FIRST-TIER TRIBUNAL
TAX CHAMBER

Heard at Taylor House, London

Appeal reference: TC/2022/01069

CORPORATION TAX – claim for Research and Development Expenditure Credit – company filed accounts on basis that it was not operating as a going concern – HMRC refused claim in reliance on Corporation Tax Act 2009, s 104S and s 104T – meaning of those provisions – whether accounts were incorrect – accounting and auditing standards considered – whether prior period adjustment and if so, its effect – whether subsequent change to the law relevant – appeal dismissed

Heard on 24 October 2023
Judgment date: 05 December 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
MS JO NEILL

Between

MW HIGH TECH PROJECTS UK LIMITED

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Nigel Bolton of R&D Tax UK Ltd

For the Respondents: Mr Martin Priestley, Litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. On 4 April 2019, MW High Tech Projects UK Ltd ("the Appellant") filed its corporation tax ("CT") return for the year ended 30 December 2017. That return included a claim for a Research and Development Expenditure Credit ("RDEC") of £1,934,343.19.

2. The statutory provisions relating to RDEC claims are in Chapter 6A of the Corporation Tax Act 2009 ("CTA 2009"). Within that Chapter, s 104S provides that a company is not entitled to a RDEC if it was not a going concern at the relevant time; that provision is subject to s 104T.

3. On 3 May 2021, HM Revenue & Customs ("HMRC") refused the claim because the Appellant's statutory accounts ("accounts" or "financial statements") for the years ended 30 December 2017 and 2018 both stated that the Appellant was not a going concern.

4. On behalf of HMRC, Mr Priestley submitted that given the "plain wording" or "literal meaning" of the statutory provisions and the facts of the case, no payment was due as a matter of law. On behalf of the Appellant, Mr Bolton put forward the following grounds of appeal, some of which were in the alternative:

(1) The statutory provisions had to be interpreted purposively, and this displaced their literal meaning; he relied in particular on *Inco Europe Ltd v First Choice Distribution* [2000] UKHL 15, 1 WLR 586 ("*Inco*").

(2) Parliament has now agreed that s 104T contained an error and the Tribunal should give effect to that correction.

(3) The Appellant's 2019 accounts contained a prior period adjustment which had retrospective effect, so as to amend the 2017 and 2018 accounts.

(4) Despite what was stated in the accounts, the Appellant was a going concern in both years under the relevant accounting rules.

(5) The Appellant's going concern status was also in accordance with the relevant International Standard on Auditing, which was ISA 570.

(6) At the time the Appellant's director, Mr Barrett, signed the accounts for 2017 and 2018, he held the view that the Appellant was a going concern, but was "pressured" by the auditors to state the opposite.

(7) HMRC had paid an RDEC claim made in the Appellant's 2018 CT return, and by so doing had accepted that the Appellant was a going concern on the relevant dates.

(8) HMRC deliberately delayed opening an enquiry into the 2017 RDEC claim in order to prevent the Appellant being able to correct the position by refiling its accounts within the relevant time limit.

(9) HMRC "could and should" pay the amount of the RDEC claim to the Appellant under Extra Statutory Concession B41.

5. We considered each of those grounds of appeal, but refused them, for the following reasons:

(1) Although the relevant provisions were to be interpreted "purposively", that did not allow the Tribunal to ignore the words of the statute, and *Inco* has no application.

(2) Although s 104T was amended by Finance Act 2023, those provisions were not retrospective. The Tribunal had no jurisdiction to treat the amendment as applying to 2017 and 2018.

(3) There was no prior period adjustment ("PPA") in the Appellant's 2019 accounts, and a PPA does not change the previous two years' published accounts.

(4) Drawing up the 2017 and 2018 accounts on the basis that the Appellant was not a going concern did not breach the applicable accounting standards.

(5) Directors are not bound by auditing standards, and Mr Bolton was in any event mistaken in thinking that there had been a relevant change to ISA 570.

(6) We rejected as not credible Mr Barrett's evidence that he knew at the time he signed the Appellant's accounts for 2017 and 2018 that they were incorrect, but had been pressured by the auditors to sign them on that incorrect basis.

(7) HMRC's payment of the RDEC claimed in the Appellant's 2018 CT return was entirely consistent with their rejection of the claim made in the previous year, because the 2019 accounts had been filed on a going concern basis. However, that change did not affect the claim made in 2017.

(8) The Tribunal has no jurisdiction to rule on whether HMRC had deliberately delayed opening the enquiry.

(9) The Tribunal also had no jurisdiction to rule on whether ESC B41 applied.

6. We instead agreed with Mr Priestley that:

(1) the statutory provisions are clear;

(2) those provisions "extinguished" an otherwise valid claim if the claimant's "latest published accounts" were not prepared on a going concern basis;

(3) the Appellant had prepared its 2017 and 2018 accounts on the basis that it was not a going concern; and

(4) as a result the claim was extinguished and HMRC's decision was correct.

7. We therefore refuse the Appellant's appeal and uphold the decision made by HMRC.

THE HEARING

8. The hearing was listed for 24 and 25 October 2023, but ended at 5pm on 24 October, after Mr Bolton and Mr Priestley had both confirmed they had closed their case.

9. The following day Mr Bolton sent the Tribunal further submissions in a lengthy email. Although we had not directed those submissions, we nevertheless considered them. We did not think it necessary to ask HMRC to respond.

THE EVIDENCE

10. The evidence consisted of documents, an expert report, witness statements and oral evidence.

The documents

11. The Tribunal was provided with a documents bundle of 511 pages, which included:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) the Appellant's CT return for the year ended 30 December 2017;

(3) the Appellant's accounts for the years ended 30 December 2017, 2018 and 2019; and

(4) an HM Treasury Report entitled "R&D Tax Reliefs" dated November 2021, and an HMRC policy paper on draft legislation, dated 21 July 2022.

12. We were also provided with a separate "Accountancy Bundle" of 1175 pages containing various accounting and auditing standards and guidance, together with related documents; this was supplemented by a further 27 pages provided by the Appellant shortly before the hearing. HMRC did not object those further documents and we admitted them into evidence.

13. Mr Bolton's sought to hand the Appellant's finance director, Mr Barrett, a further document in the course of his re-examination. We refused permission for that document to be admitted into evidence, because it had been provided far too late. Not only was it almost a year since the date by which the parties had bee directed to provide document lists, it was also after Mr Barrett had given evidence-in-chief and been cross-examined.

The expert evidence

14. On 6 May 2022, HMRC applied for both parties to have permission to adduce expert accountancy evidence. The Appellant objected to that application, but on 12 July 2022, Judge Poole allowed it. The Appellant did not instruct an expert, but HMRC instructed Mr Jonathan Parkin, an HMRC employee and a Chartered Accountant. Mr Parkin provided an expert report dated 22 October 2022; he gave evidence-in-chief led by Mr Priestley, and was cross-examined by Mr Bolton.

15. In evaluating Mr Parkin's evidence, we began from the principles set out in in *Natural England v Warren* [2019] UKUT 300 (AAC), where the Upper Tribunal said at [103]:

> "As long as the fact that a witness is employed by one of the parties is disclosed, it is open to the First-tier Tribunal to take into account that kind of lack of independence of witnesses in deciding what weight to give to their expertise. That approach is fully supported by the Court of Appeal in *R (Factortame Ltd) v Secretary of State for Transport (No. 8)* [2002] EWCA Civ 932, [2003] QB 381 at [69]-[70]."

16. In *Foundation Partners v HMRC* [2021] UKFTT 18 (TC), Juge Aleksander referred to that authority and then said:

> "It is not ideal that an employee of one of the parties should provide expert evidence on behalf of his employer...But I appreciate that many accountants in professional practice are not prepared to act for HMRC as an expert witness (which makes it difficult for HMRC to instruct external accountancy experts). But that makes it all the more important for HMRC's accountants to exercise professional detachment and to be able to demonstrate deep expertise in relation to the issues on which they are asked to opine."

17. Mr Parkin's report was prepared in accordance with the requirements of the Civil Procedure Rules set out in PD35. He was admitted as a Chartered Accountant in 2011, and before he joined HMRC he was employed by the National Audit Office delivering financial audits and acting as technical expert. He was not involved with the Appellant's appeal other than in his capacity as an expert. The Appellant did not submit that Mr Parkin was not acting independently, or that he had otherwise failed to comply with the requirements of PD35.

18. Both Mr Parkin's report and his oral evidence demonstrated comprehensive knowledge of the issues on which he was instructed, and we find that he has both the "deep experience" and the "professional detachment" referred to by Judge Aleksander. We therefore placed significant reliance on his evidence.

The other witnesses

19. The other witnesses were Ms Alana Richards, Mr Bolton and Mr Barrett.

Ms Richards

20. Ms Richards was the HMRC officer who refused the Appellant's claim. She provided a witness statement, attended the hearing and entered the witness box to give oral evidence. However, Mr Bolton then said that none of her evidence was in dispute and in consequence her witness statement was accepted.

Mr Bolton

21. Mr Bolton had advised the Appellant on RDEC claims for several years before the events with which this appeal is concerned. He provided the figures for the 2017 RDEC claim, responded to HMRC's enquiry correspondence and made the appeal to the Tribunal on behalf of the Appellant. He was thus both a witness of fact and the Appellant's representative.

22. Mr Bolton did not provide a witness statement, but his submissions were interspersed with statements of fact. We gave Mr Priestley the opportunity to cross-examine Mr Bolton on the statements of fact, but Mr Priestley declined the offer. We accepted some of Mr Bolton's evidence, but where he gave accounting or auditing evidence which conflicted with that of Mr Parkin, we preferred that of Mr Parkin. Mr Bolton was not a qualified accountant and often failed to distinguish appropriately between accounting standards and auditing standards.

Mr Barrett

23. Mr Andrew Barrett is the Appellant's finance director. He provided a witness statement, gave evidence-in-chief led by Mr Bolton, was cross-examined by Mr Priestley, answered questions from the Tribunal and was re-examined by Mr Bolton. As explained at §126 to §132 we found his evidence on certain issues to lack credibility and did not accept it. Those issues were:

(1) whether at the time he signed the accounts for 2017 and 2018, he held the view that the Appellant was a going concern;

(2) whether KPMG had put pressure on him and his co-director to state in the 2017 and 2018 accounts that the Appellant was not a going concern; and

(3) about KPMG's view as to the impact of certain regulations on the Appellant's going concern position.

24. Some of Mr Barrett's evidence on accountancy practice and principles was in conflict with that given by Mr Parkin, and where this was the case we preferred that given by Mr Parkin. As we have already found, Mr Parkin was an expert with "deep experience" acting with "professional detachment". In contrast, Mr Barrett included passages in his witness statement about accounting and auditing principles, which under cross-examination he accepted he did not understand, and which had been drafted for him by Mr Bolton. We accepted Mr Barrett's evidence on matters other than those identified above.

FINDINGS OF FACT

25. On the basis of that evidence, including our findings on credibility, we make the findings of fact set out below. We make further findings of fact about Mr Barrett's belief at §132 and §134. In reliance on Mr Parkin's evidence together with the documents in the Accountancy Bundle we make finding in relation to:

(1) accounting standards at §103 to §110 and §116;

(2) auditing standards at §118 to §122 and §125, and

(3) whether there was a PPA, at §143 to §148.

26. That a tribunal's findings on accountancy matters are findings of fact was confirmed by the Upper Tribunal in *HMRC v Jasper Conran* [2023] UKUT 00166 (TCC) at [6].

The Appellant's business

27. The Appellant is an engineering and construction company owned by the M+W Group GmbH. In its accounts, the Appellant described its principal activities as "the design and project management of clean room, technical, manufacturing, research facilities and Energy from Waste (EFW) plants". All the Appellant's projects involve considerable risk, because the related technology is expensive and requires significant research and development.

28. By the end of 2016, the Appellant had suffered (and was continuing to suffer) considerable losses as a result of the technology challenges encountered on the EFW projects. In January 2017, because of the Appellant's significant losses, the M+W Group decided to exit the EFW sector and not to take on any new projects, although it would complete three existing EFW projects already being worked on by the Appellant.

29. The EFW projects continued to make losses. The Appellant's accounts for the year to 30 December 2017 state that the loss before tax was over £135m, and its balance sheet shows net liabilities of £197m. In July 2018, the M+W Group decided that:

(1) the Appellant would no longer tender for, or pursue, any new project opportunities; and

(2) opportunities currently in the Appellant's "sales funnel" would transfer to another group company, being either Exyte Northern Europe or Exyte UK, a newly incorporated subsidiary.

30. In the year to 30 December 2018, the M+W Group wrote off £61m loans to the Appellant. The Appellant's net liabilities reduced to £50.8m and it made a profit before tax of £90m.

The 2017 accounts

31. The Appellant's accounts for the year ended 30 December 2017 were due to be filed at Companies House nine months after the year end, so by 30 September 2018. KPMG AG was the auditor of the M+W Group in Germany, and KPMG LLP ("KPMG") was the Appellant's auditor.

32. The Appellant faced significant problems finalising its 2017 accounts, and they were not filed by the due date. Companies House issued reminders, followed by the threat of legal action against the directors. Mr Barrett and his fellow director, Ms Fowler, finally signed the accounts on 22 March 2019; KPMG signed on 28 March 2019 and the accounts were received by Companies House on 3 April 2019. We return to the finalisation of the 2017 accounts later in our decision, see §126ff.

The Directors' Report and Note 1

33. The Directors' Report for the 2017 accounts, under the heading "Going Concern" included the following passage:

> "Whilst the company is wholly committed to completing all of its current contracts (including project completion, hand-over, commissioning and defects period), subsequent to the period end and due to a reorganisation of the Group, the company has ceased all new tendering activities in accordance with an instruction of its ultimate operational parent.
>
> As a result of this decision and the fact that there is no intention to acquire a replacement trade, these financial statements have not been prepared on a

> going concern basis. Notwithstanding this the company still continues to receive the full backing and support of the ultimate operational parent, M+W Group GmbH. Further detail can be found in note 1 to these financial statements."

34. Note 1 included the following passage under the heading "measurement convention":

> "In previous years, the financial statements have been prepared on a going concern basis. However, following the decision for the company to cease trading once it has contractually completed all of its current contracts (including project completion, hand-over, commissioning and defects period) and closed out all of its contractual liabilities, the directors have considered it inappropriate to prepare the financial statements on a going concern basis and have therefore prepared them on a break-up basis, as detailed in the following notes."

35. The following note was headed "Going concern", and began:

> "Whilst the company is wholly committed to completing all of its current contracts (including project completion, hand-over, commissioning and defects period), subsequent to the period end and due to a reorganisation of the Group, the company has ceased all new tendering activities in accordance with an instruction of its ultimate operational parent. As a result of this decision and the fact that there is no intention to acquire a replacement trade, these financial statements have not been prepared on a going concern basis. Notwithstanding this the company still continues to receive the full backing and support of the ultimate operational parent, M+W Group GmbH."

36. The Note continued by stating that:

(1) M+W Group had confirmed it would "continue to offer support and funding to close out the current projects, and will not call in any existing loans for the foreseeable future, and specifically for at least 12 months following the date of approval of these financial statements";

(2) as a result of that continuing financial support, the Appellant had continued to meet all of its liabilities as they fell due; and

(3) having prepared cash flow forecasts taking into account that promise of continuing support, the directors had concluded that "the Company will be able to operate for the period required to complete these contracts and close out its liabilities arising therefrom".

The Strategic Report

37. Under the heading "Principal activities", the Strategic Report included this passage:

> "…subsequent to the period end the directors have been instructed by its ultimate operational parent to cease all tendering activities with the long term· intention that, once it has completed all of its current contractual requirements and closed out all of its contractual liabilities on existing projects, the company will cease to trade. Therefore as there is no intention to acquire a replacement trade the financial statements have not been prepared on a going concern basis. The effect of this is explained in note 1 of the financial statements."

38. Under the heading "Principle risks and uncertainties", the Strategic Report included this passage:

> "The reduction in revenue and increased losses reflected in the period are predominantly the result of the difficulties faced on the EfW projects. As a result of the decision to cease all tendering activities and the preparation of

> the accounts on a non going concern basis, the Directors no longer consider the goodwill balance to be recoverable, as such the balance has been fully impaired, and charged to the profit and loss account in the period."

The Statement of responsibilities

39. The "Statement of directors' responsibilities in respect of the Strategic report, the Directors' report and the financial statements" ("the Statement of responsibilities") included the following text:

> "Company law requires the directors to prepare financial statements for each financial year. Under that law they have elected to prepare the financial statements in accordance with UK Accounting Standards and applicable law (UK Generally Accepted Accounting Practice), including FRSlOl Reduced Disclosure Framework."

40. It continued by saying that "under company law the directors must not approve the financial statements unless they are satisfied that they give a true and fair view of the state of affairs of the Company and of the profit or loss of the Company for that period", and that in preparing the financial statements, the directors were required:

(1) to assess the company's ability to continue as a going concern, including disclosing matters related to going concern; and

(2) to use the going concern basis of accounting unless the directors either intended to liquidate the company or to cease operations, or had no realistic alternative but to do so.

41. That second requirement was followed by this statement "as explained in note 1, the directors do not believe that it is appropriate to prepare these financial statements on a going concern basis".

The audit report

42. The auditors disclaimed an opinion on the 2017 financial statements, and explained the reason for that disclaimer as follows:

> "The audit evidence available to us was limited due to unexpected cost overruns and delays on Energy from Waste ("EfW") contracts, the directors were unable to prepare reliable future cost forecasts in respect of those contracts. As a result of this we have been unable to obtain sufficient appropriate audit evidence concerning revenue and cost of sales for the period ended 30 December 2017, and payments received on account and onerous contract provisions as at that date."

43. KPMG recorded that both the Directors' Report and the Strategic Report were the responsibility of the directors and were not subject to audit, and then continued:

> "Our responsibility is to read the strategic report and the directors' report and, in doing so, consider whether, based on our financial statements audit work, the information therein is materially misstated or inconsistent with the financial statements or our audit knowledge.
>
> Due to the significance of the matter described in the basis for disclaimer of opinion on financial statements paragraph, and the consequential effect on the related disclosures in the Strategic Report and Directors' Report, although in our opinion the information given in the Strategic Report and the Directors' Report for the financial period is consistent with the financial statements, we do not express an opinion on the preparation of those reports in accordance with the Companies Act 2006 or whether we have identified material misstatements in those reports."

The 2018 accounts

44. On 17 October 2019, Mr Barrett and Ms Fowler signed the accounts for the year ended 30 December 2018, and on 21 October 2019, KPMG signed the auditor's report.

The Directors' Report and Notes to the Accounts

45. Under the heading "Going Concern", the Directors Report stated:

> "The company is fully committed to completing all of its existing contracts, including project completion, hand-over, commissioning and defects period. Whilst the accounts have not been prepared on a going concern basis due to the cessation of all tendering activities in the previous year, the company still continues to meet all of its contractual liabilities. All core opportunities currently in the Sales Funnel will transfer to another UK based company which forms part of the same Group. The company continues to meet all of its contractual liabilities and still continues to receive the full backing and support from its ultimate operational parent, M+W Group GmbH, by way of a cash framework agreement, where funding is provided as and when required… Further details on the Going Concern can be found in note 1 to these financial statements."

46. Under the heading "measurement convention", Note 1 said that "the accounts have been prepared on a break up basis, as detailed in the following notes". The following note was headed "Going concern", and it said:

> "Whilst the accounts have not been prepared on a going concern basis due to the cessation of all tendering activities the previous year, the company still continues to meet all of its contractual liabilities. All core opportunities currently in the Sales Funnel will transfer to another UK based company which forms part of the same Group. The company is wholly committed to completing all of its current contracts including project completion, hand-over, commissioning and defects period All core opportunities in the sales funnel have transferred to another UK based company which forms part of the same Group.
>
> The company continues to meet all of its contractual liabilities and still continues to receive the full backing and support from its ultimate operational parent, M+W Group GmbH, by way of a cash framework agreement, where funding is provided as and when required.
>
> The directors have prepared cash flow forecasts and have concluded, on the basis of regular oral and written assurances and continuing financial support from its ultimate operational parent, M+W Group GmbH, the Company will be able to operate for the period required to complete these contracts and close out its liabilities arising therefrom.
>
> In preparing those forecasts, the directors have taken into account various risks and uncertainties, and the potential cash outflows required to complete the existing projects and despite the net liability position reflected in these accounts, the company has continued to meet all of its liabilities as they fall due as a result of the continuing financial support provided from the ultimate parent company."

Strategic Report and Statement of responsibilities

47. The Strategic Report did not refer to "going concern", but the Statement of responsibilities repeated the text from the 2017 accounts about the requirement for directors to consider whether to use the going concern basis, and then said that "as explained in note 1, the directors do not believe that it is appropriate to prepare these financial statements on a going concern basis". The Statement of responsibilities also repeated the statement that "under

company law the directors must not approve the financial statements unless they are satisfied that they give a true and fair view of the state of affairs of the Company and of the profit or loss of the Company for that period".

The audit report

48. KPMG provided a "modified" opinion on the financial statements because of the issue identified in their 2017 report; that issue would, they said, have a "consequential effect" on the Appellant's opening net asset position. KPMG also drew attention to Note 1 of the accounts "which explains that the financial statements have not been prepared on a going concern basis" and went on to say that their opinion "is not modified in respect of this matter".

Receipt by Companies House

49. The 2018 accounts were received by Companies House on 21 October 2019.

The claim and the HMRC enquiry

50. Meanwhile, on 4 April 2019, the Appellant had filed its CT return for the year ended 30 December 2017. That return included a payable RDEC of £1,934,343.19. The Tribunal was not provided with information as to what the claim related.

51. On 26 July 2019 Mr Bolton called HMRC to "chase" the payment, and he followed that with further emails and calls.

52. On 15 November 2019, HMRC told Mr Bolton that an enquiry would be opened into the Appellant's claim. On 21 November, HMRC emailed Mr Bolton in relation to the Appellant and another of his clients, saying:

> "Without going in to the various factors that have affected the teams this summer, you are obviously aware of the backlog we had to overcome etc. There was a perfect storm of issues that have meant that we have not been able to provide the service that we want to provide and that our customers have come to expect.
>
> These two claims have been selected for a compliance check and whilst ideally that check would have got underway sooner we do have the enquiry window available to us. The caseworkers will clearly set out the concerns and areas that require clarification and where appropriate will consider whether an interim payment can be made.
>
> I apologise that we have not been able to provide the service expected and that you have not been kept abreast of what was happening…Hopefully the compliance checks will run more smoothly."

53. On 10 December 2019, Ms Richards sent an "opening letter" to the Appellant and emailed a copy to Mr Bolton. Her letter referred to CTA 2009, ss 104S and 104T and went on to note that the Appellant had not prepared its 2017 accounts on a going concern basis, and that this remained the position in the 2018 accounts. Ms Richards asked for the Appellant's "agreement or comments" on her view that the Appellant was not entitled to be paid its RDEC claim.

54. On 30 December 2019, Mr Barrett responded, disagreeing with HMRC's position, and on 17 January 2020, Mr Bolton sent a lengthy email. After extensive further correspondence, Ms Richards closed the enquiry on 26 April 2021 on the basis that no RDEC was payable to the Appellant.

The 2019 accounts

55. Meanwhile, at some point before July 2020, the Appellant changed its auditor from KPMG to Moore. On 9 July 2020, Mr Barrett signed the accounts for the year ended 30

December 2019, and Moore signed the auditor's report the following day. The 2019 accounts were prepared on a going concern basis.

The Directors' Report and Notes to the Accounts

56. Under the heading "Going Concern", the Directors' Report included these passages:

> "The Company has on the basis of two factors revised its position in relation to going concern:
>
> - The company has reviewed its strategy going forward, due to the legacy projects nearing completion, to focus on tendering for future work. This decision will extend the companies pipeline beyond the existing projects. This strategy is fully supported by the ultimate operational parent, M+W Group GmbH; and
> - During the 2019 accounting period, the company has reviewed and adopted the now mandatory corrections to the FRC's ISA 570 definition of going concern. In accordance with the September 2019 published revisions, the company's status was updated in relation to going concern, as the pipeline of existing projects extends well beyond the going concern assessment period. As the corrected regulations were available for early adoption from September 2019 the directors consider that this revision should, once available, have resulted in a going concern status for 2018 and that this would also have applied to 2017 under these regulatory corrections. Further details on the Going Concern can be found in note 2 to these financial statements."

57. The second of those two passages relates to ISA 570, the International Standard on Auditing (UK) which was revised on September 2019. Mr Barrett was asked in cross-examination whether he had drafted the passage. He initially said he couldn't remember; when asked why the passage referred to the ISA 570's definition of "going concern" as being relevant to the director's responsibility for financial statements, given that the ISA was an international standard on *auditing*, Mr Barrett said he didn't know. When Mr Priestley took him to the passages in his witness statement which discussed ISA 570, Mr Barrett said he had not read it, but had relied on Mr Bolton in relation to those passages.

58. Taking into account all that evidence, we find as a fact that the text for the second bullet point in the 2019 accounts had been drafted by Mr Bolton and that Mr Barrett included the text in the accounts without having read ISA 570.

The Strategic Report

59. The Strategic Report, under the heading "Bustiness Review and Future Prospects" included the following pa:

> "As discussed in the Director's Report, the company has been reviewing the overall mid to long term strategy, and with the legacy projects due to complete, the focus will be on increasing the pipeline of future work. The Company will implement a highly selective bidding process to secure leading positions in our core markets, and additionally reduce the risk profile for the company…
>
> This considerable change in the company's circumstances has resulted in these financial statements being prepared on a going concern basis, details of which are discussed further in the Directors Report and Note 2 of the financial statements."

60. Note 2 to the financial statements included the text set out above from the Directors' Report.

The 2018 CT return

61. The Appellant's CT return for the year ended 30 December 2018 contained a further RDEC claim. On 9 February 2021, Mr Bolton wrote to Ms Richards chasing payment of that claim. In reliance on Ms Richards' witness statement, which was unchallenged, we find that HMRC paid that RDEC claim for the following reason:

> "As the latest published accounts were the 2019 accounts, which were prepared on a going concern basis, under s104S(3) CTA09, the company had become a going concern."

The statutory review and the notification of the appeal

62. On 26 June 2021, the Appellant appealed Ms Richards' decision to refuse payment of the 2017 RDEC claim, and on 3 August 2021, accepted HMRC's offer of a statutory review. This was carried out by Mr Bradley Inglis; on 3 December 2021 he upheld Ms Richards' decision. On 30 December 2021, the Appellant made an in-time notification of its appeal to the Tribunal.

THE LAW

63. The law is set out so far as relevant to the issues under appeal.

The RDEC provisions

64. The provisions relating to RDEC claims are in Chapter 6A of CTA 2009. Within that Chapter, s 104A provides that a company can claim a payable RDEC if it has incurred qualifying R&D expenditure which is deductible from it trading profits.

65. The amount of the RDEC is determined in accordance with s104M; this applies a relevant percentage to the qualifying R&D expenditure for the period in order to arrive at the amount of the credit. Section 104N(2) sets out seven steps as to how the RDEC is to be treated. Step 7 of that section provides that the credit remaining once all other surrenders and offsets are exhausted is payable to the company.

66. Section 104S sets out restrictions on the payment, and reads:

> "(1) This section applies if
>
> > (a) a company is entitled to an R&D expenditure credit for an accounting period under this Chapter, and
> >
> > (b) an amount of the R&D expenditure credit is payable to the company under step 7 of section 104N(2).
>
> (2) If at the time of claiming the credit the company was not a going concern (see section 104T)
>
> > (a) the company is not entitled to be paid that amount, and
> >
> > (b) that amount is extinguished.
>
> (3) But if the company becomes a going concern on or before the last day on which an amendment of the company's tax return for the accounting period could be made under paragraph 15 of Schedule 18 to FA 1998, the company is entitled to be paid that amount…"

67. Section 104T reads:

> "(1) For the purposes of section 104S(2) and (3) a company is a going concern if

(a) its latest published accounts were prepared on a going concern basis, and

(b) nothing in those accounts indicates that they were only prepared on that basis because of an expectation that the company would receive R&D expenditure credits under this Chapter.

This is subject to subsection (2).

(2) A company is not a going concern at any time if it is in administration or liquidation at that time.

(3)-(4)

(5) Section 436(2) of the Companies Act 2006 (meaning of 'publication' of documents) has effect for the purposes of this section."

68. The subsection there referred to from the Companies Act 2006 ("CA 2006") reads:

> "…a company is regarded as publishing a document if it publishes, issues or circulates it or otherwise makes it available for public inspection in a manner calculated to invite members of the public generally, or any class of members of the public, to read it."

69. Section 104T was amended by Finance (No 2) Act 2023, s 10 and Sch 1 paras 15 and 17(1). We consider those amendments at §84ff below.

The amendment, filing and enquiry dates

70. As set out above, s 104S(3) provides that a claimant is entitled to RDEC where:

(1) it was not a going concern on the date the claim was made, but

(2) became a going concern "on or before the last day on which an amendment of the company's tax return for the accounting period could be made" under FA 2018, Sch 18 para 15.

71. FA 2018, Sch 18 para 15 reads:

> "(1) A company may amend its company tax return by notice to an officer of Revenue and Customs.
>
> (2) The notice must be in such form as an officer of Revenue and Customs may require.
>
> (3) The notice must contain such information and be accompanied by such statements as an officer of Revenue and Customs may reasonably require.
>
> (4) Except as otherwise provided, an amendment may not be made more than twelve months after
>
> (a) the filing date…"

72. The "filing date" is defined by Sch 18, para 14 as being twelve months from the end of the period for which the return was made.

73. HMRC are empowered to enquire into a CT return within the time limits set out in Sch 18, para 24. Subparagraphs (2) and (3) of that paragraph provide as follows:

> "(2) If the return was delivered on or before the filing date, notice of enquiry may be given at any time up to twelve months from the day on which the return was delivered.
>
> (3) If the return was delivered after the filing date, notice of enquiry may be given at any time up to and including the 31st January, 30th April, 31st July

or 31st October next following the first anniversary of the day on which the return was delivered."

THE "PLAIN" OR "LITERAL" MEANING OF THE RELEVANT PROVISIONS

74. Sections 104S and 104T are set out at §66 and §67 above. Mr Priestley said that the meaning and application of those provisions was straightforward, and that on the facts of this case, they operated as set out below.

(1) Section 104S(2) provides that a company is not entitled to be paid an RDEC credit to which it would otherwise be entitled, if "at the time of claiming the credit the company was not a going concern".

(2) Section 104T defines when a company is or is not a "going concern", and subsection (1) provides that a company is only a "going concern" if "its latest published accounts were prepared on a going concern basis"; subsection (5) read with CA06 s 436(2) provides that "published" includes "mak[ing] it available for public inspection in a manner calculated to invite members of the public generally, or any class of members of the public, to read it".

(3) Applying those provisions to the Appellant's case:

(a) The 2017 accounts were received by Companies House on 1 April 2019.

(b) The Appellant claimed the RDEC in its 2017 CT return which was filed on 4 April 2019.

(c) On that date, the "latest published accounts" were those for the year ended 30 December 2017, and those accounts had been filed on the basis that the Appellant was not a going concern.

(4) Thus, the Appellant would only be entitled to the RDEC if it satisfied s 104S(5). This provides that a company is entitled to the credit if it becomes a going concern on or before the last day on which it could amend its CT return. The parties called this "the last day" and we have used the same wording.

(5) Section 104S(5) must be interpreted in accordance with s 104T(1), which specifically provides that whether a company "is a going concern" on the last day is determined by "its latest published accounts".

(6) Applying those provision to the Appellant's case:

(a) The filing date was "twelve months after the end of the period for which the return was made", so 30 December 2018.

(b) The last day was 12 months after the filing date, so 30 December 2019.

(c) On that date, the Appellant's latest published accounts were those for the year to 30 December 2018, which were not on a going concern basis.

75. We agreed with Mr Priestley. We note in particular that s104T is specifically stated to apply to both 104S(2) and (3); in other words, it does not only determine whether the company "is a going concern" at the time it makes the claim, but also applies to s 104S(5), which gives entitlement if the company subsequently "has become a going concern" as long as it has done so by the last day. Whether a company has become a going concern by that last day must therefore be determined by reference to the latest published accounts.

76. Applying the statutory provisions to the facts of the case, it follows that the Appellant's entitlement to a RDEC was extinguished under s 104S(2) because:

(1) at the time the claim was made, its latest published accounts were those for December 2017, and these stated that the Appellant was not a going concern; and

(2) the Appellant could not rely on s 104S(5), because the last day was 30 December 2019, and on that date the latest published accounts were those for the year to 30 December 2018, which also stated that the Appellant was not a going concern.

77. Mr Bolton did not dispute Mr Priestley's analysis of the literal meaning, but instead sought to defeat that reading by a number of other submissions, to which we now turn.

PURPOSIVE INTERPRETATION AND THE "*INCO*" PRINCIPLE

78. Mr Bolton submitted that, if read literally, the provisions were more restrictive in relation to those companies which filed accounts on a non-going concern basis as compared to companies who were in administration or liquidation. He said that this could be seen from the following:

(1) Companies are required to file their accounts with Companies House nine months after the end of their accounting period.

(2) Thus, a company such as the Appellant was required to file its 2018 accounts by 30 September 2019; this was three months before the last day.

(3) Whether or not such a company could benefit from the s 104S(5) exception depended on accounts published three months before the last day.

(4) In contrast, s 104(2) provided that a company was not a going concern if it was in administration or liquidation, and thus if it exited from that procedure *at any point* before the final date it would benefit from the s 104S exception,

79. Mr Bolton submitted that Parliament "had given insufficient consideration" to the different timing as between companies in administration/liquidation on the one hand and companies who filed accounts on the basis that they were not operating on a going concern basis on the other. He said that as a result the sections should be read purposively so as to allow the Tribunal to decide whether or not a company was a "going concern" on the last day by reference to other factors, and not by reference to the latest published accounts. He supported that submission by reference to *Inco*, in which Lord Nicholls said at p 596:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words."

80. However, as Mr Priestley rightly pointed out, Lord Nicholls continued by saying:

> "This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed."

81. We agree with Mr Priestley that *Inco* has no application here. For this Tribunal to be able to "rectify" this legislation in the way described in *Inco*, we must, as Lord Nicholls said, be "abundantly sure" that s 104S(2) failed to give effect to its "intended purpose", because it treated companies in administration/liquidation differently from those who filed accounts on the basis that they were not operating on a going concern basis Mr Bolton did not put forward any evidence or further submissions to the effect that Parliament intended that there should be no difference between those two categories of company, or that it had "by inadvertence" failed to reflect its intention in the wording of the statute. Mr Bolton's position was instead that Parliament had "*given insufficient consideration*" to those different outcomes when the legislation was drafted. We therefore reject Mr Bolton's submission that the *Inco* principle is relevant here.

82. We also reject his wider submission that allowing the Tribunal to decide for itself on the basis of the evidence whether a company was a "going concern" on the last date would accord with the requirement that the Tribunal interpret legislation "purposively". We accept, of course, that legislation must be read purposively: as Lord Millett said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] 6 ITLR 454, "the ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically". However, applying a purposive construction does not mean that the Tribunal can ignore the words of the statute. Lord Neuberger said in *Williams v Central Bank of Nigeria* [2014] UKSC 10 at paragraph [72]:

> "When interpreting a statute, the court's function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used."

83. That is particularly the case where, as here, the provision in question is part of a "detailed and prescriptive code" setting out when a company is or is not entitled to be paid RDEC, see *Gripple v HMCE* [2010] EWHC 1609 (Ch) at [12] *per* Henderson J (as he then was).

THE FA23 AMENDMENTS

84. As noted at §69, s 104T was amended by FA 2023 to introduce two new subsections ("the FA23 amendments"), which read:

> "(4A) For the purposes of this section, where a company ("A") is a member of the same group as another company ("B") and A's latest published accounts were not prepared on a going concern basis by reason only of a relevant group transfer, the accounts are to be treated as if they were prepared on a going concern basis.
>
> (4B) For the purposes of this section a "relevant group transfer" is a transfer within the accounting period to which the latest published accounts relate by A of its trade and research and development to another member of the group mentioned in subsection (4A)."

85. The FA23 amendments were effective for accounting periods beginning on or after 1 April 2023; they were not retrospective.

The Treasury Report

86. The FA23 amendments were preceded by an HM Treasury Report published in November 2021 entitled "R&D Tax Reliefs" ("the Treasury Report"). In a chapter on

"anomalies and unforeseen consequences in the R&D tax relief legislation", the Treasury Report said at para 2.39:

> "The R&D review has also considered features of the legislation which create anomalies, unfairness or impede efficient operation of the reliefs. The government will bring forward proposals to address these, as set out below."

87. It continued by saying that the government "will change legislation" in a number of ways, including to:

> "amend the rule restricting relief for a company which is not a 'going concern' so that it focusses on those that are unviable, rather than those not a going concern because a technical requirement of the accountancy standard has been triggered (for example, by the transfer of a trade)."

88. It was common ground that the FA23 amendments were narrower than presaged by the Treasury Report, because they were limited to cases where there had been a "relevant group transfer", whereas the Treasury Report simply gave "the transfer of a trade" as an example of a case where a company had been required to file its accounts on a non-going concern basis because "a technical requirement of the accountancy standard has been triggered".

Mr Bolton's submissions

89. Mr Bolton submitted that the FA23 amendments, together with the Treasury Report, showed that the original legislation contained drafting errors which prevented it meeting its statutory purpose. He said this was a further reason why the Tribunal should move away from the literal interpretation of the provisions. He submitted that:

(1) the Appellant met the requirements of the FA23 amendments, because it had prepared its 2017 and 2018 accounts on a non-going concern basis by reason only of a transfer of its trade to another group company; and/or

(2) the Appellant had been obliged by a "technical requirement" of an accountancy standard to produce its accounts on an non-going concern basis, and it was thus clear that Parliament did not intend companies in that situation to be blocked from receipt of the RDEC.

Mr Priestley's submissions and discussion

90. We agree with Mr Priestley that these submissions have to be rejected, for the following reasons:

(1) The FA23 amendments are not retrospective and so do not apply to the Appellant's RDEC claim.

(2) The Tribunal does not have the jurisdiction to rewrite legislation, except in the narrow circumstances already discussed earlier in this judgment. It is plainly outwith our jurisdiction to make a statutory provision retrospective when Parliament has decided not to do so.

(3) It is well established that preliminary documents such as the Treasury Report cannot "displace the meanings conveyed the words of a statute that…are clear and ambiguous and do not produce absurdity", see the recent restatement of that principle by the Supreme Court in *R (oao O) v SSHD* [2022] UKSC 2. The FA23 provisions are clear and unambiguous and do not produce absurdity; they are simply narrower in scope than envisaged in the Treasury Report

91. Mr Priestley also submitted that as the FA23 amendments were in any event irrelevant because they only take effect in relation to cases where the latest published accounts were not prepared on a going concern basis "by reason only of a relevant group transfer", and the

Appellant prepared its 2018 accounts on a non-going concern basis "due to the cessation of all tendering activities", and not because its trade had transferred.

92. Mr Bolton disagreed, referring to the fact that the 2018 accounts also say that the Appellant had transferred "core opportunities currently in the Sales Funnel" to "another UK based company"; he submitted this was a transfer of trade within the meaning of the FA23 amendments.

93. However, we do not need to decide whether the Appellant would have come within the FA23 amendments, because those provisions are not retrospective and the Tribunal has no power to treat them as if they were.

WHETHER THE ACCOUNTS WERE INCORRECT

94. Mr Bolton also submitted that the Tribunal should not rely on the Appellant's 2017 and 2018 accounts, because they were both incorrect.

95. Mr Priestley reiterated that this ignored the words of the statute, which states that a company is not entitled to RDEC if its latest published accounts are not prepared on a going concern basis. Thus, even if the Appellant was to right that the 2017 and 2018 accounts were incorrect, the Appellant would not be entitled to the RDEC, because it is not possible to go behind the published accounts and investigate whether they are right or wrong.

96. We have already agreed with Mr Priestley's analysis of the relevant provisions, and as a result we also agree with him that it makes no difference whether the accounts were correct or incorrect: the only issue is whether the accounts were prepared on a going concern basis or not.

97. However, because this issue formed a major part of Mr Bolton's case, we have gone on to consider his submissions and Mr Barrett's related evidence. That case rested on three legs:

(1) The Appellant was a going concern in both years under the relevant accounting standards.

(2) The Appellant's going concern status was also in accordance with ISA 570.

(3) When Mr Barrett signed the accounts for 2017 and 2018, he held the view that the Appellant was a going concern, but had been "pressured" by KPMG to state the opposite.

98. We first set out relevant provisions of CA 2006 and then consider each of those three submissions.

CA 2006

99. CA 2006, s 393 provides that directors of a company must not approve accounts unless they are satisfied that they give a true and fair view of the assets, liabilities, financial position and profit or loss of the company.

100. CA 2006 s 495(3) requires a company's auditors to "state clearly" whether the accounts give a true and fair view, have been "properly prepared in accordance with the relevant financial reporting framework" and have been prepared in accordance with CA 2006.

101. CA 2006 s 495(4)(c) provides that the auditor's report must "include a statement on any material uncertainty relating to events or conditions that may cast significant doubt about the company's ability to continue to adopt the going concern basis of accounting".

The accounting standards

102. We first make findings of fact about the relevant accounting standards, based on Mr Parkin's evidence and the documents in the Accountancy Bundle. We then consider both parties' submissions.

Findings of fact about accounting standards

103. The Appellant's accounts were prepared in accordance with UK Generally Accepted Accounting Practice ("GAAP"), including Financial Reporting Standard 101 ("FRS 101") entitled " Reduced Disclosure Framework".

104. FRS 101 allows reduced disclosure in a set of accounts where the parent company prepares publicly available consolidated financial statements which are intended to give a true and fair view, and the company in question is included in that consolidation. It therefore provides a financial reporting framework by which accounts that provide a true and fair view may be prepared and approved by the directors in line with their responsibilities under CA 2006.

105. International Accounting Standard 1 ("IAS 1") is entitled "Presentation of Financial Statements". It begins by setting out its objective as follows:

> "This Standard prescribes the basis for presentation of general purpose financial statements to ensure comparability both with the entity's financial statements of previous periods and with the financial statements of other entities. It sets out overall requirements for the presentation of financial statements, guidelines for their structure and minimum requirements for their content."

106. IAS 1, para 24 provides:

> "An entity shall prepare financial statements on a going concern basis unless management either intends to liquidate the entity or cease trading, or has no realistic alternative but to do so."

107. Under the heading "going concern", IAS 1 provides at para 25:

> "When preparing financial statements, management shall make an assessment of an entity's ability to continue as a going concern…When management is aware, in making its assessment, of material uncertainties related to events or conditions that may cast significant doubt upon the entity's ability to continue as a going concern, the entity shall disclose those uncertainties. When an entity does not prepare financial statements on a going concern basis, it shall disclose that fact, together with the basis on which it prepared the financial statements and the reason why the entity is not regarded as a going concern."

108. It continues at para 26:

> "In assessing whether the going concern assumption is appropriate, management takes into account all available information about the future, which is at least, but is not limited to, twelve months from the end of the reporting period."

109. The Financial Reporting Council ("FRC") has issued guidance to directors as to how to carry out that assessment ("the 2016 FRC Guidance"). At para 5.2 the 2016 FRC Guidance says:

> "Directors should assess which factors are likely to be relevant to their company. These factors will vary according to the size, complexity or the particular circumstances of the company, its industry and the general economic environment."

110. A company such as the Appellant which prepares its accounts under FRS 101 is required to comply with IAS 1, unless FRS 101 gives a specific exemption or exclusion. There is no

such exemption or exclusion in relation to the going concern assumption. The Appellant was also required to follow the 2016 FRC Guidance.

Mr Bolton's submissions

111. Mr Bolton submitted that the accounts for 2017 and 2018 had been prepared incorrectly because it was clear from the accounts themselves that the Appellant was continuing to carry out its existing projects. In reliance on Mr Barrett's evidence, which was unchallenged on this point, the Appellant expected this to take between seven and nine further years.

112. Mr Bolton also relied on an example in the 2016 FRC Guidance which he said paralleled the Appellant's position: it reads:

> "A subsidiary company may be heavily loss making or have substantial net liabilities. The financial statements of a subsidiary company might therefore give the impression that the company is experiencing significant financial difficulties. However, the existence of ongoing support from its parent may, in some circumstances, mean that no material uncertainty exists. Disclosure of this ongoing support may be necessary to give a true and fair view."

Mr Priestley's submissions

113. Mr Priestley relied on the expert evidence of Mr Parkin, who had drawn attention to para 25 of IAS 1. As set out above, this states that "An entity shall prepare financial statements on a going concern basis unless management either intends to liquidate the entity *or to cease trading*". Mr Priestley said that this approach had been followed by the Appellant, because:

(1) Note 1 to the 2017 accounts states that the accounts had been drawn up on a non-going concern basis "following the decision for the company to cease trading once it has contractually completed all of its current contracts"; and

(2) the Strategic Report similarly said that the Appellant "will cease to trade", and the 2018 accounts stated that the position was unchanged.

114. Mr Priestley and Mr Parkin also referred to para 26 of IAS 1, which said that when directors are assessing whether the going concern basis is appropriate, they should consider "all available information about the future". The 2016 FRC Guidance, which the Appellant was required to follow, similarly obliged directors to assess all relevant factors. In Mr Priestley's submission, that was exactly what the Appellant's directors had done. They had taken into account that the Appellant had "has ceased all new tendering activities" and had "no intention to acquire a replacement trade" and that its "long term· intention" was to "cease trading". Moreover, the directors had signed both sets of accounts confirming that they gave "a true and fair view of the state of affairs of the Company".

115. Mr Priestley added that the example relied on by Mr Bolton simply meant that directors in that position might have a basis for continuing to produce accounts on a going concern basis, but it did not mean that accounts prepared on a non-going concern basis were incorrect, if having considered all relevant factors the directors had decided to cease trading.

The Tribunal's view

116. We agreed with Mr Priestley for the reasons he gave. We find as a fact that drawing up the accounts on a non-going concern basis was not a breach of the relevant accounting standards.

The auditing standards

117. We first make findings of fact about the relevant auditing standards, based on Mr Parkin's evidence and the documents in the Accountancy Bundle. We then consider both parties' submissions.

Findings of fact about auditing standards

118. Auditors of UK companies are required to comply with standards determined by the FRC. These include those in the International Standards on Auditing (UK) ("the ISAs"). ISA 200 sets out the "overall objectives of the Independent Auditor and the Conduct of a Audit"; other ISAs are to be read in conjunction with ISA 200.

119. ISA 200 provides at para 4 that ISAs do not "impose responsibilities on management or those charged with governance and do not override laws and regulations that govern their responsibilities".

120. The subject of ISA 570 is "Going Concern". A version of that ISA was published in June 2016 and took effect for audits of financial statements commencing on or after 17 June 2016. It began as follows:

> "**Interpreting the term "going concern" in this ISA(UK)**
>
> The financial reporting frameworks applicable in the UK generally require the adoption of the going concern basis of accounting in financial statements, except in circumstances where management intends to liquidate the entity or to cease trading, or has no realistic alternative to liquidation or cessation of operations. In effect, an entity that does not meet the threshold for that exception is described as a going concern. This requirement applies even when there are uncertainties about events or conditions that may cast significant doubt upon the entity's ability to continue as a going concern in the future. Such uncertainties are required to be disclosed in the financial statements when they are material."

121. At para 13, ISA 570 read:

> "In evaluating management's assessment of the entity's ability to continue as a going concern, the auditor shall cover the same period as that used by management to make its assessment as required by the applicable financial reporting framework, or by law or regulation if it specifies a longer period. If management's assessment of the entity's ability to continue as a going concern covers less than twelve months from the date of the financial statements as defined in ISA (UK) 560, the auditor shall request management to extend its assessment period to at least twelve months from that date."

122. In March 2019 a revised version of ISA 570 was published in draft; this was followed in September 2019 by a final version. Paragraph 8 of that revised version stated that it was effective for audits of financial statements commencing on or after 15 December 2019, but that earlier adoption was permitted. The opening paragraph of the revised version was identical to that published in June 2016, and paragraphs 13 and 14 replicate the text from para 13 of that earlier version.

The parties' submissions

123. Mr Bolton submitted that when ISA 570 was revised, it "required impact within 12 months", in other words, it required a company to use a going concern basis unless its business was going to cease within twelve months. He called this a "correction", and went on to submit as follows:

(1) The Appellant was expecting to continue to trade for between seven and nine further years and it therefore continued to operate on a going concern basis throughout 2017 and 2018.

(2) Although ISA 570 was only required to take effect for accounting periods which began after 15 December 2019, earlier adoption was permitted.

(3) The revised ISA 570 was available in March 2019, before KPMG signed the audit report for the 2017 financial statements. KPMG should have taken the new approach into account, and had they done so, the Appellant would not have filed the 2017 accounts on a not-going concern basis.

(4) The revised ISA 570 had been published in September 2019, before KPMG signed the 2018 statutory accounts. KPMG should have therefore have taken the option of using the revised standard in relation to the 2018 accounts, as this would have prevented "the latest published accounts" having been prepared on a not-going concern basis.

124. Mr Priestley disagreed. He said that the revised ISA 570 was not a "correction" such as to restrict the period management had to consider to a maximum of twelve months. As is clear from the text of both documents, there was no such change. Instead, both versions of ISA 570 emphasise that it is the responsibility of the directors to consider and decide whether or not a company is operating on a going concern basis in accordance with the relevant accounting standards. He added that, in any event, responsibility for deciding whether to draw up the accounts on a going concern basis rested with the directors, not with the auditors, so ISA 570 was not relevant.

The Tribunal's view

125. We agree with Mr Priestley for the reasons he gave. In short, Mr Bolton's reliance on a supposed change to this auditing standard was misplaced, both because there was no such change, and because auditing standards do not determine the directors' responsibility for deciding whether or not a company is operating as a going concern.

Mr Barrett's evidence

126. Mr Barrett's evidence was that he knew at the time he signed the 2017 and 2018 financial statements that they were incorrect because the Appellant was a going concern. Mr Bolton relied on that evidence.

Mr Barrett's evidence

127. Mr Barrett said in his witness statement that the Appellant's business "was not ceasing" but that:

> "Our view at that time, and this has not changed today, is that due to the continued financial support of our parent company, the actual incoming orders, the period of projects that would continue through to at least 2025, was that we were still a going concern."

128. He went on to say that "KPMG also agreed that in the traditional sense, this was correct" but that the firm nevertheless focused on the Appellant's decision to stop tendering for new business. He said that as a result the directors:

> "had to agree to both the non-going concern basis and the disclaimer within [KPMG's] 2017 audit opinion, to get the accounts filed, although the time-consuming arguments to try and maintain going concern basis on the point of transferring trade meant filing took place in April 2019, rather than September 2018."

129. Although Mr Barrett did not explain what he meant by "the traditional sense", we understand him to be saying that not only did the directors sign accounts they knew to be wrong, but the auditors also knew the accounts were wrong.

130. In his oral evidence, Mr Barrett said he had acted "under duress" and that KPMG refused to "close the audit" unless the 2017 accounts were prepared on a non-going concern basis. However, when asked under cross-examination about supporting documentation, he said that

the issue had been dealt with entirely orally, and there was no correspondence or other written record.

Why we did not accept that evidence

131. Under cross-examination it was put to Mr Barrett that the evidence summarised above was not correct, and Mr Priestley subsequently asked the Tribunal to reject it as not credible. For the reasons set out below, we agree with Mr Priestley.

(1) The 2017 accounts state in eight separate places that the Appellant was not a going concern. Mr Barrett signed those accounts on the basis that they were "true and fair", as he was required to do as a director of the company under CA 2006 and the relevant accounting standards. The 2018 accounts were signed on the same basis.

(2) Mr Barrett said he had signed accounts he knew to be incorrect because that was necessary in order to "get the accounts filed". However, he was unable to explain why the directors had to agree to a non-going concern basis, given that KPMG had in any event disclaimed an opinion on the 2017 financial statements (see §42).

(3) Had there been "continuing arguments" with KPMG about the Appellant's going concern status, there would have been at least some written record, such as emails between Mr Barrett and the audit team; between him and the M+W Group and/or meeting notes and letters. It is not credible that such a major disagreement about this fundamental issue would be entirely undocumented.

(4) We also reject Mr Barrett's evidence that KPMG believed that the Appellant was operating on a going concern basis "in the traditional sense" but had nevertheless insisted that the accounts be filed on the non-going concern basis. It would be very surprising for a large accounting firm with an international reputation to have taken that approach, and in the absence of any contemporaneous supporting documentation we do not accept it.

(5) We also took into account that Mr Barrett began corresponding with Ms Richards in December 2019. This was just over a month after KPMG signed the 2018 accounts and before Moore was appointed as replacement auditors. If Mr Barrett's assertions were correct, there is no good reason why he could not have asked KPMG to confirm what had happened and why.

(6) Mr Barrett also accepted in cross-examination that he knew that it was the directors and not the auditors who were responsible for the decision as to whether or not a company is a going concern, and he could not explain why he would have been forced to act "under duress" to file incorrect accounts.

132. We therefore find that Mr Barrett did not believe, at the time he signed the 2017 and 2018 accounts, that the Appellant was a going concern. Consistently with that finding, we also find that:

(1) he did not sign accounts he knew to be incorrect because of pressure from KPMG; and

(2) KPMG did not put the directors under pressure to sign the accounts on what they knew to be an incorrect basis.

Reason for change of view

133. In his witness statement Mr Barrett said it was only after the Appellant filed the 2018 accounts that he realised "the impact these accounts would have on our R&D tax claims". When asked in cross-examination whether his opinion on whether the Appellant was operating

on a going concern in 2017 and 2018 was "materially influenced by HMRC opening an enquiry", he said "I can't deny it would have had an impact".

134. Mr Priestley invited us to find that Mr Barrett's view as to the Appellant's going concern status only changed after he understood the consequential effect on the RDEC claim. We agree and we so find.

Other submissions relating to going concern

135. Mr Bolton made two other submissions relating to going concern. The first was that the USA's Public Company Oversight Board ("PCAOB") stated in AS 2415 that the *maximum* period which should be considered when deciding whether a business was operating on a going concern basis was a year. Mr Bolton said that statement was "analogous to" the UK's ISA 570 and showed that the Appellant's accounts were incorrect.

136. Mr Priestley pointed out that AS 2415 was an auditing standard, not an accounting standard, and it also had no application to a UK business such as the Appellant. We agree with Mr Priestley that an auditing statement issued in a different country is irrelevant to the correctness of the Appellant's accounts.

137. Mr Bolton also submitted that HMRC had paid the Appellant's later RDEC claims, and this showed they too accepted that the Appellant was a going concern. However, the 2018 claim was paid because "the latest published accounts" were those for the year ended 2019, and these had been were prepared on a going concern basis, see §61. HMRC's payment of that claim was entirely consistent with their understanding of the law as set out in this decision, and does not show that they accepted that the Appellant was a going concern in either 2017 or 2018.

WHETHER THERE WAS A PPA

138. We have already found as a fact that the position changed in 2019, because (as stated in the Directors' Report) the Appellant had "reviewed its strategy going forward,…to focus on tendering for future work" and was therefore operating on a going concern basis.

139. Mr Bolton submitted that the Appellant's 2019 accounts also contained a prior period adjustment ("PPA") which had retrospective effect, so as to amend the 2017 and 2018 accounts so that they too were on a going concern basis. Mr Priestley did not agree with either part of that submission.

Mr Bolton's position

140. Mr Bolton's submission relied on the second bullet point of the statement in the Directors' Report set out at §56 above. In summary, this stated that the Appellant had "adopted" ISA 570 for that accounting period, and that as those "corrected regulations" had been available for early adoption:

> "the directors consider that this revision should, once available, have resulted in a going concern status for 2018 and that this would also have applied to 2017 under these regulatory corrections."

141. Mr Bolton said that this statement constituted a "prior period adjustment" and under the relevant accounting standards the effect of a PPA was "as if the error had never occurred".

Findings of fact

142. We make the following findings of fact about the relevant accounting standards, based on Mr Parkin's evidence and the documents in the Accountancy Bundle.

143. Mr Parkin explained that, in accordance with International Accounting Standard 8 ("IAS 8"):

> "A PPA may refer to either retrospective application of a new accounting policy as if that policy had always been applied; or retrospective restatement to correct the recognition, measurement and disclosure of amounts of elements of financial statements as if a prior period error had never occurred."

144. In relation to the second of those possibilities, IAS 8 at para 22 reads:

> "When a change in accounting policy is applied retrospectively the entity shall adjust the opening balance of each affected component of equity for the earliest prior period presented and the other comparative amounts disclosed for each prior period presented as if the new accounting policy had always been applied."

145. Mr Parkin said that it followed from that paragraph, read together with other relevant passages from IAS 8, that "retrospective restatement" meant:

> "correcting the recognition, measurement and disclosure of amounts of assets, liabilities, equity, income and expenses as if a prior period error had never occurred."

146. He added that:

> "A PPA accounted for under the relevant accounting standards in the 2019 accounts does not impact the published 2018 accounts or 2017 accounts themselves."

147. Under cross-examination, Mr Parkin pointed out that "going concern" is in any event not an "accounting policy" as defined in IAS 8, but is instead described in IAS 1 as an "assumption".

148. Mr Parkin also said that if a company's directors consider that the published accounts do not comply with the requirements of CA 2006, they can withdraw those accounts and issue corrected accounts under the Companies (Revision of Defective Accounts and Reports) Regulations 2008. Reg 10 of those regulations provides as follows:

> "the provisions of the 2006 Act have effect as if the revised accounts were, as from the date of their approval, the annual accounts of the company in place of the original annual accounts."

Mr Priestley's submissions

149. In reliance on Mr Parkin's evidence, Mr Priestley submitted that:

(1) A PPA which involved "retrospective restatement" would:

(a) reflect a change in accounting policies; and

(b) require the company to adjust prior period balances.

(2) The statement in the Directors' Report was not a PPA because it neither reflected a change in an accounting policy (but instead, was a change in the going concern assumption) and there was no change to prior period balances.

(3) The passage in the Directors' Report instead reflects Mr Bolton's understanding of ISA 570, which is an auditing standard. A change to an auditing standard is not a "change in an accounting policy" which has to be applied retrospectively.

(4) As already discussed earlier in this judgment, Mr Bolton was mistaken in his belief that the revised version of ISA 570 published in September 2019 changed the position so as to impose a twelve month limit on the period which could be considered for going concern purposes.

(5) Even if the statement in the Directors' Report *had* been a PPA, that would not have changed the 2017 or 2018 published accounts. The only way in which those accounts could have been changed would be for them to be withdrawn, amended, and reissued. That did not happen.

The Tribunal's view

150. We again agree with Mr Priestley for the reasons he gave. There was no PPA in the 2019 accounts and even had there been, it would have had no effect on the 2017 and 2018 published accounts.

OTHER SUBMISSIONS

151. Mr Bolton made two further submissions, one relating to HMRC's behaviour and one to an extra-statutory concession ("ESC").

Duty of care?

152. Mr Bolton submitted that HMRC had a "duty of care" to the Appellant not to put it at a "financial disadvantage", but that in breach of that duty, HMRC had instead delayed opening the enquiry until it was too late for the Appellant to remedy the position by withdrawing and reissuing the financial statements.

153. We agree with Mr Priestley that the Tribunal has no jurisdiction to decide submissions of this type; instead, whether HMRC acted in an improper or unfair manner is a matter for judicial review or a complaint. We noted however that HMRC had until 30 April 2020 to open the enquiry into the Appellant's RDEC claim (the time limit having been extended because the Appellant submitted its CT return late). Ms Richards sent the opening letter on 11 December 2019, well within the enquiry window.

ESC B41

154. Mr Bolton submitted that HMRC should "be instructed" by the Tribunal to pay the Appellant's 2017 RDEC claim under ESC B41. This is headed "Claims to repayment of tax" and reads:

> "Under the Taxes Management Act, unless a longer or shorter period is prescribed, no statutory claim for relief is allowed unless it is made within 4 years from the end of the tax year to which it relates. However, repayments of tax will be made in respect of claims made outside the statutory time limit where an over-payment of tax has arisen because of an error by the Inland Revenue or another Government Department, and where there is no dispute or doubt as to the facts."

155. Mr Priestley said that the ESC had no application because the Appellant had not made an out-of-time claim for repayment of tax, and there had been no error by HMRC or any other government department. He added that in any event the Tribunal had no jurisdiction to rule on whether or not an ESC applied.

156. We agree with Mr Priestley that the Tribunal has no jurisdiction to consider this argument; this is clear from the Court of Appeal's judgment in *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713 at [142] to [143]. We do not make this already lengthy decision any longer by including *obiter* observations about the scope and application of this ESC.

OVERALL CONCLUSION AND APPEAL RIGHTS

157. For the reasons set out above, the Appellant's appeal is dismissed and HMRC's decision upheld.

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

ANNE REDSTON
TRIBUNAL JUDGE
RELEASE DATE : 05 December 2023