[147] Booklet of Documents, Tab C
[148] Transcript, Day 7, page 21

Respondent's argument to be persuasive in that regard. The Appellant submits that the reports are not hugely relevant to this appeal, in circumstances where it is agreed that the margin is 5%-15%.[149] The Appellant submits that the [redacted] reports do not assist with the question of whether the cost of the SBAs should be excluded. The Commissioner agrees with that submission, having considered the reports and the evidence adduced in this appeal.

191. As the use of the TNMM is agreed, the Commissioner does not propose to deal with its application in any further detail, except to state that it is relevant and arises in due course when the Commissioner deals with her consideration of the correct cost base. The purpose of the TNMM is not to directly identify consideration, it is to identify the margin that an arm's length third party would make if it were to engage in this transaction. It appears to the Commissioner that the experts, namely the Appellant's expert witness 1, the Appellant's expert witness 2 and the Respondent's expert witness 2 are all in agreement that the TNMM does not tell you the costs to which the margin applies.

192. Therefore, the issue that remains to be determined herein, is whether or not it was correct to exclude the SBAs expense from the Appellant's cost base. The central disagreement between the parties relates to whether the Appellant's SBAs accounting expense should be included in the cost base that it is entitled to a mark-up on when determining the Appellant's operating profits. The Respondent asserts that at arm's length, the Appellant would earn a profit mark-up, not only on the operating costs taken into account by [redacted] but also on the SBAs accounting expenses.

The SBAs

(i) The global nature of the business and mobility of employees

193. The Commissioner heard evidence from the Appellant's witnesses as to the global nature of the business of the parent company and its subsidiaries and the mobility of its employees. The evidence was that it takes a flexible approach to the location in terms of hiring employees. The rationale being that this would allow it to secure the best talent for the role, regardless of where the employee are based. The witnesses described global reporting structures and teams that are scattered around the globe. This is not an unusual occurrence. The Appellant's witness 2 testified that there is no management team in [redacted] overseeing [redacted] and most heads of function are based in the [redacted]. She stated that the reason for that is that as an organisation, the reporting line is within each function, rather than country. The witness said that for example, she is based in [redacted] but

149 Transcript, Day 7, page 21

there is no [redacted] management, such that her manager is based in the [redacted] The Appellant's witness 3 gave the example of being based in [redacted] but having direct employee reports located in [redacted]. The Commissioner considers the evidence of the witnesses as to the global nature of the business to be uncontroversial.

(ii) Benchmarking base pay and SBAs – A distinction

194. The Commissioner heard evidence from the Appellant's witness 1 and the Appellant's witness 2 in relation to the SBAs. The Commissioner considered that the evidence of both witnesses was credible and the Commissioner accepts the evidence of both witnesses, in this regard.

195. The evidence is that SBAs are granted by the parent company and are awarded contemporaneously with an offer of employment. The Commissioner was directed to sample documents namely, an offer of employment and an award of SBAs, in redacted form that have issued to employees.[150]The evidence is that base pay is benchmarked separately to the SBAs. The Appellant's witness 2 gave comprehensive evidence in relation to her responsibilities, in that regard.

196. The Appellant's witness 2 testified that "*our approach to compensation is by a programme. So we would benchmark the base pay programme on its own. The bonus programme gets benchmarked separately and the share-based awards programme gets benchmarked separately.*"[151]The witness gave evidence that when she benchmarks the base pay programme for each labour market, it is compared to what competitors within that market would pay on base pay, such that it is *"an apple to apple comparison*". The witness stated that this is then done for benefits also, but that she has no responsibility for benchmarking the SBAs. The witness testified that benchmarking the SBAs is carried out by the parent company, specifically the Compensation Committee in the [redacted]

197. In that regard, the Commissioner notes that the evidence adduced is that the parent company is solely responsible for issuing the SBAs and the level of the award. The Appellant's witness 2 testified that the SBAs are benchmarked separately in the [redacted], with direct oversight by the Compensation Committee of the parent company. The witness stated that the reason for this is that they may bring in external consultants to benchmark the awards. The witness testified that in 2022, an external third party consultant was engaged to benchmark the SBAs programme, considering what are software or technology peer companies doing and factors such as the burn rate, which measures the

[150] Booklet of Documents, Tabs 29-35
[151] Transcript Day 2, page 13

stock dilution. That review and that approval is required to be given by the Compensation Committee.[152]The witness testified that the SBAs are similar to the base pay process, such that there is a range within which an award can be made.

198. The Commissioner notes the evidence of the Appellant's witness 2 and the description of the [redacted] system, which is a system of record. The witness testified that if for example a team lead wanted to recruit a new hire, the [redacted] system would identify the market range for the type of role that is being recruited for. The witness confirmed that the [redacted] system relates only to base pay range, not the SBAs range, which has its own separate tool. Additionally, the evidence is that as a global company, technology is used to ensure that employees are identifiable in different subsidiaries across the globe.

(iii) A refresh award of SBAs

199. The Commissioner notes that in addition to an award of the SBAs at the commencement of employment, employees are eligible for what is described as a refresh award, which is also determined by the Compensation Committee in the [redacted]. Of note, the evidence is that at the commencement of each year, managers are given a budget pool of the SBAs and depending on performance and contribution for the year, managers can allocate a refresh award to employees. Moreover, there is a process involved, such that once a recommendation is made it goes through each level of management review, with the final level of approval residing with the leadership team in the [redacted]

200. The evidence of the Appellant's witness 2 is that the refresh grant is not guaranteed and that not every employee is entitled to receive a refresh grant each year, due to the fact that it is based on performance. The witness testified that the criteria is different for a refresh award as opposed to an initial grant on employment, as it is linked to ongoing employment and demonstrated performance.

201. The Commissioner notes the evidence of the Appellant's witness 2 is that the rationale for issuing the SBAs to employees is not only to attract and retain employees, but to motivate performance that would then in turn create value for the business. The Commissioner observes that this evidence is not dissimilar to the evidence of both the Appellant's expert witnesses and the Respondent's expert witnesses, such that the purpose of the SBAs is to incentivise, motivate and retain employees.

(iv) The portability of SBAs

202. The Commissioner notes the evidence of the Appellant's witnesses that the SBAs are portable. The Appellant's witness 1 gave evidence that whilst his base pay was re-

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[152] Transcript, Day 2, page 12

evaluated on his move from the Appellant to the [redacted] subsidiary, his SBAs remained unchanged.

203. This differing approach to base pay and the SBAs when an employee's location changes was confirmed also by the Appellant's witness 2 in her evidence. The witness stated that as long as an employee remains continuously employed with one of the subsidiaries, there is no impact on the SBAs and the SBAs continue to vest. As aforementioned, it is only base pay that is reviewed, as a new country represents a different labour market and a different labour market taxes different pay levels. Therefore, the base pay package is aligned to pay structures in that location, with the SBAs awarded remaining unchanged.

(v) The [redacted] *platform*

204. The Commissioner notes the evidence of the Appellant's witnesses in relation to the separate and distinct platform that employees have access to and the use of the platform in relation to their SBAs. The Commissioner notes that it is called the [redacted] platform which is a brokerage platform, wherein each employee receives the SBAs and can view information in relation to the SBAs. The Commissioner notes the evidence of the Appellant's witness 1 that "*you are very much aware that it is separate from your monthly salary*".[153] The witness stated that the platform allows employees to log in and accept a grant of the SBAs and there is an overview of every grant of the SBAs and the vesting periods. The witness testified that if an employee wants to sell an amount or all of their shares, they would do that through the platform.[154]

205. The Commissioner notes the evidence of the Appellant's witness 1 that he would be keenly aware that, even though the SBAs are awarded by the parent company, it relates to the role that he undertakes for the Appellant. The witness said that he is keenly aware that the Appellant only pays his salary and other benefits, whereas the SBAs are coming directly from the parent company.

206. Furthermore, the Commissioner notes that evidence of the Appellant's witness 2 in relation to the platform and its uses, such that the Appellant is not involved in the awarding of the SBAs or the administration of the SBAs via the stock portal. She gave evidence that when an employee is granted SBAs, the employee must log onto the stock portal to review the terms of the stock agreement and accept the terms and conditions of the grant.

207. Of note, is the evidence that the parent company sells approximately half of the SBAs to cover taxes, because it is deemed as taxable income in Ireland and that this would appear

[153] Transcript, Day 1, page 130
[154] Transcript, Day 1, page 131

on an employee's payslip. The evidence of the Appellant's witness 1 is that the parent company "*would push those taxes down to [the Appellant] so that [the Appellant], as part of monthly payroll, can remit that tax to [the Respondent].*"[155] In addition, the witness stated that in terms of an employee's visibility on the platform, if an employee receives 100 SBAs, what would vest and arrive in the platform is 50 SBAs, as the parent company will sell 50 SBAs to cover tax liabilities. The Commissioner notes that the receipt of the SBAs by an employee from the parent company, is therefore the receipt of the net share amount.

208. The Commissioner has considered the evidence of the Appellant's witness 1 that the platform illustrates that the granting of the SBAs is a separate and distinct matter to an employee's salary and that employees treat the SBAs differently, such that some would treat the SBAs akin to bonus pay, as part of their monthly income, while others may allow the SBAs to accumulate over time, creating the potential for a lump sum payment once sold. The Commissioner considers that it is noteworthy that administratively, the platform is provided by the parent company and relates solely to each employee's SBAs, which are awarded by the parent company. The Appellant has no role in the administration of the platform.

(vi) Decision making by the parent company in relation to SBAs

209. The Commissioner notes that the evidence establishes as a matter of fact that it is the Compensation Committee in the [redacted], within the parent company, that determines the grant of the SBAs, both in relation to new employees and refresh awards. The Commissioner observes that it is the Compensation Committee that engages in ongoing reviews in terms of the level of grant of the SBAs available, having regard to competitors and its "burn rate". The evidence of the Appellant's witness 2 is relevant in that regard.[156]

210. Moreover, it is the Compensation Committee that issues a framework based on the differing roles within the organisation and entitlements to the SBAs within a certain range. Notably, the evidence establishes that it is the Compensation Committee that determines that benchmark and that range.[157] The evidence of the Appellant's witness 2 is that her team has no role in the benchmarking of the SBAs, only base pay and other benefits.

211. The Appellant's witness 2 testified that when reviewing the SBAs programme, one of the considerations for the Compensation Committee is competitiveness, such that the Compensation Committee will ensure that the SBAs are awarded in line with peers, in

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[155] Transcript, Day 1, page 130
[156] Transcript, Day 2, page 10
[157] Transcript, Day 1, page 128

order to attract and retain talent in a competitive market. She testified that the other consideration for the Compensation Committee, which is equally important, is to ensure that shareholder value is preserved, which is done through tracking and benchmarking the burn rate, which informs how shares are being diluted. She stated that the Compensation Committee considers competitiveness verses the preservation of shareholder value[158] and it is a balance that needs to be struck accordingly.

212. The Commissioner has found as a material fact that the decision in relation to both the initial grant of the SBAs and a refresh award of the SBAs rests with the parent company. The Commissioner has observed the documentation[159] issued by the parent company in relation to the grant of the SBAs to employees, in addition to the [redacted] Plan.[160] Importantly, the Commissioner observes that in relation to a new hire, correspondence issues from the parent company in relation to the award of the SBAs, separately and distinctly to the offer of employment from the subsidiary.[161]

213. Moreover, the evidence establishes that the parent company provides a separate and distinct platform to employees for managing the SBAs, including providing employees with complete visibility of their SBAs, vesting periods, values and the ability to sell the SBAs within the platform. In addition, it is the parent company that sells a percentage of the SBAs issued to employees of the Appellant for tax purposes, such that employees receive a net share award. The Commissioner is satisfied that the Appellant has no role in the administration of the platform.

(vii) The purpose of SBAs

214. The Commissioner notes that employees of the parent company or one of its subsidiaries, whose role meets the relevant criteria, become eligible to participate in the parent company's SBAs scheme. The Commissioner has considered [redacted] of the [redacted] Plan which states that: "*Eligibility: Grantees under the Plan will be such full or part-time officers and other employees, Non-Employee Directors and key persons (including Consultants) of [the parent company] and its Subsidiaries as are selected from time to time by the Administrator in its sole discretion.*"[162]

215. The Commissioner notes that the [redacted] Plan describes the purpose of the SBAs scheme as "*to encourage and enable the officers, employees, Non-Employee Directors and other key persons (including Consultants) of* [redacted] *[the parent*

[158] Transcript, Day 2 page 54
[159] Booklet of Documents, Tabs 30, 31, 33, & 34
[160] Booklet of Documents, Tab 29
[161] Booklet of Documents, Tabs 30-35
[162] Booklet of Documents, Tab 29, page 698

company] (the "Company") and its Subsidiaries upon whose judgment, initiative and efforts the Company largely depends for the successful conduct of its business to acquire a proprietary interest in the Company. It is anticipated that providing such persons with a direct stake in the Company's welfare will assure a closer identification of their interests with those of the Company and its stockholders, thereby stimulating their efforts on the Company's behalf and strengthening their desire to remain with the Company".[163]

216. The evidence of the Appellant's witness 2, the Appellant's expert witness 1 and the Respondent's expert witness 2 is that the purpose of the SBAs is to not only attract employees but to retain them, in addition to motivating performance that in turn creates value for the parent company. The Appellant's witness 2 agreed that in terms of the initial grant of the SBAs and any refresh award of the SBAs, it is an integral component of the overall compensation package. The Appellant's expert witness 1 testified that the SBAs were issued with the purpose of incentivising the employees of the Appellant and that there is therefore a connection between the issuance of the SBAs to employees of the Appellant and the services rendered under the services arrangement between the Appellant and the parent company.[164]

217. This is of notable importance, in circumstances where the Respondent's submissions at the hearing of the appeal are that there is no connection between the services agreement and the SBAs. The Respondent submits that the services agreement and the SBAs plan each have a different economic logic, which requires keeping them separate. They are not linked. The Appellant could not provide the services in Ireland unless all those staff were paid for, that is the cost of doing business in Ireland.[165] The employee remuneration includes both salaries and other benefits provided by the Appellant and the SBAs provided by the parent company. Both parts of the remuneration are, however, the remuneration for performing their duties of employment with the Appellant.[166]

218. Moreover, the Commissioner notes that it is the evidence of the Appellant's expert witness 1 is that it is his understanding that employees of the Appellant were not entitled by virtue of their employment to receive the SBAs, but that employees were qualified to receive the SBAs if the company determined that doing so would incentivise the employees and that the company then evaluated those employees in receipt of the SBAs to see if the

[163] Booklet of Documents, Tab 29, page 694
[164] Transcript, Day 3, page 142, line 7-25
[165] Transcript, Day 6, page 70
[166] Transcript, Day 6 page 136

employees turned out to be a good investment, when making further decisions down the road.[167]

(viii) An award of SBAs to third parties/consultants

219. The Commissioner observes that the [redacted] Plan[168] refers to the ability to award the SBAs to non employee Directors and other key persons (including Consultants). The Commissioner is satisfied that this reference refers to an ability to award the SBAs to non employees or independent contractors. The evidence of the Appellant's witness 2 is that whilst the ability to make such an award is provided for in the [redacted] Plan, it is her understanding that no award of the SBAs has been made to Consultants, to date. Nevertheless, the Commissioner notes the evidence of the witness that in relation to her previous employment, she is aware of one company having issued the SBAs to non employees and consultants as independent contractors.

220. Furthermore, the Commissioner heard evidence from the Appellant's expert witness 1 in relation to his experience of SBAs being issued to non employees. The Commissioner notes his evidence that it is his experience that SBAs are issued to non-employees who also contribute to a company, such as consultants for example. Notably, his evidence is that it is not uncommon among technology companies to issue SBAs to non employees and that it is his understanding that the parent company's stock compensation plan envisages the possibility of offering these types of inducements to consultants as well. Moreover, the Commissioner notes his evidence that SBAs are issued to consultants precisely to induce an effort that is aligned with a company's own goals and that "*[t]he underlying economic principle is the same. It is in the demonstrated interest of companies if they have stock to issue to be able to incentivise labour contributions from those who are not their employees by giving them an incentive to align their interests with those of the company. So as an economic matter I do not see why such an incentive system would not be market practice you would observe*."[169]

221. The Commissioner heard evidence the Respondent's expert witness 1 in relation to accounting standards. The witness made reference to a document appended to his report namely the KPMG Share based payments IFRS2 Handbook[170] which contain a chapter on an analysis of the accounting treatment of share-based payment transactions with non-employees. It is posited by the Appellant that this is such a common occurrence,

[167] Transcript, Day 3, page 142, line 7-25.
[168] Booklet of Documents, Tab 29
[169] Transcript, Day 3, page 139
[170] Booklet of Documents, Tab 97 & 98

namely the award of SBAs to non employees, that an entire chapter is dedicated to the matter in the handbook.

222. The Commissioner observes that from the expert evidence given by the witness, it appears that it is only the Respondent's expert witness 2 who is unfamiliar with the provision of SBAs to non employees. His evidence was that when he has come across it, it is to a consultant and tends to have two characteristics, namely "*One is that a consultant, although not an employee, is often an ex-employee, like a retiring director, who goes through a transition period. And the second example I have come across is when that contractor or consultant is providing very, very high value advice, so it may be advice about funding something or merger and acquisition activity. But in the case of routine cost plus services all I can say is, in my experience, I have never come across the provisions of SBAs to the employees of a separate company."*[171]

223. Of note, the Commissioner observes that during cross examination of the witness, it was put to the witness by Counsel for the Appellant, that the practice is common enough as to require the publication of accounting standards on the matter. The Commissioner notes the response of the Respondent's expert witness 2 that: "*I don't have any evidence to dispute that assumption other than my own experience*".[172] This is in stark contrast to the evidence of the Appellant's expert witness 1 who testified that the award of SBAs to non employees is a common occurrence and has the same purposes as an award to employees[173].

224. The Commissioner is satisfied that based on the [redacted] Plan, the parent company is permitted to issue SBAs to non employees and that it would not be an unusual occurrence, had it done so, having regard to the evidence of the Appellant's expert witness 1 and Chapter 11 of the KPMG Share based payments IFRS 2 Handbook on share based payments to non employees. The Commissioner is further satisfied having regard to the evidence adduced, that the purpose of an award to non employees i.e. consultants or other third parties, is not dissimilar to the purpose for which the SBAs are awarded to employees, namely to incentivise contributions and/or performance and to align a consultants or third party's interests with those of the company.

[171] Transcript, Day 4, page 93
[172] Transcript, Day 4, page 93, line 27 - page 100, line 22
[173] Transcript, Day 3, page 89 & 139

(ix) No SBA recharge

225. The Commissioner is satisfied that the evidence establishes that the parent company did not charge the Appellant for the SBAs which it issued to the employees of the Appellant and that there is no recharge agreement between the Appellant and the parent company in relation to the issuing of the SBAs. There was no contractual entitlement to do so. In fact, Exhibit A to the services agreement specifically states that the Appellant's costs "*will not include [the Appellant's] stock-based compensation expense (as determined pursuant to GAAP) or other like non-operating non-cash charges that may be required by GAAP".* The Appellant states that the rationale for this is that the costs did not burden the Appellant and it would not be at arm's length to include a cost that it did not incur in its cost base for services rendered.

226. The Respondent argues that an independent enterprise contracting at arm's length would not realistically enter into a transaction (particularly if the transaction was its only source of revenue) year on year if it could expect to consistently make a loss and the OECD Guidelines specifically deal with the considerations in respect of losses at paras. 1.70 to 1.72.

227. The Commissioner notes that it was put to the Appellant's expert witness 1 in cross examination by Senior Counsel for the Respondent that due to the Appellant's loss making position, it would pose difficulties for the company, for instance, in terms of making a dividend or raising finance. The witness did not agree and stated that "*[i]t is my understanding that the reason the company was reporting a statutory loss is that, while it was receiving revenues that covered only its own incurred costs, salary, bonus and other staff incurred costs, it was for financial accounting purposes having to reflect as an expense the deemed accounting charge for the SBA which was issued by [the parent company]. In other words, for statutory accounting purposes it was reflecting a cost for which it had not received a compensating revenue and thus, for statutory financial purposes it was indeed incurring a loss. The question that market participants or investors would look at is, what is the true economic cash-flow of the business as against its statutory financial profit or loss? And to the extent that the underlying business operations of the company are generating positive cash flow, they would still be willing to invest in the company*".[174] This evidence is consistent with the Appellant's witness 1 and 3, the Respondent's expert witness 2 and the Appellant's expert witness 2, all of whom agreed that that accounting loss arises from the fact that the SBAs are treated as an expense in the accounts. The Commissioner is satisfied that this is the position.

[174] Transcript, Day 3, page 131

The [redacted] Plan

228. Having reviewed [redacted] Plan, the Commissioner observes that individuals employed by the parent company or one of its subsidiaries, whose role meets the relevant criteria, become eligible to participate in the parent company's SBAs scheme. The Commissioner notes [redacted] of the [redacted] Plan which deals with eligibility and states that:

> "*Grantees under the Plan will be such full or part-time officers and other employees, Non-Employee Directors and key persons (including Consultants) of [the parent company] and its Subsidiaries as are selected from time to time by the Administrator in its sole discretion.*"[175]

229. Furthermore and of note, the purpose is of the [redacted] Plan is described as

> "*to encourage and enable the officers, employees, Non-Employee Directors and other key persons (including Consultants) of [the parent company] (the "Company") and its Subsidiaries upon whose judgment, initiative and efforts the Company largely depends for the successful conduct of its business to acquire a proprietary interest in the Company. It is anticipated that providing such persons with a direct stake in the Company's welfare will assure a closer identification of their interests with those of the Company and its stockholders, thereby stimulating their efforts on the Company's behalf and strengthening their desire to remain with the Company."*[176]

230. It is the case that individuals employed by the Appellant were awarded SBAs in the parent company which were shares provided at no cost to the employees, but to which they become entitled to only over a period of time. This entitlement to shares to which the entitlement arises over that period of time is referred to as 'vesting'. As stated, the parent company did not charge the Appellant for the provision of the SBAs and had no contractual entitlement to do so.

231. The Commissioner notes that the SBAs are awarded, having regard to eligibility, rather than simply being an employee of a subsidiary of the parent company. The Commissioner is satisfied that the purpose of the award of the SBAs is to incentivise certain eligible employees which in turn creates value for the parent company. The purpose and eligibility of the SBAs is clearly stated in the [redacted] plan. There is no evidence to suggest any contrary purpose or eligibility criteria.

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[175] Booklet of Documents, Tab 29, page 698
[176] Booklet of Documents, Tab 29, page 694

The Employment Agreements

232. The Commissioner was furnished with sample redacted Employment Agreements[177] for Employee A and Employee B, in which the Appellant is described as the Employer. The Commissioner observes that there are references to benefits in the agreements, but there are no references to the [redacted] Plan in the Employment Agreements. In addition, the Commissioner has considered the documents described as Equity Side letters[178] issued in respect of an award of SBAs to employees. The Commissioner notes that correspondence dated 22 August 2016 to Employee A (and replicated in a similar manner in the other letters) states that:

> "*We are pleased to inform you that we will recommend to the Board of Directors (the 'Board') of [the parent company] (the 'Company') or to a committee or officer of the Company appointed by the Board that you be granted an award of restricted stock units for 2,350 of shares of the Company's common stock ('Common Stock'), to be granted under, and subject to the terms and conditions of, the [parent company]* [redacted] *Plan (the 'Plan'), including any sub-plan for your country, as well as the terms and conditions, including vesting conditions, of the applicable restricted stock unit agreement, which will be provided to you as soon as practicable after the grant date and which you will be required to sign or otherwise accept in accordance with the Company's acceptance procedures.*"[179]

233. The Commissioner observes that it is this correspondence that refers to the [redacted] Plan and which clearly outlines is correspondence that issues from the parent company. In that regard, the Commissioner notes the evidence of the Appellant's witness 1 and the Appellant's witness 2, such that the correspondence that issues from the parent company, in relation to the SBAs, usually does so contemporaneously with the employment agreement of the Appellant. Of note, the correspondence additionally states that:

> "*Furthermore, you should know that the restricted stock units and any shares of Common Stock acquired pursuant to the restricted stock units are an additional benefit that may be given to you by the Company and not by your employer or any other subsidiary of the Company. Therefore, the restricted stock units and any shares acquired pursuant to the restricted stock units are not part of your employment*

[177] Booklet of Documents, pages 803 and 878
[178] Booklet of Documents, pages 797 and 875
[179] Booklet of Documents, page 797

relationship and are completely separate from your salary or any other remuneration or benefits provided to you by your employer".[180]

234. In addition to the above referenced documents, the Commissioner was furnished with the [redacted] Agreement. In the agreement dated 23 October 2018, addressed to Employee B (and replicated in a similar manner in the other letters) it states that:

"*Pursuant to the [the parent company]* [redacted] [redacted] *Plan as amended through the date hereof (the "Plan"), [the parent company] (the "Company") hereby grants an award of the number of Restricted Stock Units listed above (an "Award") to the Grantee named above. The Award shall be governed by and subject to the terms of the Plan and this Global Restricted Stock Unit Award Agreement (the "Award Agreement") including any special terms and conditions for the Grantee's country set forth in any appendix to this Award Agreement (the "Appendix") (together with the Award Agreement, the "Agreement").*

…………………

Vesting of Restricted Stock Units. The restrictions and conditions of Paragraph 1 of this Award Agreement shall lapse on the Vesting Date or Dates specified in the following schedule so long as the Grantee remains an employee or other service provider with the Company or a Subsidiary on such Dates, as further described in Paragraph 3 of this Award Agreement.[181]

235. The Commissioner is satisfied that based on her consideration of the documents and consistent with the evidence adduced, the employment agreement is issued to a new employee by the Appellant (or the subsidiary employing the employee), but the correspondence in relation to an award of the SBAs and the agreement relating to the SBAs emanates directly from the parent company. The Commissioner considers that the documentation illustrates a separate and distinct lineation between the two entities, such that the employment relationship with the Appellant is separate to the issuance of the SBAs by the parent company.

236. Nevertheless, the Commissioner is satisfied that the award of the SBAs by the parent company to the Appellant's employees, and the purpose of same, is to incentivise employees which in turn creates value for the parent company. It is the case that any

[180] Booklet of Documents, Tab 30, page 797
[181] Booklet of Documents, Tab 35 page 885

refresh award is derived and awarded in connection with the performance of the employee as opposed to the Appellant.

The Services Agreement

237. The services provided by the Appellant to the parent company for the relevant years were governed by the services agreement entered into by the parent company and the Appellant, effective 14 May 2013 and 1 January 2016.[182] The services agreement states that the Appellant would provide the services as requested by the parent company. The services agreement specifies that in consideration for services rendered, the parent company would pay the Appellant service fees that would cover the costs incurred by the Appellant in providing the services, in addition to an additional profit mark-up to the Appellant representing a specified percentage of these costs. The 2013 Agreement, specified the profit mark-up to be [redacted]; in other words, the service fees were stipulated to be [redacted] of all costs (100% of the Appellant's incurred costs plus a mark-up of [redacted] over these costs)[183]. In the 2016 Agreement, the service fees were stipulated to be 110% of the Appellant's incurred costs, implying a profit mark-up of 10% on incurred costs.[184]

238. The Commissioner observes that the services agreement expressly specifies that the costs used to compute the Appellant's fees would not include any expense associated with the SBAs or other similar non operating, non cash charges. Therefore, the Appellant's profit from its services was computed as a mark-up on costs that excluded the SBAs accounting expense. The Respondent posits that the corollary of this is that the services agreement is not an arm's length agreement.[185] The Commissioner notes that the opposite views are expressed by the Appellant's expert witness 1 and the Appellant's expert witness 2.

239. The Commissioner accepts the uncontroverted evidence of the Appellant's expert witnesses in coming to her conclusion that the Respondent is incorrect in its argument in this regard. The opinion of the Appellant's expert witness 1 is that the Appellant was correct in its treatment of the SBAs accounting expense from an economic perspective, under the transfer pricing principles articulated in the OECD Guidelines. At arm's length, the Appellant would not earn an additional taxable profit attributable to the SBAs accounting expense, because notwithstanding the accounting treatment of the SBAs, the Appellant did not bear an economic cost associated with the SBAs received by its

[182] Booklet of Documents, Tabs 17 & 18
[183] Booklet of Documents, Tab 13, page 154
[184] Booklet of Documents, Tab 13, page 154
[185] Transcript Day 6, page 79

employees and therefore, is not entitled to a return or mark-up for bearing such a cost.[186]The Respondent took issue with the term “economic cost,” such that a cost is a cost.

240. The Commissioner notes the testimony of the Appellant’s expert witness 2 wherein he states that “…*my view of the arrangements, as they are structured, that the total costs of the services are €120, I agree on that; that Ireland bears €100 of the costs related of those services, the US bears €20 of the costs relating to those services and therefore, it would be appropriate for Ireland to earn a reward on the €100 of costs that it incurs. That is in effect what the taxpayer, the Appellant, did in its tax return… In effect the way the Revenue's assessment operates is that ultimately Ireland is paying -- the Appellant is paying tax on €32… Being the 12 of profit plus the 20 of costs borne by the US related to the SBAs. So it would be, in my view, a non-arm's length outcome to pay tax on the 32*”.[187]

241. As aforementioned, [redacted] concluded that, consistent with the services agreement, it was appropriate to exclude the SBAs accounting expense from the base of costs on which the Appellant was entitled to earn a profit mark-up at arm’s length. [redacted] supported its conclusion by noting that *“[t]hese costs are borne by [the parent company] and not [the Appellant]*”. The Commissioner observes that [redacted] concluded that the SBAs accounting expense did not reflect a cost incurred by the Appellant and that the profit mark-up the Appellant earned at arm’s length should reflect only the costs it incurred.[188]

242. The Commissioner considers it noteworthy to set out here that the Respondent made detailed submissions at the hearing of the appeal that the SBAs and the services agreement are not linked in any way. The Appellant’s position is that both are linked and cannot be separated as the SBAs are “baked into the services agreement”.[189] The Appellant states that the focus cannot be narrowed to just the services agreement being the “arrangement”, as contended for by the Respondent and the Appellant directed the Commissioner to Article 9(1) of the OECD Model Tax Convention which the Appellant states requires that consideration is given to the “*conditions made or imposed between the two associated enterprises in their commercial or financial relations*." The Appellant submits that this is not the language of a one-sided analysis, such that both the award of the SBAs and the services agreement must be considered as the arrangement. The reason for this is that the SBAs were awarded by the parent company to incentivise

[186] Booklet of Documents, Tab 13 page 176
[187] Transcript, Day 4, pages 49 & 50
[188] Booklet of Documents, Tab 7, page 38
[189] Transcript, Day 7, page 38

employees, including employees of the Appellant who provide services under the services agreement to the parent company.

243. The Commissioner is satisfied that the services agreement and the SBAs are inextricably linked and the evidence adduced supports the Commissioner's view in this regard.

244. As mentioned, the Respondent argues that the services agreement is not an arm's length agreement.[190] The Appellant contends that the Respondent is arguing that the clause at Exhibit A in the services agreement, excluding the SBAs accounting expense from the Appellant's costs, is a non-arm's length clause and so, the question then becomes, is the exclusion of this non operating, non cash charge required by GAAP, from the services agreement, an arm's length provision.

245. The Commissioner is satisfied that in order to decide whether or not arm's length third parties would exclude this charge from the services agreement, there must be consideration as to what the charge is and would an arm's length third party exclude this SBAs accounting expense from its costs for the services rendered? The Appellant argues that they would and the expert evidence adduced supports that view, because it would not be an arm's length agreement to issue SBAs at a cost of €20 to employees of the Appellant to enable the employees of the Appellant to provide services to it and then pay €132 to the Appellant for those services.

246. The Commissioner considers it to be a material fact that the Appellant did not make any payment to the parent company in respect of the SBAs received by its employees, but as stated under FRS 102, the Appellant was required to record a non-incurred accounting expense associated with these SBAs in its audited profit and loss statements for the relevant period. Having considered the evidence adduced, the Commissioner does not accept the Respondent's argument that the services agreement is a non arm's length agreement and the evidence adduced, including the expert evidence supports the Commissioner in her finding in this regard.

Functional analysis

247. The Glossary of the OECD Guidelines defines functional analysis as:

> *"An analysis of the functions performed (taking into account assets used and risks assumed) by associated enterprises in controlled transactions and by independent enterprises in comparable uncontrolled transactions."*[191]

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[190] Transcript, Day 6, page 79
[191] Booklet of Authorities, Tab 22, page 72

248. The functional analysis describes the functions, risks and assets associated with the intercompany transactions under review. Paragraph 1.42 of the OECD Guidelines, in relation to functional analysis, states that:

> "*In transactions between two independent enterprises, compensation usually will reflect the functions that each enterprise performs (taking into account assets used and risks assumed).Therefore, in determining whether controlled and uncontrolled transactions or entities are comparable, a functional analysis is necessary. This functional analysis seeks to identify and compare the economically significant activities and responsibilities undertaken, assets used and risks assumed by the parties to the transactions. For this purpose, it may be helpful to understand the structure and organisation of the group and how they influence the context in which the taxpayer operates".*

249. The transfer pricing reports dated January 2018, state that a functional analysis is essential to the development of analysis of transfer pricing policies *inter alia* to identify transactions involving unrelated companies with functions, risks and assets sufficiently similar to those of a related party.

250. The Commissioner notes the testimony of the Appellant's expert witness 1 describing this step in a transfer pricing analysis, wherein he states that: "*to be clear, the term functional analysis is a convenient short form for a somewhat broader exercise in which we seek to understand not only the functions played by the relevant parties in the intercompany transaction but also the economic risks they bore as a result of their participation in that transaction and any assets they may have deployed to make that transaction happen. So very broadly, it's an analysis of functions, assets and risks. And from an economic perspective, economists are guided by Transfer Pricing Guidelines or regulations that any analysis they perform or answers they reach regarding the appropriate arm's length terms in a transaction must reflect their economic assessment of functions, risks and, where relevant, assets of the parties engaged in the transaction.*"[192]

251. Moreover, functional analysis is incomplete unless the material risks assumed by each party have been considered, since the assumption or allocation of risks would influence the conditions of transactions between the associated enterprises.[193] The functions carried out (taking into account the assets used and the risks assumed) will determine to

[192] Transcript, Day 3, page 77
[193] Booklet of Authorities, Tab 22, page 92

some extent the allocation of risks between the parties, and therefore the conditions each party would expect in arm's length transactions.[194]

252. The functional analysis is the first step in the analysis of whether the relative profits earned are appropriate to the functions performed, degree of risks undertaken and the value of the assets provided in the intercompany transactions. The principal functions performed by the party under examination should be identified. The functional analysis should consider the type of assets used, such as plant and equipment. Controlled and uncontrolled transactions and entities are not comparable if there are significant differences in the risks assumed for which appropriate adjustments cannot be made.[195]

253. The Appellant provides services as described in the services agreement to the parent company. The services are sales and marketing and research and development services. In addition, the Appellant undertakes administrative functions that enable it to carry out its business and provides back office and administrative support services to other entities within the group in the EMEA region. These activities include, finance support, legal support, HR, and IT. The parent company organises its sales and marketing programme by three regional hubs, including, Americas, EMEA and APAC.[196] The parent company is the Appellant's only customer.

254. Whilst the Appellant performs these functions, the evidence adduced establishes that most managerial functions are performed by the parent company, such as setting strategies, price lists, budgets and maintaining overall authority over variations from those strategies, price lists and budgets. The Commissioner has set out above and considered the extensive evidence adduced in relation to the global nature of the business, the reporting structures and the senior leadership being based in the [redacted]. The parent company issues the SBAs to the employees of the Appellant and does not charge a cost for the provision of the SBAs to the Appellant's employees. The Commissioner has considered the documentation relating to the issuance of the SBAs and is satisfied that it is the function of the parent company to make decisions in relation to the award of the SBAs to employees of its subsidiaries, including the Appellant. The evidence adduced also supports this position. Moreover, it is the function of the parent company through the compensation committee to assess the level of the SBAs awarded, to issue guidance in relation to the SBAs and to engage third party's to assist with measuring the dilution of its stock or burn rate.

194 Booklet of Authorities, Tab 22, page 92
195 Booklet of Authorities, Tab 22, pages 91 & 92
196 Booklet of Documents, Tab 20, page 411

255. The Commissioner has considered the documentation related to the issuance of the SBAs to employees of the parent company and its subsidiaries and the Commissioner accepts that the entirety of the decision making in respect of the SBAs rests with the parent company. The Commissioner is satisfied that the evidence adduced supports this view. Of note, is the evidence of the Appellant's witness number 2 who confirmed that it is the parent company, specifically the compensation committee that makes decisions in relation to an award of the SBAs, such as the level of the initial awards and any refresh awards that are to be made thereafter.

256. As stated, the functions performed by the Appellant for the benefit of the parent company are governed by the services agreement between the Appellant and parent company.[197] Pursuant to the services agreement the Appellant performed sales and marketing and contract research and development activities for the benefit of the parent company. The Appellant is responsible for remunerating its employees, but it is the parent company that is responsible for the award of the SBAs both initially and any refresh award thereafter. [redacted] Plan [redacted] governs the award of the SBAs by the parent company.

257. It was the parent company alone that agreed with the employees that it would issue SBAs in the circumstances defined by the [redacted] [redacted] Plan and the parent company was thereafter contractually obliged to do so with no recourse to the Appellant. This is evident from the sample documentation submitted by the Appellant, namely the Equity Side letter and the [redacted] Agreement. Consequently, the Commissioner is satisfied that it is the parent company that bears the risk of issuing the SBAs to the employees of the parent company and its subsidiaries.

258. In this regard, the Commissioner accepts the opinion of the Appellant's expert witness 1 as set out in his report wherein he states that it is the parent company that is liable to the employees for the SBAs, "*so that if it used the Appellant's services to a lesser extent than previously envisaged or if the SBAs failed to elicit the hoped-for increase in performance and productivity, the parent company alone bears the risk of this*".[198]

259. Moreover, the Commissioner considers that it is important to note the purpose of the SBAs. [redacted] of the [redacted] [redacted] Plan states that:

> "*The purpose of the Plan is to encourage and enable the officers, employees, Non-Employee Directors and other key persons (including Consultants) of [the parent*

[197] Booklet of Documents, Tab 17 and 18, pages 309 and 318
[198] Booklet of Documents, Tab 13 page 183

company] (the "Company") and its Subsidiaries upon whose judgment, initiative and efforts the Company largely depends for the successful conduct of its business to acquire a proprietary interest in the Company. It is anticipated that providing such persons with a direct stake in the Company's welfare will assure a closer identification of their interests with those of the Company and its stockholders, thereby stimulating their efforts on the Company's behalf and strengthening their desire to remain with the Company"

260. The Commissioner notes the Appellant's submission that the award of the SBAs to staff is not correlated to the performance of the Appellant as an entity nor to the services which the Appellant provides to the parent company, but is linked to the performance of the individuals themselves. The Commissioner is satisfied that the evidence supports this. Moreover, of note, the right to the SBAs is not contingent upon the recipients remaining employed by the Appellant, but is merely contingent upon their remaining employed by a subsidiary of the parent company. The Appellant's witness 1 gave evidence in this regard. The Commissioner is satisfied that the parent company needs to be able to attract and retain key talent across the group and it is in the parent company's interests that it can do so effectively. In order to do so, the parent company makes the SBAs available to individuals who work for it or for its subsidiaries.

261. The Commissioner notes the evidence adduced by the Appellant in relation to the provision by the parent company of the platform to allow employees to view their SBAs and interact with their awards of shares. This platform is provided by the parent company and the Appellant has no role in the provision or administration of the platform. The Commissioner is satisfied based on the evidence adduced that the platform is an asset connected with the parent company and not the Appellant.

262. The evidence adduced from the witnesses is that the compensation committee of the parent company had considerations such as the risks associated with the dilution of the fractional ownership of the pre-existing shareholders. That is a risk borne by the parent company and attributable to the parent company only, not the Appellant. The Commissioner is satisfied that the risks associated with bearing this cost remained with the parent company, since the Appellant was not required to compensate the parent company for any costs arising from issuing the SBAs, the parent company bore the risk that having incurred the SBAs related cost, it would fail to realise sufficient value from the Appellant's services to justify this cost.[199]The evidence supports the view that the

[199] Booklet of Documents, Tab 13

rationale for the parent company bearing the risk, is that if the risk pays off and the employees are incentivised, it is the parent company that stands to benefit overall.

263. The Commissioner is satisfied that if the SBAs failed to elicit a sufficient quality of effort from the Appellant's employees to justify the amount of the SBAs granted, it would be the parent company that would bear the resulting net loss of value, since the Appellant has not paid them an amount upfront to cover the gross dilution cost of the SBA. The Commissioner considers the testimony of the Appellant's expert witness 1 in relation to the entity that is bearing the risk to be notable, wherein he states that: *"From an economic perspective I think the pertinent question when evaluating who is incurring an expense is to ask, who is bearing the risk associated with that expense being incurred? …..As an economist when presented with that understanding, I infer as a matter of economic reasoning that it is the shareholders of [the parent company] that are bearing the economic risks associated with having issued the SBA, the stock-based awards. Because by issuing the stock-based awards those shareholders have diluted their own fractional ownership in the firm in the expectation that the employees of [the Appellant] incentivised by these shares will produce a level of performance and a level of services and output that would add more to the value of [the parent company] than the dilution, as it were, in the slice in the pie"*.[200]

264. The Respondent's expert witness 2 testified that there was a risk to the Appellant if the parent company failed to issue the SBAs and that it would have to look elsewhere to remunerate its employees at market value. However, during cross examination of the Appellant's expert witness 1, the Commissioner notes that he testified that if that occurred, the economics of the Appellant would change. The Commissioner notes the witness's evidence that: "*If the termination clause is invoked or more generally, if [the parent company] were to terminate this arrangement, the economics of [the Appellant] would change. They would now have to find, presumably, other means to incentivise their work force. But now they would be incurring the entire cost of that work force themselves. They in turn could sell their services to other customers and charge a market price for it. In our examples from the morning, €132. But now, by having borne the entire expense, they would then get to deduct that entire expense from the €132. As a result of which once again they would be earning an arm's length return of €12.*"[201]

265. Moreover the Commissioner notes that during cross examination, the Respondent's expert witness 2 agreed that the "*complete risk analysis is (a) the US bears the risk, (b)*

[200] Transcript, Day 3, page 85 & 86
[201] Transcript, Day 3, page 146, line 24, page 149, line 16

the risk for Ireland is if the US stops bearing the risk, so that analysis presupposes that the US bears the risk and the risk to Ireland is that the US will stop doing so" and that if Ireland does not take on that risk, "*then the risk must lie with the US*."[202]

266. The Commissioner found the testimony to be of assistance to her understanding of the risks associated with the issuance of the SBAs. As stated, functional analysis is set down in considerable detail in the OECD Guidelines and requires analysis of the functions performed by the Appellant and the parent company taking into account the assets used, risks assumed, and functions performed by both entities. The exercise is to understand not only the functions played by the relevant parties in the intercompany transaction, but also the economic risks they bore as a result of their participation in that transaction and any assets they may have deployed to make that transaction happen.[203]From the evidence adduced, it is apparent to the Commissioner that the Appellant did not bear the risks associated with the provision of the SBAs to its employees and had no role in the deployment of the assets associated with the provision of the SBAs to the Appellant's employees.

267. Importantly, it appears to the Commissioner, having considered the entirely of the Respondent's submissions, that it is the Respondent's position that functional analysis is not relevant, rather what is relevant is that there is an expense for the SBAs in the Appellant's financial accounts, therefore, it is a cost to be included in the cost base. The Commissioner observes the Respondent's correspondence dated 1 December 2021[204] wherein it states that:

> "*The only relevant consideration is whether the exclusion of the expense for share based payments in the service fee calculations would be consistent with the arm's length conditions between comparable independent enterprises based on a comparability analysis.*"

268. The Commissioner is satisfied that the Respondent is incorrect in this regard, and in order to determine whether or not the Appellant was correct to exclude the SBAs accounting expense from its cost base when calculating the fee for the services provided to the parent company, the OECD Guidelines must be consulted and a functional analysis undertaken. As stated, the answer to the issue arising in this appeal does not lie in the Appellant's financial accounts and section 76A TCA 1997. Rather, it lies in the consideration and application of the economic principles of transfer pricing and the OECD Guidelines.

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[202] Transcript, Day 4, page 90, line 24, page 91, line 3
[203] Booklet of Documents, Tab 13,
[204] Booklet of Documents, Tab 58, page 1224

The Transfer Pricing Reports

269. In correspondence dated 30 September 2021,[205] the Respondent suggests that the inclusion of the SBAs in the calculation of the Appellant's arm's length return is justified on the basis of the "comparability adjustments" for which the OECD Guidelines provide. The Commissioner notes that the Respondent states that *"…. given that share based compensation is a form of employee remuneration, these costs are generally comparable with other forms of employee remuneration which are included within the cost base of all* [redacted] *comparables considered when ascertaining the NCP arm's length range*".[206]

270. However, the Appellant's expert witness 2 points out in his report that: "*the issue of the comparability adjustments does not answer the fundamental question of whether SBAs should be included in the cost base to which a mark-up is applied*." In short, the Commissioner notes that the Appellant's expert witness 2 articulates that: *"[p]ut simply, the making of 'comparability adjustments' is directed towards identifying the appropriate level of mark-up to be applied to particular costs but tells us nothing as to the costs which are to be included in that calculation.*" The Commissioner has been presented with no evidence that contradicts the purpose of the comparability adjustments.

271. The Commissioner notes that the nature of the comparability analysis performed for purposes of applying the TNMM necessitates comparing "like with like". Paragraph 1.6 of the OECD Guidelines refers to the comparability analysis as "*an analysis of the controlled and uncontrolled transactions*". The Commissioner notes paragraph 1.36 of the OECD Guidelines provides that:

> *"…in making these comparisons, material differences between the compared transactions or enterprises should be taken into account. In order to establish the degree of actual comparability and then to make appropriate adjustments to establish arm's length conditions (or a range thereof), it is necessary to compare attributes of the transactions or enterprises that would affect conditions in arm's length transactions."*[207]

272. Paragraph 3.2 of the OECD Guidelines provides that that:

[205] Booklet of Documents, Tab 55
[206] Booklet of Documents, Tab 55
[207] Booklet of Authorities, Tab 22, page 89

"[a]s part of the process of selecting the most appropriate transfer pricing method (see paragraph 2.2) and applying it, the comparability analysis always aims at finding the most reliable comparables".[208]

273. Paragraph 3.4 of the OECD Guidelines describes the typical process that can be followed when performing a comparability analysis. It states that:

"*This process is considered an accepted good practice but it is not a compulsory one, and any other search process leading to the identification of reliable comparables may be acceptable as reliability of the outcome is more important than process (i.e. going through the process does not provide any guarantee that the outcome will be arm's length, and not going through the process does not imply that the outcome will not be arm's length)."*[209]

274. The Commissioner observes that step 8 in the process is the "*Determination of and making comparability adjustments where appropriate",*[210] with the OECD Guidelines setting out guidance around such adjustments in paragraphs 3.47-3.54.

275. The Commissioner notes the Respondent's correspondence to the Appellant dated 30 September 2021, which under a heading "Consideration of Comparability Adjustment", it states that:

"*The OECD guidance indicates that comparability adjustments may only be made if appropriate to the results of the comparables identified and does not refer to adjustments to the financial results of the tested party. As a result, it is not appropriate to adjust the financial results of [the Appellant] in its statutory financial statements for the purposes of comparing with the NCP results of the comparables which are obtained from their statutory financial statements*."[211]

276. The Commissioner observes that the Appellant in subsequent correspondence[212] asserts that an adjustment to the financial results of the Appellant as the tested party to exclude the SBAs expense from its cost base is reasonable and enhances the reliability of the comparability analysis. The Respondent in its correspondence dated 30 September 2021, refers to paragraphs 3.47, 3.50 and 3.51 of the OECD Guidelines. The Commissioner considers it useful to set out in full the paragraphs referred to. Paragraph 3.47 of the OECD Guidelines provides that:

[208] Booklet of Authorities, Tab 22, page 153
[209] Booklet of Authorities, Tab 22, page 154
[210] Booklet of Authorities, Tab 22, page 155
[211] Booklet of Documents, Tab 55
[212] Booklet of Documents, Tab 56, page 1218

"*The need to adjust comparables and the requirement for accuracy and reliability are pointed out in these Guidelines on several occasions, both for the general application of the arm's length principle and more specifically in the context of each method. As noted at paragraph 1.33, to be comparable means that none of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology or that reasonably accurate adjustments can be made to eliminate the effect of any such differences. Whether comparability adjustments should be performed (and if so, what adjustments should be performed) in a particular case is a matter of judgment that should be evaluated in light of the discussion of costs and compliance burden at Section C.*"[213]

277. Paragraph 3.50 of the OECD Guidelines provides that:

"*Comparability adjustments should be considered if (and only if) they are expected to increase the reliability of the results. Relevant considerations in this regard include the materiality of the difference for which an adjustment is being considered, the quality of the data subject to adjustment, the purpose of the adjustment and the reliability of the approach used to make the adjustment*."[214]

278. Paragraph 3.51 of the OECD Guidelines provides that:

"*It bears emphasis that comparability adjustments are only appropriate for differences that will have a material effect on the comparison. Some differences will invariably exist between the taxpayer's controlled transactions and the third party comparables. A comparison may be appropriate despite an unadjusted difference, provided the difference does not have a material effect on the reliability of the comparison. On the other hand, the need to perform numerous or substantial adjustments to key comparability factors may indicate that the third party transactions are in fact not sufficiently comparable*."[215]

279. The Commissioner notes the expert report of the Appellant's expert witness 2, wherein he states that "*it appears the [Respondent] have inferred that as the paragraphs in the OECD Guidelines above do not refer to adjustments to the financial results of the tested party, such an adjustment is not permissible under the OECD Guidelines"* and he refers to paragraph 7.35 of the OECD Guidelines which states that:

[213] Booklet of Authorities, Tab 22
[214] Booklet of Authorities, Tab 22
[215] Booklet of Authorities, Tab 22

"*Where the cost plus method is determined to be the most appropriate method to the circumstances of the case, the analysis would require examining whether the costs incurred by the group service provider need some adjustment to make the comparison of the controlled and uncontrolled transactions reliable. […].*"[216]

280. Furthermore, the expert report of the Appellant's expert witness 2 states that "*This section of the 2010 OECD Guidelines specifically deals with transfer pricing considerations relating to intra-group services and is thus especially relevant to the arrangement between [the Appellant] and [the parent company]. As set out above, the 2010 OECD Guidelines specifically notes that depending on the circumstances of the case, the costs of the tested party ([the Appellant]) may need to be adjusted to increase reliability of the transfer pricing method applied…. Furthermore, and as previously noted, the OECD are clear in paragraph 2.58 that the TNMM method operates in a manner similar to the cost plus method and should be applied in the same way. Accordingly, the reference in paragraph 7.35 of the 2010 OECD Guidelines should be similarly construed and allows for adjustments to be made to the financial results of the tested party where such adjustments improve the comparability".*[217]

281. The Commissioner is satisfied that having adjusted the cost base of the Appellant to account for the fact that it did not incur a cost for the SBAs accounting expense and was therefore not entitled to earn a mark-up on costs it had not incurred (based on the arm's length principle as well as the application of net cost plus as a PLI), it was necessary to consider whether the cost base of the comparable companies requires adjustment to remove costs not incurred.

282. The Commissioner notes that upon initial review of the financial data for the comparable third parties, [redacted] did not identify any SBAs expenses in the cost base of comparable companies. However, in the letter dated 30 September 2021, the Respondent identified comparables where SBAs were identified; comparables without SBAs; and comparables where insufficient financial information from public sources was available to determine the position on SBAs.

283. The Commissioner notes that the Appellant responded to the Respondent's discovery in correspondence dated 11 November 2021,[218] wherein it states that:

"*As seen in the table above, 70% of the total number of accepted comparables had insufficient publicly available financial information with regard to their SBP. As such, in*

[216] Booklet of Documents, Tab 14, page 240
[217] Booklet of Documents, Tab 14, page 240
[218] Booklet of Documents, Tab 56, page 1219

order to continue the principle of comparing 'apples with apples', we have in the next section performed two variations of adjustment to the benchmarking studies. Assuming a comparability adjustment is appropriate, the adjusted benchmarking analyses support [the Appellant's] results.

To test the robustness of the benchmarking analyses, and in acknowledgement of the fact that we can identify SBP [SBC] expense for certain of the comparables, we performed a comparability adjustment to the comparable companies identified by the benchmarking analyses. We performed two versions of the comparability adjustment:

(a) Scenario 1: For comparables that have identifiable SBP expense, we removed that SBP expense from that comparable's cost base and recalculated the MTCs based on the adjusted cost base.

(b) Scenario 2: We removed altogether comparables that have identifiable SBP expense.

…………….

[The Appellant's] result fell within the adjusted full range of all sets within all years. Due to an insufficient number of observations in each period, we are unable to compute an arm's length range of results comprised only of companies that do report SBP. As such, we maintain that the exclusion of SBP expense from the cost base of [the Appellant] is appropriate"

284. The Commissioner notes the views of the Appellant's expert witness 2, which are contrary to the views expressed by the Respondent, that in his opinion, "*it is permitted under OECD guidance to adjust [the Appellant's] results in its financial statements to take account of this fact, i.e., to exclude non-incurred SBAs. It is then necessary to consider whether adjustments are required to the results of the comparable independent service providers to ensure the arm's length mark-up is computed using a cost base consistently calculated for the comparable service providers and the tested party*".[219]

285. Nevertheless and despite the disagreement on the issue, the Commissioner again notes the views of the Appellant's expert witness 2 that: "*the issue of the comparability adjustments does not answer the fundamental question of whether SBAs should be included in the cost base to which a mark-up is applied*" and that *"[p]ut simply, the making of 'comparability adjustments' is directed towards identifying the appropriate level of mark-up to be applied to particular costs but tells us nothing as to the costs which are to*

[219] Booklet of Documents, Tab 14, page 242

be included in that calculation." Moreover he states that: "..*the comparability analysis – or benchmarking study as it is also referred to – identifies independent companies providing similar services to that of the Appellant. And I agree that the analysis shows that a mark-up of between 5 and 15% is generally reasonable. That would be consistent with my own experience having undertaken many similar benchmarking studies and also some public sources information around the levels of mark-up such as produced by the EU Commission".*[220]

286. Furthermore, the Commissioner notes the evidence of the Respondent's expert witness 2 that he agrees with Counsel for the Appellant that: "*the purpose of the comparability analysis is to determine the arm's length profit, the range of arm's length profit that one would expect to see in unrelated third parties who are engaged in similar activities to those in which the Appellant engages*". Moreover, the witness stated that he agreed that *"The point that [the Appellant's expert witness 2] made this morning is that, in all of the comparators, the accounting treatment and the amount of costs that they incurred was the same; they incurred costs of 120 and their accounting expense was 120. This company is different. Because this company has an accounting expense of 120 and incurred expenses of 100. And the point I would like to put to you is this: The comparability analysis cannot help the Appeal Commissioner to decide who's right about whether it is 100 or 120.*"[221]

287. It is the view of the Appellant's expert witnesses that as parties are agreed on the arm's length nature of the mark-up being [redacted] in 2015 and 10% in the subsequent relevant years, which is the outcome of a comparability analysis, any potential comparability adjustments to the comparable service providers are not matters to displace what is an agreed position of the parties as to the arm's length nature of the mark-up of [redacted] and 10% as the impact of the comparability adjustment performed is seen in the calculation of the mark-ups. The Commissioner notes that the Respondent's expert witness 2 states in his report that "*I note that the estimated markup for comparator businesses, which are broadly in the range of a 5-15% markup on total costs, is consistent with what I would expect commercial businesses providing services equivalent to [the Appellant] to achieve at arm's length, based on the relevant economic characteristics of the Intercompany Services Agreement.*"[222]

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[220] Transcript, Day 4, page 23
[221] Transcript Day 4, page 106
[222] Booklet of Documents, Tab 15

288. The TP reports concluded that the Appellant's reported taxable profit from these services, as a percentage of its incurred costs, was within the range of cost-plus profit mark-ups of firms performing comparable services for unrelated third parties.

Who bears the cost of the SBAs: the Appellant v the parent company

289. As aforementioned, it is accepted by the Appellant for the purposes of this appeal that there is a cost to the SBAs, but it is argued by the Appellant that the cost is borne by the parent company, rather than the Appellant. The Respondent argues that the SBAs accounting expense must be treated as a cost incurred by the Appellant and thus, the SBAs accounting expense should be included in the Appellant's cost base to which a mark-up is applied in the provision of services to the parent company.

290. The Commissioner accepts the Appellant's argument that the cost of the SBAs is borne by the parent company. The Commissioner is entirely satisfied, having considered the totality of the documentation, submissions and evidence adduced in this appeal, that the cost of the SBAs is not borne by the Appellant.

291. Consequently, the Commissioner is satisfied that the Appellant was correct to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant. The Commissioner will proceed now to set out her reasons for her finding.

292. The Commissioner is satisfied that the cost, is a cost which the parent company incurs specific to that business in the conduct of its activities, as detailed in the preceding paragraphs and in accordance with the evidence adduced, and the SBAs are not a cost that burdens the services which the Appellant undertakes to provide to the parent company. The Commissioner considers that all of the evidence including the expert evidence concludes that the risk and the cost of issuing the SBAs lies with the parent company, not with the Appellant. The Commissioner has set out the parent company's role in issuing the SBAs in detail under the various preceding headings and that it is the sole decision maker in relation to an award of the SBAs across the organisation, the administration of the infrastructure to manage awards of the SBAs and being a party to the SBAs agreement with eligible employees.

293. It is common case that the arm's length principle requires that the terms at which related parties transact with each other and the profits arising from these terms, should reflect the terms and related profit outcomes in comparable transactions conducted by unrelated

or independent entities in a market setting.[223]The application of the arm's length principle is generally based on a comparison of a controlled transaction (between associated enterprises) with an uncontrolled transaction (between independent enterprises). Paragraph 2.92 of the OECD Guidelines states that:

"… the determination of what costs should be included in the cost base should derive from a careful review of the facts and circumstances of the case."[224]

294. The Commissioner considers that the OECD guidelines make it clear that the costs to the service provider in providing the service is a relevant consideration. Paragraph 7.29 of the 2010 OECD Guidelines states that:

"*the matter should be considered both from the perspective of the service provider and from the perspective of the recipient of the service. In this respect, relevant considerations include the value of the service to the recipient and how much a comparable independent enterprise would be prepared to pay for that service in comparable circumstances, as well as the costs to the service provider".*[225]

295. The Commissioner considers that it is pertinent at this point to restate the evidence of the Appellant's expert witness 1 in relation to the hypothetical scenario used throughout this appeal by the parties. The Appellant's expert witness 1 gave evidence of an Irish company that incurs a cost of €100 and a company in the US that incurs a cost of €20 in relation to the SBAs, and the objective of the employees is to create services that are then sold by the entity in Ireland to the company in the US. He testified that there is no way that the Irish company at arm's length, assuming a mark-up of 10%, can generate €132 of income without incurring €120 of cost, because if the Irish company incurs a revenue of €132, but has to bear an expense only of €100, its profits would now be €32, which actually represents a mark-up of 32% on cost, which, under the terms of the example, is three times the arm's length return. The witness stated that connected to this excess profit that the Irish company is now earning, is the fact that the US company, that actually bore €20 of expense is receiving no compensation for having borne that expense, and so the other entity suffers a loss.[226]

296. The Commissioner considers the expert report[227]of the Appellant's expert witness 1 to be illustrative, wherein he outlines the approach taken by [redacted] and the approach taken by the

[223] Booklet of Authorities, Tab 22
[224] Booklet of Authorities, Tab 22, page 133
[225] Booklet of Authorities, Tab 22, page 259
[226] Transcript, Day 3, page 71
[227] Booklet of Documents, Tab 13, page 173

Respondent. The report highlights that under the [redacted] approach, the taxable profit in the hypothetical scenario is as follows:

Revenue =	€100 x (100% + 10%)	= €110	Cost plus mark-up on non SBA cost
Minus: Cost =	€100 =	= €100	Non SBA- Costs
Equals: Profits =	€100 x 10% =	= €10	Profits on Non SBA costs (10% mark-up)

297. The Appellant's expert witness 1 sets forth that under the Respondent's approach,[228] the Appellant is deemed to have incurred an actual economic cost arising from the SBAs, despite not having issued the SBAs. The taxable profit in the hypothetical scenario is as follows:

Revenue =	€100 x (100 + 10%)	= €110	Cost plus mark-up on non SBA costs
	+ €20 x (€100 + 10%) =	= €22	Cost plus mark upon SBA expense
Minus: Costs =	€100 =	= €100	Non SBA costs
	+ 0		No adjustment for SBA expense
Equals: Profits =	€100 x 10%	= €10	Profits for Non SBA costs (10% mark-up)
	+ €20 (x 110%)	= €22	Plus revenues for SBA Expense
		= €32	

298. The diagrams show that the consideration to which the Appellant would be entitled to receive at arm's length from a third party is €132, but the Appellant's expert witness 1 explained that the parent company herein is wearing two hats, such that it is both a

[228] Booklet of Documents, Tab 13, page 174

customer of the service and the supplier of the SBAs. Therefore, the arm's length consideration to which the company in Ireland is entitled to is €110. Both the Appellant’s expert witness 2 and the Respondent’s expert witness 2[229] agreed with this hypothetical. It is important to restate that the Respondent’s expert witness 2 said that he agreed with 99% of the testimony of the Appellant’s expert witness 1.

299. The Commissioner has considered the views of the Respondent’s expert witness 2 in relation to the costs associated with the SBAs. The Commissioner notes that the witness was asked his opinion on two questions posed by the Respondent. Of notable importance, both questions relate to the amount of consideration. The Commissioner considers it prudent to set out the questions posed namely, to consider “*The arm’s length nature of the <u>amount of</u> <u>consideration receivable</u> by the Appellant from [the parent company] under the Intercompany Services Agreement in each period”* and to provide “*an assessment of the reliability of the comparability analysis conducted by the Appellant’s advisors in their transfer pricing documentation to demonstrate <u>the arm’s length nature of the amount of consideration receivable</u> by the Appellant from [the parent company] under the Intercompany Services Agreement”.* [Emphasis added]

300. However, the Commissioner considers it appropriate to set out the expert witness’s conclusions in his report to the questions posed. The Commissioner notes that in respect of the first question that arises, it is the opinion of the Respondent’s expert witness 2 that the amount receivable by the parent company under the services agreement in each period is less than what would be agreed by independent parties and not at arm’s length, as the SBAs costs would be an economic cost for the Appellant at arm’s length, which must be incurred to remunerate the Appellant’s employees. If these costs were not recovered from the parent company, the Appellant would expect to make losses from entering into the services agreement in every period. At arm’s length, compared to the prospect of sustained losses, there is a superior commercial alternative readily available for the Appellant: not to sign the contract on these terms.[230]

301. In respect of the second question, the Commissioner notes that it is the expert witness’s opinion that the comparability analysis conducted is not reliable in demonstrating the arm’s length nature of the amount receivable by the Appellant from the parent company and that the [redacted] analysis compares a mark-up on partial costs for the Appellant with a mark-up on total costs for the comparator companies. This difference between partial and total costs is economically significant, and materially affects the condition being

[229] Transcript, Day 4, page 67
[230] Transcript, Day 4, page 77

examined. The situations compared in the [redacted] analysis are therefore not sufficiently comparable, and as a result the [redacted] benchmarking analysis presented does not support the arm's length nature of the amount of consideration receivable by the Appellant from the parent company under the services agreement. Further, none of the scenarios presented by [redacted] successfully make or permit reasonably accurate adjustments to eliminate the effect of these economically significant differences.[231]

302. The Commissioner has already stated that the Respondent's expert witness 2 testified that he agreed with 99% of the testimony of the Appellant's expert witness 1 and that things have moved on somewhat since his report.[232] The Respondent's expert witness 2 also confirmed that he was not furnished with the correspondence that issued from the Appellant to the Respondent, dated 3 February 2023.[233]

303. Despite the witness's opinion in his expert report, the Respondent's expert witness 2 testified that he agreed with the Appellant's expert witness 2 that the comparability analysis cannot assist the Commissioner to decide who is right about whether it is €100 or €120.[234]The Commissioner considers it important to state this herein. Moreover, it is important to restate that the Respondent's expert witness 2 testified that he agreed with the evidence of the Appellant's expert witness 1 that if the Appellant did not work for the parent company, but provided the same services to another company, the answer is it would cost €120, the Appellant would charge €132 and the profit would be €12 and whichever way it is looked at, the market price, is established as €132, the costs of the service are €120 and therefore the profit is €12.[235]

304. Moreover, whilst the Respondent's expert witness 2 testified that he believed that at arm's length the services agreement would not happen, such that the parent company would not provide the SBAs to an independent company, he testified that he could not dispute that there is an entire chapter dedicated to the award of SBAs to non employees in the KPMG Share based payments IFRS 2 handbook.

305. The Commissioner notes that the Respondent's expert witness 2 was cross examined by Senior Counsel for the Appellant on the replacement costs of the SBAs. It was put to the witness that the fair value of the SBAs issued is €20, but there exists the [redacted] Plan and evidence has been adduced in relation to the parent company bearing all of the administrative expenses around the administration of that plan, such that the

[231] Booklet of Documents, Tab 15
[232] Transcript, Day 4, page 65
[233] Booklet of Documents, Tab 69, page 1250
[234] Transcript, Day 4, page 106
[235] Transcript, Day 4, page 68

parent company is not just issuing the SBAs, it is performing all of the functions around the allocation of those SBAs, so why, if the fair value of the SBAs is €20, do you think that this is something that the Appellant could acquire, for just the fair value of the SBAs? In other words, the Appellant would have to pay more than just the fair value of the SBAs to do what the parent company does? The witness agreed and stated that he thought that is correct, but that he would have no idea what that additional cost would be.

306. The Respondent contends that the services agreement, wherein at Exhibit A to the services agreement it specifically states that the Appellant's costs will not include the parent company's "*stock-based compensation expense (as determined pursuant to GAAP) or other like non-operating non-cash charges that may be required by GAAP*", is not an arm's length agreement. The Commissioner has found that the evidence does not support what is contended for by the Respondent.

307. The Commissioner notes that it is the opinion of the Appellant's expert witness 1 that the Appellant would not, at arm's length, be entitled to an additional profit associated with the SBAs accounting expense, as the Appellant did not bear any economic cost relating to the SBAs. The Commissioner notes that reference was continually made by the Respondent to the SBAs representing around [redacted] of the total wages and salaries costs of the Appellant in the relevant period, but the Commissioner considers that this misses the point, that this relates back to the risk of the parent company in the award of the SBAs and not the Appellant, as the value of the SBAs is linked to the share price and market factors which are outside of the parent company's control. The Commissioner heard evidence from the Appellant's witnesses on this point. The Commissioner does not consider that there exists evidence to support the services agreement not being at arm's length and the Commissioner has set out her detailed reasoning for this finding under the heading "the Services Agreement" herein.

308. The Commissioner is satisfied that the Respondent's position is fundamentally based on their assertion that the SBAs expense is in the Appellant's accounts and therefore it cannot be excluded when identifying the cost base for testing the arm's length nature of the Appellant's remuneration. In its letter of assessment dated 1 December 2021,[236] the Respondent states that: "*The only relevant consideration is whether the exclusion of the expense for share based payments in the service fee calculations would be consistent with the arm's length conditions between comparable independent enterprises based on a comparability analysis.*" The Commissioner has set out above, including the relevant

[236] Booklet of Documents, Tab 58, page 1224

expert evidence that supports the view, that the exclusion of the cost of the SBAs is consistent with the arm's length principle.

309. The Commissioner is satisfied that the glaringly obvious point which all of the evidence and submissions establish is that there was an accounting loss, because there is an expense in the accounts for the SBAs in accordance with FRS 102, but it was not an incurred expense, in other words it was not an expense which the Appellant had to pay out. Thus, even though the Appellant's accounts show the SBAs as an expense, it was not a cost that the Appellant had to pay or in other words incur in the provision of its services to the parent company. Moreover, "*it is [the parent company] that is at risk for the expense associated with the stock-based awards and, therefore, it is [the parent company] that is entitled to earn a profit mark-up for having incurred that risk.*"[237] The Respondent accepts that *"[the Appellant] did not pay [the parent company] anything."*[238]

310. The Appellant suggests that the Respondent posits the view that it is irrelevant what the cost is, all that is sufficient is that it is there in the accounts. Moreover, it does not matter what the SBAs are or the circumstances in which the SBAs were issued or who bore the risk or who stood to gain financially if the SBAs were effective, if it is in the accounts, an arm's length third party provider of this service would include it in the consideration to which they are entitled.[239] The Commissioner accepts the Appellant's submission in this regard. The Commissioner notes the submission of Counsel for the Respondent wherein it is submitted that: *Whether it is a cost to the* [redacted] *or whether it is a cost to [the Appellant] is irrelevant*.[240]

311. Furthermore, the Commissioner notes that the Respondent's submission went further and the Respondent accepted that the SBAs were a real substantive economic cost to the parent company which it incurred for its own purposes, at its own risk, for its own benefit, and at its own discretion. The Commissioner, being somewhat muddled by this submission sought clarification from Counsel for the Respondent. The response was "*absolutely, it didn't involve [the Appellant]*".[241]

312. In light of this submission, the Commissioner can only assume that while the Respondent accepts that both the risk and cost of issuing the SBAs lies with the parent company, nonetheless, the notional cost in the Appellant's accounts in accordance with FRS 102, mandates that consideration is adjusted to reflect the amended assessments raised by

[237] Transcript, Day 3, page 87
[238] Transcript, Day 6, page 194
[239] Transcript Day 7, page 13
[240] Transcript Day 6, page 108
[241] Transcript Day 6, page 103

the Respondent for the relevant years. The Commissioner does not consider the submission to be logical nor in accordance with the OECD Guidelines, as set out herein.

313. It is important to mention that Counsel for the Respondent submitted that "*it is a tax-geared pricing arrangement agreed between connected parties. That is made very clear by paragraph 3 of Exhibit A, which envisages that the fee could be renegotiated if the Appellant was entitled to a corporation tax deduction for the SBA expense,*"[242] but at no stage during the hearing nor in any prior correspondence or submissions was this purported, nor was this proposition put to any witnesses during the course of examination or cross examination. The first time that reference was made to the term tax geared pricing arrangement, was during the Respondent's legal submissions on Day 6. The Commissioner considers that in circumstances where there exists no evidence that the transaction was structured in such a way, and where no evidence was adduced or submissions made on the point, it would not be appropriate for the Commissioner to proceed to consider and determine such a suggestion.

314. The Appellant argues that the preparation of its accounts in a manner which complies with FRS 102 is not of any relevance to the question of whether it is earning an arm's length return from the services it is supplying to the parent company. The Commissioner accepts the Appellant's argument in this regard. The Commissioner notes the evidence of the Appellant's witness 3, that other subsidiaries under her remit are not subject to FRS 102 and thus, not required to include in their statutory financial accounts an expense relating to the SBAs. Those subsidiaries do not include a cost for the SBAs issued to employees when calculating their cost base for services provided to the parent company.[243]

315. The Commissioner is satisfied that FRS 102 has no relevance to transfer pricing principles and that it is economic principles that are relevant in this regard. The expert evidence of both parties' expert witnesses supports the Commissioner's conclusion in this regard. The Commissioner is satisfied that the SBAs in the Appellant's statutory financial accounts, are a non operating, non cash accounting expense required by FRS 102.

316. The Commissioner accepts the testimony of the Appellant's expert witness 2, who states that: "*SBAs are notional costs, which are included in the financial statements for accounting purposes but are not incurred by [the Appellant] and for which no tax deduction is taken. It is noted that the [Intercompany Services Agreement] between [the*

[242] Transcript Day 6, page 79
[243] Transcript, Day 3, page 28

Appellant] and [the parent company] provides that the mark-up is applied to the costs incurred and specifically excludes the SBA."[244] The Commissioner has no reason not to accept the evidence of the witnesses in this regard.

317. The Commissioner is satisfied that the Appellant has incurred certain expenses in making supplies to the parent company. Nonetheless, the expenditure which it has incurred does not include a cost of providing the SBAs to its employees. The evidence adduced supports the view that the cost of providing the SBAs to the employees of the Appellant is borne by the parent company. The Appellant has charged a mark-up on the expenses it has incurred and the mark-up represents its profit. It is that profit which is taxable and the Appellant has accounted for Corporation Tax on this amount of profit. That an amount of Corporation Tax has been paid is not in dispute (This amounts to the sum of €10 in the hypothetical amounts used herein, such that the Appellant states that even if it is required to include the costs of the SBAs the amount at issue is €2 i.e. €12-€10= €2). The Commissioner is satisfied that to conclude in the manner contended for by the Respondent, would not be in accordance with the arm's length principle.

318. The Commissioner is satisfied that the evidence overwhelmingly supports the view that at arm's length, there was no economic basis for the Appellant to receive service fees or operating profits associated with the SBAs accounting expense and thus, the arm's length principle requires that the SBAs accounting expense should be excluded from the Appellant's cost base in computing its mark-up on costs, on the basis that the SBAs are notional costs, which are included in the financial statements for accounting purposes, but not costs that are incurred by the Appellant. The arm's length principle dictates that if the parent company bears the economic cost of the SBAs, it is the parent company that should earn any arm's length profit associated with incurring that cost.[245] The Commissioner is satisfied that the cost of the SBAs did not burden the services provided by the Appellant to the parent company.

319. Accordingly, in relation to the first issue herein, namely, was the Appellant correct to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant, the Commissioner is satisfied that the Appellant was correct to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial

[244] Booklet of Documents, Tab 14, page 231
[245] Booklet of Documents, Tab 13, page 183

statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant.

Consideration v Profit

320. The Commissioner finds that there was no economic rationale for the Appellant to receive service fees or operating profits associated with the SBAs expense in its statutory financial accounts and that the arm's length principle requires that the SBAs expense should be excluded from the Appellant's cost base in computing its mark-up on costs, on the basis that the SBAs are notional costs, which are included in the financial statements for accounting purposes, but not costs that are incurred by the Appellant in the provision of services.

321. The Commissioner is satisfied that this determines the matter herein and there is no requirement for the Commissioner to proceed further to consider the alternative position namely, if the Commissioner is wrong and the expert evidence is wrong, such that all risks and all costs associated with the SBAs are attributable to the Appellant, (which the Respondent accepts is not the case[246]) what would the outcome be.

322. Nevertheless, in light of the Commissioner's findings in relation to statutory interpretation, the Commissioner considers that it is appropriate that she should offer some views on this important matter.

323. The Commissioner has determined that the OECD Guidelines and the statutory scheme herein are concerned with the adjustment of profit. The Commissioner accepts the Appellant's submission that the rationale for this is to ensure that enterprises pay tax in the appropriate jurisdiction, on the appropriate amount of profit referable to the functions, assets and risks which they undertake and bear in that jurisdiction.[247]

324. Paragraph 1.3 of the OECD Guidelines could not be clearer, which provides that:

> "*When transfer pricing does not reflect market forces and the arm's length principle, the tax liabilities of the associated enterprises and the tax revenues of the host countries could be distorted. Therefore, OECD member countries have agreed that for tax purposes the profits of associated enterprises may be adjusted as necessary to correct any such distortions and thereby ensure that the arm's length principle is satisfied. OECD member countries consider that an appropriate adjustment is achieved by establishing the conditions of the commercial and financial relations that*

[246] Transcript, Day 6, page 103
[247] Booklet of Documents, Tab 69, page 1251

they would expect to find between independent enterprises in comparable transactions under comparable circumstances."[248]

325. In addition, the adjustment of profit lies at the heart of Article 9(1) of the Model Convention which provides that:

> *"[Where] conditions are made or imposed between the two [associated] enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises, then any profits which would, but for those conditions, have accrued to one of the enterprises, but, by reason of those conditions, have not so accrued, may be included in the profits of that enterprise and taxed accordingly*."[249]

326. Moreover, paragraph 1.6 of the OECD Guidelines provides that:

> "*By seeking to adjust profits by reference to the conditions which would have obtained between independent enterprises in comparable transactions and comparable circumstances (i.e. in "comparable uncontrolled transactions"), the arm's length principle follows the approach of treating the members of an MNE group as operating as separate entities rather than as inseparable parts of a single unified business*."[250]

327. The Commissioner notes that the Appellant attempted to tease out this situation in correspondence with the Respondent dated 3 February 2023,[251]wherein the Appellant states that:

> *"…this letter will assume that the issuance of RSU's carries a cost. It will assume that the cost is one which, though in fact borne by [the parent company], was a cost of supplying the services which [the Appellant] provided to [the parent company]. It will also assume that the cost was a cost which an arm's length third party would have included in the calculation of its charges and we will assume that a mark-up would be applied to that cost. We will also assume (just for ease of analysis) that the appropriate arm's length mark-up to apply is 10%. As set out above, these concessions and assumptions are made strictly for the purpose of this letter and without prejudice to any of the Appellant's arguments to the contrary in the appeal*".

328. The Appellant in its correspondence sets out a hypothetical example of the costs incurred. The hypothetical is slightly different to the numbers used herein and during the appeal

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[248] Booklet of Authorities, Tab 22 page 78
[249] Booklet of Authorities, Tab 22, page 79
[250] Booklet of Authorities, Tab 22, page 79
[251] Booklet of Documents, Tab 69, page 1251

hearing, but the Commissioner does not consider it useful to interfere with the numbers set out in correspondence and considers it appropriate to simply restate what the Appellant's hypothetical suggests, as it illustrates the same principles and arguments advocated on behalf of the Appellant throughout this appeal. The Appellant states that:

> "*If we assume, for the sake of analysis, that the expense which [the Appellant] incurred was €1,000 and the arm's length mark-up is 10%, its profit is €100. It is that profit which is chargeable to tax and the question which the transfer pricing rules pose is whether this profit of €100 is an arm's length return for the service which has been provided.*
>
> *It is said, however, by the [Respondent] that there was a cost to issuing the RSUs and that those costs ought to have been included in the charge. We will assume, for the sake of analysis, that there is a cost of issuing RSUs and we will assume that it is €200. To the best of our understanding, and putting matters in the most neutral way possible, it is said that this €200 was a cost of supplying the service to [the parent company] and, therefore, the amount charged to [the parent company] ought to have included this cost to which a mark-up should have been applied. However, the premise for the [Respondent's] Assessment is that the 'profit' from this arm's length transaction should have been €100 plus €200 plus a mark-up of €20 (on the €200) meaning that the profit now chargeable has increased from €100 to €320. In the example posited above, [the Appellant's] arm's length return has increased from €100 (representing a 10% mark-up on costs of €1,000) to €320 (representing a 32% mark-up on expenses of €1,000). We respectfully submit that this cannot be correct*."[252]

329. The Commissioner agrees that this cannot be correct having regard to the finding that the adjustment which follows must be an adjustment to reflect the additional profit which an arm's length third party would have realised from this transaction. Moreover, the Commissioner notes that the Appellant in its correspondence states that:

> "*It follows that if it is said that the cost of the RSUs was €200 and this was a cost which ought to have been incurred by an arm's length third party in providing its service, (and thus form part of the cost base for the supply) that cost would first have been suffered by the arm's length third party before then being incorporated into the amount charged by that arm's length third party to [the parent company] plus the mark-up. The result of this is that the additional "profit" which would result from the inclusion of the RSU's in the cost base is €20 i.e. the mark-up on the additional element of cost. There is an expense of €200, income of €200 and a mark-up of €20. There is no basis for assuming*

[252] Booklet of Documents, Tab 69, page 1252-1253

that an arm's length third party would be entitled to make an additional €220 profit without incurring any element of cost and the assumption made grossly inflates the 'profit' which an arm's length third party could make since it assumes that it can generate the income without generating the cost (even though the income is generated by reference to the costs incurred).

…………..

Even if one were to view matters exclusively through the lens of the arm's length "consideration receivable", it would be artificial, unreal and ultimately wrong to assume that an arm's length third party in the Appellant's shoes would be entitled to receive consideration from [the parent company] by reference to the value of the RSU's plus a mark-up without [the parent company] seeking payment of, or setting-off the value of the RSU's which it had issued. Put another way, it is wholly contrary to the arm's length principle to expect, in an arm's length situation, [the parent company] to bear the cost of issuing the RSUs and then to pay [the Appellant] the same amount for issuing those RSUs plus a mark-up on that cost".

330. Furthermore, the Commissioner notes that at the conclusion of the Appellant's correspondence, in an effort to narrow and/or clarify the issues, it poses a series of questions which it requests that the Respondent addresses. The Commissioner considers it appropriate to set out the relevant questions posed by the Appellant as follows:

"*1. Do you accept that the objective of the arm's length principle is to ascertain the profit or return which an arm's length third party would be expected to earn from the provision of the services in question?*

2. If so, do you accept that, using the example above, the additional profits which might be expected to be earned is limited to the mark-up if any which is applicable to the assumed cost of the RSUs i.e. in the above example, €20.

3. If not, why not?

……."

331. The Commissioner has considered the Respondent's correspondence dated 8 March 2023,[253] wherein it responds to the Appellant in relation to the questions posed. The Commissioner considers it appropriate to also set this out hereunder, as follows:

[253] Booklet of Documents, Tab 73, page 1264

"(1) No, please refer to (3) below.

(2) No, please refer to (3) below

(3) Section 835C(2)(b) TCA 1997 requires an adjustment if the actual consideration receivable for a supply under an arrangement is less than the arm's length amount. The adjustment is made by computing profits or gains or losses "as if the arm's length amount were receivable instead of the actual consideration payable". This is consistent with the authoritative statement of the arm's length principle in paragraph 1 of Article 9 of the OECD Model Tax Convention which requires an adjustment if conditions made or imposed between two associated enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises and the arm's length principle as elaborated in the 2010 OECD TPG".

332. The Commissioner is satisfied that the adjustment made by the Respondent commences with the loss in the financial statements and it makes an adjustment to a financial statement loss rather than the profits or losses chargeable to tax. The Irish transfer pricing legislation and the 2010 OECD Guidelines make clear that if there was any adjustment to be made in relation to the Appellant, the adjustment should be made to the profits or losses chargeable to tax.[254]

333. Importantly, if profits are to be adjusted, then the OECD Guidelines state that the interquartile range must be considered. If viewed through the lens of the Respondent and if it is consideration that is to be adjusted, what then is the role of the interquartile range or a comparability analysis. The Commissioner considers that the answer is that it is illogical to view this matter as contended for by the Respondent. The OECD guidelines are focused on determining profit and an adjustment to same. It is entirely incorrect of the Respondent to advocate for an adjustment to consideration, on the basis that this is what is mandated by section 835C TCA 1997. The Commissioner considers on no interpretation of the statue, is this the case.

334. The Commissioner heard competing arguments in relation to the deductibility of the costs of the SBAs if the Appellant was required to include the costs of the SBAs in its cost base to calculate the fees chargeable to the parent company for the services rendered. Given the Commissioner's findings, that the Appellant was correct to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent

[254] Booklet of Documents, Tab 14

company to employees of the Appellant, this is not an issue that remains to be determined by the Commissioner.

Conclusion

335. The Commissioner accepts the testimony of the Appellant's expert witness 1, that from an economic perspective the pertinent question when considering who is incurring an expense is to ask, who is bearing the risk associated with that expense. That is what the OECD Guidelines require. The Commissioner does not accept the evidence of the Respondent's expert witness 2 that "*why would the costs that are caused by this activity not simply fall where they are generated? And for most economists the starting point is they would fall where they are generated.*"[255] The witness accepted during cross examination by Senior Counsel for the Appellant that this is not stated nor required in the OECD Guidelines on transfer pricing.

336. The Commissioner considers that the relevant question for transfer pricing purposes is whether the SBAs issued by the parent company created an economic cost for the Appellant. The Commissioner heard extensive evidence that the parent company bears all of the administrative costs around the administration of the [redacted] Plan and that the parent company has a subcommittee who decide to whom the SBAs are allocated. The Commissioner is satisfied that the parent company is not just issuing the SBAs, it is performing all of the functions around the allocation of those SBAs, including providing a technical platform to employees and selling shares to cover tax liabilities arising. It is the parent company that bears the associated risks.

337. The Commissioner accepts the Appellant's submission that the reality of this case is that the answer lies not in the accounts of the Appellant, but in the complex economic factors that are required to be taken into consideration when assessing transfer pricing. The Commissioner is of the view that when you distil this appeal down, there arises one fundamental question and it is a question of economics which is dictated to by the OECD Guidelines, namely, was the Appellant correct to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant. (This is the substantive matter to be determined, the Commissioner having dealt with the issues that arise under sections 959AA and 959AC TCA 1997 and the proper interpretation of sections 835C and 835D TCA 1997).

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[255] Transcript, Day 4, pages 66 & 67

338. The Commissioner considers that this question does not involve the application of section 835C and 835D TCA 1997, the statutory scheme herein, but involves the application of the OECD Guidelines and within that, a functional analysis being carried out to determine who bears the risk, as set out in detail above. The Commissioner has found as a material fact that the SBAs and the services agreement are inextricably linked, given the purpose of the SBAs. Having considered the functions, risks and assets of the parties to the transactions, the Commissioner finds that the cost of the SBAs is that of the parent company and did not burden the services made by the Appellant to the parent company. Thus, the Appellant was correct to exclude in the calculation of its costs of providing the intercompany services, the expense identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant. The Commissioner accepts the evidence of the Appellant's expert witnesses that it would not be an arm's length transaction for the Appellant to earn a profit on those costs from the parent company. The Commissioner does not accept that the services agreement is not an arm's length agreement, for the reasons set out above in this determination.

339. The Commissioner considers it appropriate to mention again for the sake of completeness that whilst the Respondent is dissatisfied with the transfer pricing reports and the comparability analysis undertaken, for the reasons set out above, the Commissioner is satisfied that the relevance of the reports is to establish the margin of 5%-15%, which is not in dispute, and therefore it is irrelevant to the question to be asked namely, should the costs of the SBAs be included in the cost base of the Appellant.

340. The Appellant's experts are in agreement that at arm's length the Appellant was correct to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant. The Commissioner accepts that evidence of the witnesses and considers that, having regard to that evidence and the totality of the OECD Guidelines, it was appropriate to exclude the SBAs from the Appellant's cost base for services rendered to the parent company, as it was not a cost that the Appellant incurred and therefore, the Appellant should not earn a profit therefrom. Moreover, the Respondent's expert witness 2 testified that he "*agreed with about 99% of what [the Appellant's expert witness 1] said in his verbal evidence. I agreed with less of his written report. But that is because in his written report he spent quite a bit of time arguing that SBC have no economic cost. That's not something I agree with. That's not now an issue so nothing rests on that. So I agree with about 99% of [the Appellant's*

expert witness 1] evidence. And I thought he did a very good job at explaining that evidence”.[256]

341. The Commissioner accepts the Appellant’s submissions that the accounting treatment is blind to the question of who bears the legal and economic risk. It is applied irrespective of the fact that the parent company bears the legal and economic risk. The Respondent argues that the inclusion of amounts attributable to the SBAs granted by the parent company in the Appellant’s cost base reflects the established accounting treatment under FRS 102. The Respondent’s position is that as the SBAs expense is in the Appellant’s accounts, they are therefore costs which should be included in the cost base for the services provided to the parent company, despite it accepting that the parent company bore the risk and costs associated with the SBAs as set out above. The evidence of the Respondent’s expert witness 1 is that “*it is an incurred cost. It's not cash cost immediately. It will involve cash costs in the future. But it is an incurred cost at present. You had to incur that in order to attract the staff. So that would be my view and that's why the conclusion is there*.”[257] The Commissioner is satisfied that the correct accounting treatment is determined by the application of FRS 102, but it does not ask the question, who bore the legal and economic risk and who should be entitled to earn the profits referable to this cost, in accordance with the OECD Guidelines.

342. The Commissioner in coming to her conclusion agreed with the expert evidence as to the SBAs being notional costs in the accounts of the Appellant, dictated by FRS 102 and that the arm’s length principle requires that they are excluded from the Appellant’s cost base in providing the services to the parent company under the services agreement. Thus, the arm’s length principle requires that the SBAs should be excluded from the Appellant’s cost base to which a mark-up is applied in the provision of services to the parent company. This is on the basis that the cost of the SBAs was not incurred by the Appellant in providing the services, rather the cost of the SBAs was borne by the parent company.

343. In this regard, the Commissioner notes the expert views of the Appellant’s expert witness 1 that: “[*the Respondent] may well be correct in claiming that if [the parent company] did not provide SBA to [the Appellant’s] employees, [the Appellant] might have had to incur additional costs to provide its services. But the reality is that [the parent company] did provide these SBA and, to the extent they created an economic cost, it is the parent company that bore the cost. Therefore, in the actual world, it is [the parent company] that is entitled to the corresponding economic profit. Had the affairs of [the Appellant] and [the*

[256] Transcript, Day 4, page 65
[257] Transcript, Day 4, page 55

parent company] been arranged differently, and [the Appellant] borne additional salary or bonus costs for its staff, [the Appellant] would have been entitled to an additional profit on these costs". The Commissioner is satisfied that *"transfer pricing determines the profits to which each entity is entitled under the transactions that actually occurred, not the profits to which they would have been entitled under a hypothetical alternative transaction that did not occur*".[258]

344. In case of any doubt, the Commissioner reiterates that this finding, does not require consideration of the statutory scheme herein, namely section 835C and section 835D TCA 1997, but a comprehensive understanding of the OECD Guidelines and the economics at play. The expert evidence adduced by both parties, which was 99% in agreement, in relation to the economics of the transaction, greatly assisted the Commissioner, in coming to her conclusion that it was appropriate to exclude the costs of the SBAs from the Appellant's cost base, as the parent company bore these costs.

345. The Commissioner has considered sections 835C and 835D TCA 1997 and the Commissioner has set out above in detail, her findings in relation to the proper interpretation of the relevant sections. The statutory scheme mandates consideration of what if any **recalculation** should be made to the Appellant's **taxable profit**.

346. The Commissioner does not consider that an adjustment is required to be made to consideration, as contended for by the Respondent, and the Commissioner has set out the reasons why she considers the Respondent to be incorrect in its approach in this regard. The OECD Guidelines are clearly concerned with an adjustment to profit. Article 9(1) of the OECD Model Tax Convention is clearly concerned with an adjustment to profit and the legislative scheme under Part 35A must be read in accordance with Article 9(1) of the OECD Model Tax Convention. It is a fallacy to suggest that it is consideration that is required to be adjusted in accordance with section 835C(2) TCA 1997.

347. However, whilst the Commissioner considered it appropriate to deal with the interpretation, her findings do not require the consideration of section 835C TCA 1997, as no adjustment is required to be made herein, as the Commissioner finds that the Appellant was correct to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant.

[258] Booklet of Document, Tab 13, page 186

348. The Commissioner is satisfied based on the evidence adduced, that the ultimate purpose of applying the arm's length standard is to determine the appropriate taxable income attributable to associated entities within a multinational enterprise. The Respondent is seeking to tax what would have otherwise been the cost of the SBAs if they had been charged and incurred by the Appellant (and not just the mark-up). This is not consistent with the arm's length principle.

349. Having carefully considered all of the evidence, *inter alia* the *viva voce* evidence of the witnesses, the expert evidence, the case law and legal submissions advanced by Senior Counsel for both parties, in addition to the written submissions of the parties including, both parties' statement of case and outline of arguments, the Commissioner has taken her decision on the basis of clear and convincing evidence and submissions in this appeal. In summary and having regard to the issues in this appeal, the Commissioner is satisfied that the answer to the issues as set out above in this determination, under the heading "the issues", is as follows:

(i) Was the Appellant correct to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant **– Yes;**

(ii) If the Appellant was incorrect to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant, what, if any, adjustment is required - **Not relevant, having regard to (i);**

(iii) The interpretation of section 835C and 835D TCA 1997 - **An adjustment to profit rather than consideration is required;**

(iv) With respect to FY15, whether the Respondent was precluded from raising an amended assessment having regard to sections 959AA and 959AC TCA 1997 **– Yes**.

350. As set out, the Commissioner is satisfied that the Appellant has shown on balance that it was correct to exclude in the calculation of its costs of providing the intercompany services, the expenses identified in the statutory financial statements of the Appellant in respect of the SBAs granted by the parent company to employees of the Appellant. Hence, the appeal is allowed.

351. For all these reasons, the Commissioner is satisfied that the Appellant has shown on balance that the Respondent was incorrect to raise the Notices of Amended Assessment for the relevant years.

Determination

352. In relation to the FY15, the Commissioner determines that the Appellant has succeeded in showing that the tax is not payable, having regard to the provisions of section 959AA and section 959AC TCA 1997. The Commissioner is satisfied that the return for the FY15 was a full and true disclose of all material facts and that the return delivered was sufficient, such that the of the four year time limit applied to the Respondent.

353. Nevertheless, if the Commissioner is wrong in her finding and determination in this regard, the Commissioner considers that her findings and determination in relation to the substantive issue, as set out hereunder and which relates to the FY16, FY17 and FY18, will be equally applicable to FY15.

354. As such and for all the reasons set out above, the Commissioner determines that the Appellant has succeed in its appeal and has shown that the tax, as set out in the table hereunder, is not payable:

Corporation Tax period	**Balance of Tax Payable per the Respondent's Assessment**	**Date of Notice of Amended Assessment**
Period ending 31 December 2015	[redacted]	1 December 2021 (and revised Notice of Amended Assessment issued 17 December 2021)
Period ending 31 December 2016	[redacted]	1 December 2021
Period ending 31 December 2017	[redacted]	1 December 2021
Period ending 31 December 2018	[redacted]	1 December 2021

Total	[redacted]	

355. Accordingly, the Notices of Amended Assessment to Corporation Tax, raised under Schedule D Case I, by the Respondent, in respect of accounting periods ending 31 December 2015 ("FY15"), 31 December 2016 ("FY16"), 31 December 2017 ("FY17") and 31 December 2018 ("FY18"), in the total sum of [redacted], shall be reduced to nil.

356. This Appeal is determined in accordance with Part 40A TCA 1997. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ (6) TCA 1997.

Notification

357. This determination complies with the notification requirements set out in section 949AJ TCA 1997, in particular section 949AJ (5) and section 949AJ (6) TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ TCA 1997 and in particular the matters as required in section 949AJ (6) TCA 1997. This notification under section 949AJ TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

Appeal

358. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Claire Millrine
Claire Millrine
Appeal Commissioner
21 February 2024

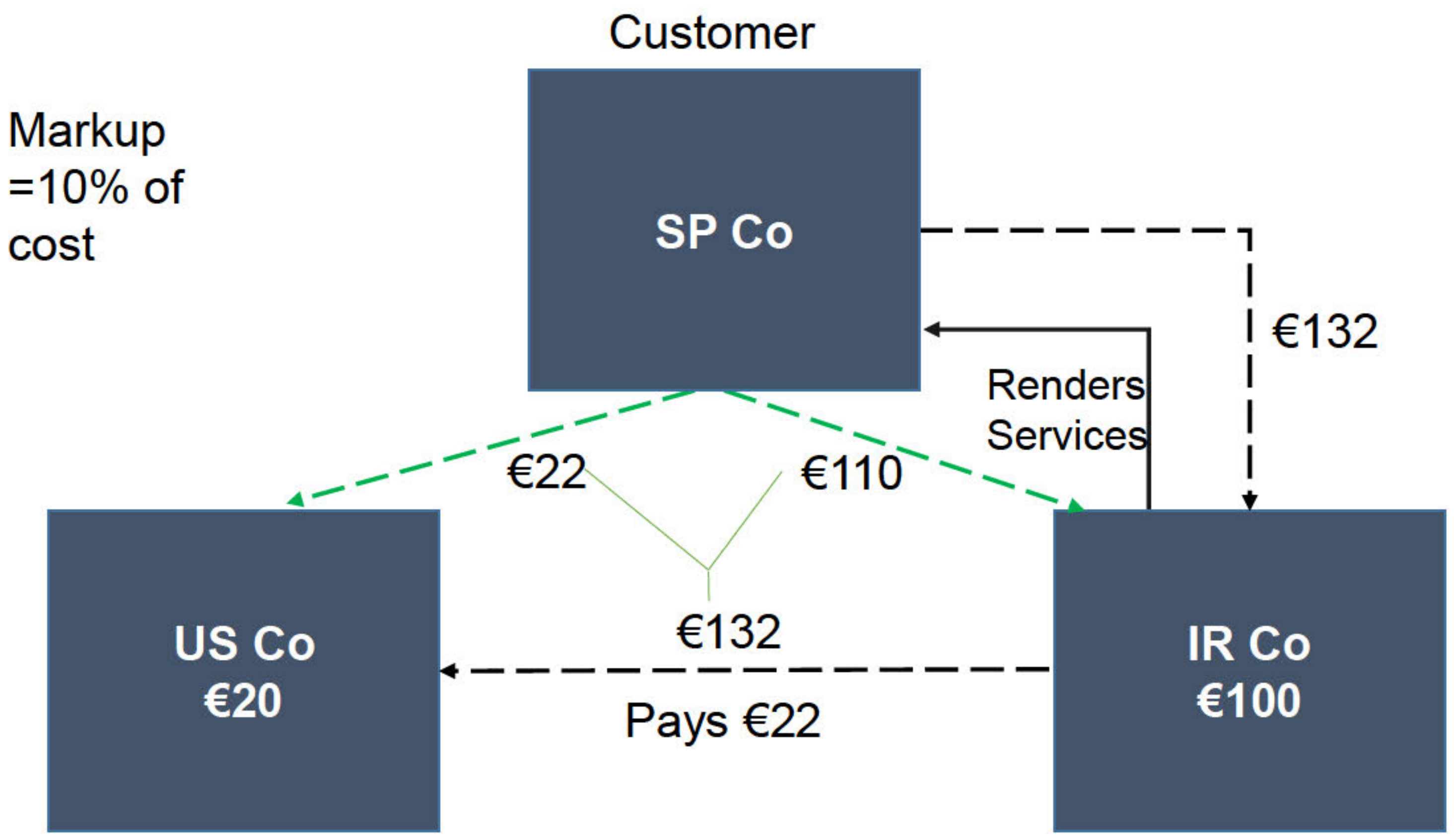
List of Appendices which form part of this Determination

Appendix A – Flipchart prepared by the Appellant’s expert witness 1

Appendix B – Flipchart prepared by the Respondent

Appendix C – Statement of Agreed Facts

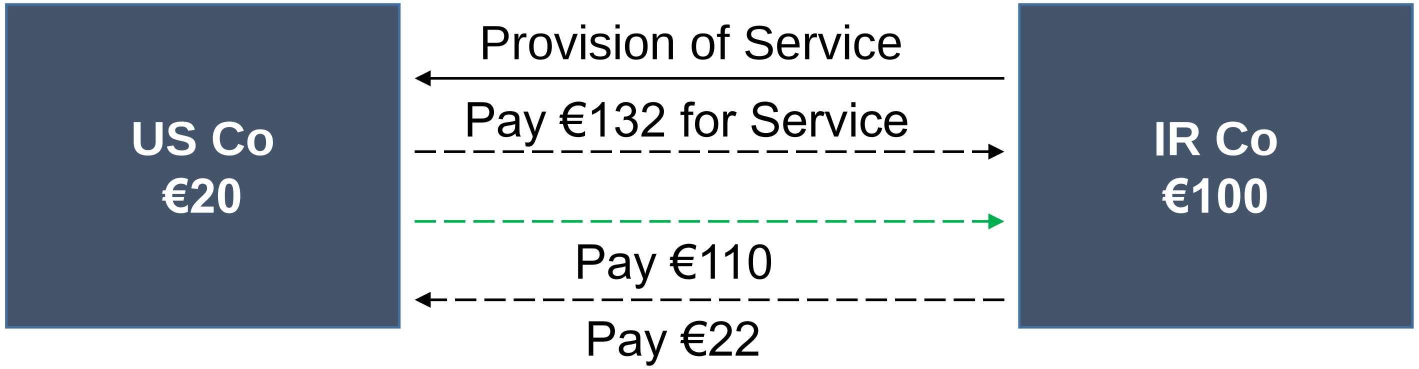
Appendix D – Translation of the hypothetical amounts to the actual amounts in the Appellant’s financial statements



Entity	Cost Incurred	Revenue Realized	Markup
IR Co	€100	€110	10%
US Co	€20	€22	10%

Refer to Day 3 transcript at page 62, line 10.

IR Co		
Revenue	€132	€132
Expense	€100	€100
Expense (payment to US Co)	<u>€22</u>	€20
	€10 *10% on costs IR Co incurred*	€12*



Entity	Cost Incurred	Revenues Realised	Markup
IR Co	€100	€110	10%
US Co	€20	€22	10%

**Position of figure moved from original diagram for readability - refer to Day 3 transcript at page 87, line 18 to page 88, line 29.*

[redacted]

Computation prepared by [redacted] **on 26 September 2023**

	Arm Length	Actual As Is	
Revenue/Consid	132	110	* Sch D C I Adj S. 835C
			€22
Cost	-120	-120	
Profit/Loss	**12**	**-10**	
Add Back S. 81 (n)[1] SBA cost	20	20	
Taxable Profit	**32**	**10**	

[1] Please note the complete reference is S81 (2) (n) TCA 1997.

TAX APPEALS COMMISSION

[redacted]

BETWEEN:

[redacted]

THE APPELLANT

-and-

THE REVENUE COMMISSIONERS

THE RESPONDENT

STATEMENT OF AGREED FACTS

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1 Background

1.1 [redacted].

1.2 [redacted]

1.3 The Appellant is a wholly owned subsidiary of [redacted]

1.4 [redacted] and the Appellant are associated within the meaning of section 835B of the Taxes Consolidation Act, 1997 ("**TCA**").

2 The Controlled Transactions

2.1 Pursuant to [redacted] agreements entered into between the Appellant and [redacted] on 14 May 2013 and 1 January 2016 respectively (hereinafter referred to as collectively as the [redacted], the Appellant:

(a) performed sales and marketing and contract research and development activities for the benefit of [redacted] and

(b) charged a fee to [redacted] by reference to its costs plus a mark-up. Exhibit A to the [redacted] specifically excluded any share-based compensation expense from the costs used in the fee calculation.

3 Share-based Awards

3.1 Eligible employees of the Appellant participated in a group share based incentive scheme provided by [redacted] whereby certain share-based awards ("**SBAs**") were granted to the employees of the Appellant.

3.2 [redacted] did not charge the Appellant for the provision of the SBAs and had no contractual obligation to do so.

3.3 The Appellant did not include SBAs in the costs for purposes of calculating the fee under the [redacted] Agreement for FY15, FY16, FY17 and FY18.

3.4 The Appellant's financial statements relating to the Audit Period included a line item for expenses relating to the SBAs which were awarded by [redacted] to the employees of the Appellant.

3.5 The SBA expense was not claimed as a deduction in the Appellant's corporation tax computation in arriving at its tax adjusted profits in FY15, FY16, FY17 and FY18.

4 Audit and Amended Assessments

4.1 [redacted]

4.2 [redacted]

4.3 On 1 December 2021, the Respondent wrote to the Appellant responding to the Appellant's comments on the letter dated 30 September 2021 and issued Notices of Amended Assessment to the Appellant with additional tax liabilities for FY15, FY16, FY17 and FY18 (the "**Amended Assessments**").

4.4 On 17 December 2021, the Respondent issued a revised Notice of Amended Assessment to the Appellant with respect to FY15, as the previous notice for FY15 did not accurately reflect the tax previously paid for the period.

4.5 The Appellant filed its CT1 return with respect to FY15 on 23 September 2016. The return was not subsequently amended by the Appellant. The revised Notice of Amended Assessment was therefore issued more than four years after the end of the chargeable period in which the Appellant filed its FY15 CT1 return.

4.6 The Amended Assessments are set out in the below table:

Corporation Tax period	**Balance of Tax Payable per the Respondent's Assessment**	**Date of Notice of Amended Assessment**
Period ending 31 December 2015	€[redacted]	1 December 2021 (and revised Notice of Amended Assessment issued 17 December 2021)

Period ending 31 December 2016	[redacted]	1 December 2021
Period ending 31 December 2017	[redacted]	1 December 2021
Period ending 31 December 2018	[redacted]	1 December 2021

4.7 The Appellant appealed the Amended Assessments for FY15, FY16, FY17 and FY18 in their entirety by Notice of Appeal dated 30 December 2021.

Overview of Respondents Position						
		Hypothetical Scenario Reference	FY15 (€)	FY16 (€)	FY17 (€)	FY18 (€)
[redacted]						
[redacted]						

[redacted]

S&M - Sales and Marketing
R&D - Research & Development

[redacted]