CORPORATION TAX – R&D expenditure under section 1044 of the Corporation Tax Act 2009 – whether taxpayer company a venture capital company within paragraph 2(a) of Article 3 of the Annex to Commission Recommendation (EC) No 2003/361

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/04348

BETWEEN

DNAE GROUP HOLDINGS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE GUY BRANNAN

The hearing took place on 14 July 2021. The form of the hearing was by video on the Tribunal's video platform. A face to face hearing was not held because of the Covid-19 pandemic.
Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. Therefore, the hearing was held in public.

David Yates QC for the Appellant

Ben Blakely litigator of HM Revenue and Customs' Solicitor's Office for the Respondents

DECISION

INTRODUCTION

1. The issue in this appeal is whether a company called Edith Grove Ltd ("EGL") is a venture capital company within the meaning of paragraph 2(a) of Article 3 of the Annex to Commission Recommendation (EC) No 2003/361 ("the Recommendation").

2. If EGL[1] is a venture capital company, the Appellant ("DNAe") – in whom EGL had a shareholding of more than 25% during the relevant periods – is entitled to an additional deduction (125%) for small or medium-sized companies ("SMEs") for R&D expenditure under section 1044 of the Corporation Tax Act 2009 ("CTA 2009"). If EGL is not an SME then DNAe is only entitled to an additional deduction (30%) for large companies under section 1087 CTA 2009.

3. The expression "venture capital companies" is not defined in the Recommendation.

4. HMRC have concluded that DNAe was only entitled to the additional deduction for large companies. HMRC's decision was conveyed by letter dated 15 December 2017 and, following a statutory review, a letter dated 24 May 2018. HMRC have issued three closure notices, in respect of the accounting periods ended 31 December 2010 (for £431,434), 31 December 2011 (for £841,587) and 31 December 2012 (for £1,158,721), on this basis. DNAe now appeals against those closure notices.

5. There is no dispute about the procedural validity of the closure notices – the only issue in dispute is whether EGL is a venture capital company.

6. For the reasons given later in this decision, I have concluded that DNAe is entitled to the deductions for SMEs and that this appeal should be allowed.

EVIDENCE

7. DNAe called two witnesses:

   (1) Patrick Stephansen – the chief financial officer of DNAe at the material times; and

   (2) Chong Kin Leong – the Executive Vice President of Finance of Genting Berhad ("GB"), the ultimate parent company of EGL and a director of EGL.

8. Both Mr Stephansen and Mr Chong produced witness statements (Mr Chong produced a witness statement and a supplementary witness statement), gave limited oral evidence-in-chief and were cross-examined.

9. I found Mr Stephansen and Mr Chong to be credible and straightforward witnesses. I accept their evidence, save as otherwise stated. Accordingly, my account of their evidence set out later in this decision should be treated as part of my findings of fact.

THE RELEVANT LEGISLATION

10. In order to be eligible to claim R&D Credits as an SME, DNAE must meet the definition in s. 1119 CTA 2009 which states:

> "(1) In this Part 'small or medium-sized enterprise' means a micro, small or medium-sized enterprise as defined in Commission Recommendation (EC) No 2003/361, but subject to the qualifications in section 1120."

[1] DNAe submitted that if EGL or its parent company Genting Genomics Ltd ("GGL") was a "venture capital company" then the necessary test will be satisfied. HMRC accepted that if EGL was a "venture capital company" then DNAe would have satisfied the relevant statutory test. I have, therefore, concentrated on the position of EGL.

11. The effect of the Commission Recommendation (EC) No 2003/361 ("the Recommendation") is that an SME is defined by reference to staff count and financial criteria. If the enterprise is autonomous, these figures are taken solely from the accounts of that enterprise (paragraph 1 of Article 6). However, if the enterprise has partner enterprises, the figures of those partner enterprises are taken into account. It is common ground that if DNAE is autonomous then it will be an SME, but it will not be an SME if the figures of its partner enterprises are taken into account.

12. 'Partner Enterprises' is defined by paragraph 2 of Article 3 of the Annex to the Recommendation:

> "'Partner enterprises' are all enterprises which are not classified as linked enterprises within the meaning of paragraph 3 and between which there is the following relationship: an enterprise (upstream enterprise) holds, either solely or jointly with one or more linked enterprises within the meaning of paragraph 3, 25% or more of the capital or voting rights of another enterprise (downstream enterprise)."

13. The crucial provision in this appeal is paragraph 2(a) of Article 3 of the Annex to the Recommendation. This provides:

> "However, an enterprise may be ranked as autonomous, and thus as not having any partner enterprises, even if the 25% threshold is reached or exceeded by the following investors, provided that those investors are not linked, within the meaning of paragraph 3, either individually or jointly to the enterprise in question:
>
> (a) public investment corporations, *venture capital companies*, individuals or groups of individuals with a regular venture capital investment activity who invest equity capital in unquoted businesses ('business angels'), provided the total investment of those business angels in the same enterprise is less than EUR 1 250 000… (*emphasis added*)

14. Paragraph 3 defines linked enterprises as follows:

> 'Linked enterprises' are enterprises which have any of the following relationships with each other:
>
> …
>
> (d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.
>
> …
>
> There is a presumption that no dominant influence exists if the investors listed in the second sub-paragraph of paragraph 2 are not involving themselves directly or indirectly in the management of the enterprise in question, without prejudice to their rights as stakeholders

15. It is common ground that EGL is not a linked enterprise during the relevant period. Therefore, if EGL was a venture capital company during the relevant period, then DNAe was autonomous notwithstanding the fact that EGL held more than 25% of voting rights. Consequently, DNAe would be an SME and entitled to claim SME R&D Credits.

16. The purpose of these provisions is explained in Recitals 9 and 10 to the Recommendation as follows:

> "(9) To gain a better understanding of the real economic position of SMEs and to remove from that category groups of enterprises whose economic power may exceed that of genuine SMEs, a distinction should be made between various types of enterprises, depending on whether they are autonomous, whether they have holdings which do not entail a controlling position (partner enterprises), or whether they are linked to other enterprises. The current limit shown in Recommendation 96/280/EC, of a 25% holding below which an enterprise is considered autonomous, is maintained.
>
> (10) In order to encourage the creation of enterprises, equity financing of SMEs and rural and local development, enterprises can be considered autonomous despite a holding of 25% or more by certain categories of investors who have a positive role in business financing and creation. However, conditions for these investors have not previously been specified. The case of 'business angels' (individuals or groups of individuals pursuing a regular business of investing venture capital) deserves special mention because — compared to other venture capital investors — their ability to give relevant advice to new entrepreneurs is extremely valuable. Their investment in equity capital also complements the activity of venture capital companies, as they provide smaller amounts at an earlier stage of the enterprise's life."

CASE LAW AND HMRC GUIDANCE

17. The Recommendation was considered by the Court of Justice of the European Union ("CJEU") in *HaTeFo GmbH v Finanzamt Haldensleben* Case C-110/13. The case concerned the interpretation of Article 3(3) of the Annex to the Recommendation but the CJEU explained the approach to take when interpreting the Recommendation:

> "32 The advantages afforded to SMEs are in most cases exceptions to the general rules, such as for example in the area of State aid, and therefore the definition of an SME must be interpreted strictly.
>
> 33 In those circumstances, in order to include only enterprises that are genuinely independent SMEs, it is necessary to examine the structure of SMEs which form an economic group, the power of which exceeds the power of an SME, and to ensure that the definition of SMEs is not circumvented by purely formal means (see *Italy v Commission*, paragraph 50)."

18. The provisions of the Recommendation have been considered in two decisions of the First-tier Tribunal ("FTT"):

(1) *Pyreos Ltd v HMRC* [2015] UKFTT 0123 (TC) (Judge Mure QC and Mr Rae) ("*Pyreos*"); and

(2) *Monitor Audio Ltd v HMRC* [2015] UKFTT 0357 (TC) (Judge Short) ("*Monitor Audio*").

19. Although neither of these decisions is binding upon me, they are of persuasive authority and helpfully shed light on the meaning of the expression "venture capital companies."

20. In *Pyreos* the FTT held at [54] as follows:

> "We have not been referred to any definition of [venture capital companies] in this context. Nor were we addressed at length on its interpretation by counsel. We note that there is no definition in the EU Recommendation or the subsequent 2014 Report …. The sense of the concept is, we think, a matter within judicial knowledge. We construe it in its dictionary sense of a company whose interest is in maximising the financial return on its investments in new businesses and speculative ventures. Matters of commercial risk will motivate it too, and no doubt the date of realisation of potential benefits. But the day-

> to-day executive management of the subject concerned in which it invests, would not. The nature and pattern of their trading, other than their profitability, would not ordinarily be a matter of concern. A [venture capital company]'s interest is in short, in the balance sheet value and revenue generation of its investments, and the ability to realise these."

21. In *Monitor Audio*, it was not necessary for the FTT to reach a concluded view on the venture capital company issue. Nonetheless the FTT stated at [63]:

> "The Tribunal does not consider it surprising that neither the term institutional investor nor venture capital company are specifically defined in the Recommendation since they are well known market terms. The usual meaning of both of those terms is considered to be within judicial knowledge; the usual sense of an institutional investor connoting an institution whose function is to invest on behalf of others in a wide range of ways, as opposed to a private or retail investor. The usual meaning of venture capital company being, as suggested by the Tribunal in the *Pyreos* decision, a company whose strategy is to invest in high risk, high return ventures. We consider it a feature common to both types of investor that they are not involved in the day to day management of their target investments."

22. HMRC's Guidance CIRD92100 states:

> "This is an institution providing, as its specialised business, finance to start-up or developing businesses, where a fairly high degree of risk is involved. The investment would be likely to be in the form of equity, but may it be supported by loans. One would expect a high return commensurate with the level of risk, and the company to be looking to realise its capital in successful investments as part of the overall business.
>
> We would also expect the company to make a significant number of investments in different companies so as to provide the spread of risk that one would associate with the carrying on of a business, rather than simply the making of one or more speculative investments.
>
> It should be noted that the European recommendation's definition of an SME refers to a 'venture capital company', not a venture capital activity or investment. So it is not enough that a company makes one or more high-risk equity investments if that is not the principal character of its business.
>
> We have seen examples of large groups that, through a group member, make strategic investments in new activities that have an obvious link with the overall business of the group. In these circumstances we would be unlikely to consider that the company was acting as a venture capital company if its aims were closely linked with the strategic aims of the group business. In these circumstances we would be more inclined to view this activity as the carrying out of an overall group purpose to expand the business by strategic investments rather than to invest for high growth and a lucrative realisation. But each case will need to be judged on its own facts."

23. Mr Yates QC, appearing for DNAe, submitted that it was the application of this Guidance that has led HMRC to issue the closure notices in this case.

THE FACTS

The Genting Berhad Group

24. EGL is an indirect subsidiary of Genting Berhad ("GB" or, as the context requires, "the GB Group"), a large public company incorporated in Malaysia and listed on the Malaysian stock exchange. GB directly owned 100% of GGL, a company incorporated in the Isle of Man. GGL is the investment arm of GB through which GB holds its investments in the UK and US.

25. GGL owns directly 100% of EGL and EGL's sister subsidiaries: Dragasac Ltd and Lacustrine Ltd (both companies incorporated in the Isle of Man).

26. EGL's holding in DNAe is the only asset of EGL during the relevant period. GGL held its investments through intermediate holding companies, such as EGL, in order to give it flexibility in realising those investments in the future. The total investments made by GGL up to the end of 2012 amounted to approximately US$142 million, including an investment of £6 million (US$9.75 million) in DNAe.

27. In addition to GGL, GB also owned 54.6% of the shares in Genting Plantations Berhad ("GPB"), a public limited liability company which was listed on the Malaysian stock exchange. GPB's main activities during the relevant period consisted of plantations, investment holdings and the provision of management services to its subsidiaries.

28. The boards of GB and GPB consisted of a majority of independent directors.

29. As Mr Chong explained, GB was a conglomerate with four strategic businesses held under four subsidiaries. Three of the subsidiaries were themselves public listed companies (see below). GB was itself an investment holding company. GB was driven by Mr Lim, the chairman and chief executive, and he propelled the investment philosophy of the company. He took an interest in life sciences and liked the potential of DNAe's concept. Mr Lim asked professionals to do due diligence on DNAe and EGL was set up to acquire GB's holding (via GGL) in its shares.

30. GB also had a majority shareholding in two other Malaysian companies listed on the Malaysian stock exchange. Mr Chong explained that these publicly listed companies in the GB Group also had independent management.

31. In 2006 GPB set up the Asiatic Centre for Genome Technology ("ACGT"), in which at 31 December 2010 GPB held 92% of the equity with the remaining 8% held by Green Resources LLC, a wholly-owned subsidiary of Synthetic Genomics Inc. ("SGI"). I shall describe in more detail a subsequent investment by GGL in SGI (in 2008) later in this decision – see paragraph 64 *et seq*. ACGT was set up to be a centre of excellence in genomic science, aiming to develop solutions to increase productivity and enhance value creation from the oil palm and other crops.

32. The principal activities of ACGT (managed under GPB) were genomic R&D activities and it focused on developing and applying genomics-based solutions to increase productivity and enhance value creation in the agricultural sector from oil palm, jatropha and other crops in a sustainable manner. ACGT focused on genome sequencing, biomarker discovery and bioinformatics for the development of planting materials for sustainable agriculture.

33. Using DNA sequencing and genotyping machines, ACGT successfully identified the palm oil, jatropha and ganoderma genome. Sequencing the genome only provided the genetic code of the plant or organism. For the genomic based research to create value for the plantation industry, the genetic variants or biomarkers that lead to traits of interest in the plant needed to be discovered and documented, and a methodology to identify such biomarkers in oil palm seeds in a cost-effective manner had to be, developed. This was the main aim of ACGT's research. To this end, ACGT pursued readily available technology in the market and expertise in the agricultural field to benefit the plantation industry.

EGL's investment in DNAe

34. In April 2008, EGL was incorporated to make an investment in DNAe.

35. DNAe was originally established as a spin-out from Imperial College London. It specialised in research and development into "point of care" solutions for DNA gene

sequencing detection. Its founder, Professor Toumazou, met the chairman and chief executive of GB, Mr Lim Kok Thay, at a conference in 2008. Professor Toumazou informed Mr Lim of the R&D work that DNAe was doing to develop a silicon chip-based solution for real time DNA gene sequencing detection at point of care. DNAe's platform could be developed for multiple markets, with focus on the point-of-care diagnostics market. Professor Toumazou explained that DNAe was at that time in the process of trying to raise funds to continue its R&D activities. Mr Chong explained that Mr Lim's approach was to back the R&D of eminent scientists.

36. GB had historically been in a surplus cash position and at that time had begun to earmark some of its unutilised cash for investments through a number of wholly owned subsidiaries with a view to develop additional sources of profit for GB in future in order to enhance returns and diversify its earnings profile.

37. Following due diligence conducted to evaluate a potential investment in DNAe, EGL signed a Share Subscription and Shareholders Agreement on 28 September 2008 ("2008 Subscription Agreement") whereby EGL agreed to subscribe for 3,525 ordinary shares of £0.10 each in DNAe (equivalent to 23.8% of DNAe's issued share capital) for a consideration of US$3 million. In addition, pursuant to Schedule 8 to the 2008 Subscription Agreement, three options were granted to EGL to subscribe for an additional 8,225 shares in two tranches upon DNAe achieving certain technical milestones. There were three milestones specified which triggered the options and were intended to reflect DNAe's expected progress towards developing a prototype product for field use, with a fourth milestone expected to be met in 2010, about 2 years after the initial subscription. The options granted to EGL the right to make further investments in EGL (for a total of 8,225 shares for US$7 million) were to be exercised by EGL at its sole discretion upon the achievement of the technical milestones.

38. The investment options and milestones contained in Schedule 8 to the 2008 Subscription Agreement were as follows:

Milestone	Milestone 1:	Milestone 2:	Milestone 3:	Milestone 4:
	The development by the DNAe of a 'laboratory-use SNP detection kit' (being an un-integrated SNP detection kit suitable for laboratory use which comprises the DNAe's portable SNP detection unit together with standard laboratory apparatus for DNA extraction and amplification); estimated to be by mid-2009	The developments by the DNAe of an un-integrated SNP detection kit towards a 'rapid lab' product in any of the following markets (subject to further strategic analysis): consumer laboratories (e.g. cosmetics retail, holistic, nutrition), clinical trial pre-screening for pharmaceutical companies, veterinary laboratories for marker-assisted breeding) or clinical research laboratories (e.g. disease screening and adverse drug reactions); estimated to be by late 2009	The developments by the DNAe of a fully-integrated 'sample to result' prototype for field-use; estimated to be by mid-2010	The development by the DNAe of a regulated and fully integrated 'lab-on-a-chip' for use by a non-expert user; estimated to be by late 2010

Investment Option Payment	$3,000,000 (the "Second Investment Option Payment") which amount shall be used by the DNAe for the development of Milestone 2	$2,000,000 (the "Third Investment Option Payment") which amount shall be used by the DNAe for the development of Milestone 3	$2,000,000 (the "Fourth Investment Option Payment") which amount shall be used by the DNAe for the development of Milestone 4	N/A
Tranche	3525 Shares	2350 Shares	2350 Shares	N/A

39. The options contained in Schedule 8 to the 2008 Subscription Agreement were exercised. By 2010, EGL's shareholding in DNAe had increased to 49.4%. This percentage shareholding declined to 48.4% and 46.7% in 2011 and 2012 respectively because further shares were issued to other shareholders.

40. Under the 2008 Subscription Agreement, DNAe agreed, upon receipt of the second option payment by DNAe, to grant a right of first refusal to EGL for it or its nominee to be appointed as the exclusive agent and sole licensee on a worldwide basis with respect to the commercialisation, marketing and sale of all products, processes and methods applying to the intellectual property of DNAe. The licence was to be on standard commercial (arm's-length) terms to be agreed between DNAe and EGL. Mr Chong explained that GB would typically seek such right of first refusal (on top of the normal investment returns) when investments made were expected to be recurring and involved material amounts.

41. In the event, the right of first refusal was never exercised.

42. In a management paper dated 25 September 2008 ("the 2008 management paper"), prepared for the board of GGL seeking their approval for the investment in DNAe, it was mentioned that the technology of DNAe would complement and enhance the business activities of ACGT. The 2008 management paper contained the following statements:

> "DNAe is a private limited company incorporated in England and Wales which has been set up to carry out research and development activities in silicon chip based solutions for real-time gene sequencing detection at point of care. Its patented Genalysis™ platform is capable of delivering real-time, disposable, accurate on-the-spot tests for any target nucleic acid sequence (DNA and RNA).
>
> Its technology application will provide the ability to accurately detect a gene sequence in real-time using a standalone, fully portable, low power unit with technology as yet unavailable outside a lab. The technology developed is expected to be commercialised into the following application:
>
> • Medical application - predisposition and infectious disease screening; pharmacogenomic personalised medicine; clinic and home use diagnostics and hospital bedside screening;
>
> • Agricultural and Food application;
>
> • Forensics application; and
>
> • Biodefense application"

43. The 2008 management paper summarised the terms of the 2008 Subscription Agreement, including the options and milestones described in paragraph 37 and 38 above, and the right of first refusal described in paragraph 40 above, and continued:

> "Upon successful completion of the research and development of its technology DNAe will hold the Intellectual Patent on the technology to develop portable genetic testing equipment. This new technology is expected to revolutionise the way genetic tests are carried out as it will provide the platform for faster and mobile genetic testing.
>
> The application of the technology will complement and enhance the value to the business activities of ACGT and the seed garden project of ADB, both of which are fellow subsidiaries of Genting Berhad. The worldwide licensing and commercialisation rights that comes with this investment will provide GGL with opportunities to set up of [sic] a new business of manufacturing portable point of care genetic test kits.
>
> Overall, this investment will provide GGL with future royalty income from the IP rights held in DNAe and future income from the manufacturing and sale of point of care genetic testing kits with wide applications.
>
> Consideration
>
> The investment of US$10 million will be utilised by DNAe to fund its research and development activities until the commercialisation stage. There is a risk that DNAe may not achieve its milestones.
>
> In order to mitigate the above risk, the investment of US$10 million is divided into 4 tranches to correspond with each agreed milestones which must be achieved before each tranche of investment is made. The Agreement also provides for the utilisation of the proceeds for each tranche of investment in accordance with an agreed cash flow forecast with allowable 10% variant from the estimated utilisation.
>
> Recommendation
>
> Given the technology of DNAe complements and enhance the value of the genomics businesses of GGL Group, Management recommends that GGL through its wholly owned subsidiary, EGL enters into the Agreement to invest in DNAe. "

44. Mr Chong gave evidence about the investment by EGL in DNAe. As already noted, I accept his evidence.

45. Mr Chong's evidence was that EGL's purpose of investing in DNAe was to have an opportunity to profit from DNAe's promising research up to a point when EGL could realise a financial return from a profitable exit.

46. Mr Chong said that at the early stage of an investment, all exit possibilities which could provide a profitable return to EGL's investment in DNAe would not be discounted, especially as scientific research for healthcare was a new and relatively unknown industry to the GB Group at that time. Although a trade sale or an initial public offering was the primary method of intended exit for GB venture capital investments, the management paper for the investment in DNAe considered various other possible ways in which a financial return could be derived from the investment, including licensing and commercialisation rights, opportunities to set up a new business of manufacturing portable point of care genetic test kits, and the possibility of tie ups within the GB Group.

47. In cross-examination Mr Blakely asked Mr Chong whether setting up manufacturing or entering into tie ups between DNAe and GB Group entities was an exit strategy. Mr Chong explained that these were rationales could be put forward for making an investment at the outset. At that stage GGL looked at all possibilities when making an investment, including hypothetical benefits beyond the straight exit. However, Mr Chong emphasised that these

hypothetical or potential benefits were not the primary purpose of the investment. The main objective was to "sell out and exit" at a profit by finding a strategic buyer, although Mr Chong accepted that, at that early stage, GGL explored all possibilities including licensing and tie ups.

48. Mr Chong explained that this was not unusual at an early stage for investors investing in a relatively unfamiliar area for the first time where the eventual market for the product had yet to be developed or did not yet exist. As an early stage investor in a new industry seeking to maximize returns on its investment, all forms of exit and ways to monetise its investment in DNAe were considered by EGL, with a view to realising the maximum return for its investment as soon as possible and this was normal practice for a large corporate group like GB: it wished to be able to demonstrate to its board and shareholders that all potential ways of mitigating investment risks had been considered. Although some of the papers did refer to the possibility of a strategic benefit to the GB Group, Mr Chong noted that this was never acted upon.

49. Mr Chong further explained that when the investment in DNAe was proposed in 2008, DNAe's principal focus was to continue its R&D activities in the silicon chip that it had developed for real-time gene sequencing detection for use at the point of care for humans. The milestones for EGL's options to further invest in DNAe were predicated on this. It was never a condition to EGL's investment in DNAe that it undertook R&D to develop DNA sequencing capability for agriculture.

50. Mr Chong was asked whether, when EGL invested in DNAe, the potential application of DNAe's technology to palm oil was recognised. Mr Chong said that this was not a driving factor in EGL's investment and that he remembered that it was "all about human application."

51. Mr Chong said that his understanding was that, although the technology developed by DNAe might in theory be applied to different industries that use DNA sequencing for detection and discrimination, the application of DNAe's technology in plant research remained a theory to which further extensive R&D had to be undertaken by DNAe for practical application. In 2010, at its own initiative, DNAe carried out an exploratory study regarding application of DNAe's technology in the palm oil industry, where it concluded that such application would be an untested and unproven market with high risk. Further study, which DNAe had never budgeted nor raised funding for, would have had to be undertaken to determine reliability of the throughput and the cost effectiveness of production. Despite this conclusion, EGL continued to fund DNAe to achieve its objectives in point of care (i.e. human care); the investment by EGL in DNAe was not undertaken for the purpose of improving the GB Group's DNA sequencing and bioinformatics capabilities.

52. Mr Chong's oral evidence also addressed the 2008 management paper. He explained that this was a typical way of writing board papers and that it would be usual to make reference to how GB (via its subsidiaries) could monetise its investments. The 2008 management paper indicated that the investment in DNAe could have some benefits to the GPB business. It was a brief reference in a board paper with no elaboration on how such benefit could be realised. The 2008 management paper simply looked at all opportunities and possibilities and this was how the reference to possible strategic benefits came about. Furthermore, Mr Chong noted that there was no scientific officer employed by GB until the time he retired in 2018. The comment in the 2008 management paper about the potential benefit to the GB Group was not, in Mr Chong's view, a knowledgeable comment. It was written from the point of view of a finance/legal/secretarial perspective but was not written with any scientific knowledge. The investment in DNAe was solely an opportunistic use of surplus cash – it was an opportunistic not a strategic investment.

The 2012 Supplemental Agreement

53. In February 2012 EGL, DNAe and the other shareholders in DNAe entered into a supplemental agreement ("the 2012 Supplemental Agreement"), amending the 2008 Subscription Agreement. Under the 2012 Supplemental Agreement the right of first refusal was removed and two licences were granted by DNAe to EGL. The first licence was a non-exclusive world-wide licence in the "First Field of Operation". The second licence was a co-exclusive world-wide licence in the "Second Field of Operation". The First Field of Operation related to agricultural biotechnology excluding palm oil. The Second Field of Operation related to agricultural biotechnology in palm oil.

54. A management paper ("the 2012 management paper") dated 22 February 2012 was provided to the GGL board seeking approval to enter into the 2012 Supplemental Agreement.

55. The 2012 management paper stated:

> "5. POTENTIAL OF THE DIAGNOSTICS INDUSTRY AND BENEFITS TO EGL
>
> 5.1. Based on the Global Industry Analyst, Inc. (www.strategyr.com), the global market for agricultural and environmental diagnostics is forecast to reach US$2.4billion by the year 2015. Goldman Sachs estimates the year-on-year growth of the industry to be close to 5% per annum in the next decade.
>
> 5.2. Apart from potential dividends from its shareholding in DNAe, EGL, by entering into both the Licensing and
>
> Supplemental Agreements, can benefit from the following additional sources of future income,
>
> (i) The facilitation fee payable by DNAe in relation to the application by DNAE or its licenses or sub-licensees of the Licensed IP in the fields of agricultural-biotechnology and non-agricultural-biotechnology; and
>
> (ii) Royalty fees payable by sub-licensees of EGL to EGL for the sub-licensing of the Licensed IP in the First and Second Fields of Operation.
>
> 5.3. In addition, the agricultural-biotechnology businesses of the Genting Group could potentially use DNAe's Licensed IP or future improvements thereon to augment in-house technical know-how.
>
> 6. RECOMMENDATION
>
> 6.1. The Supplemental Agreement and the License Agreement are intended to enhance the value of EGL's existing investment in DNAe whilst complementing the agricultural-biotechnology businesses of the Genting Group."

56. Mr Chong explained the background to the 2012 Supplemental Agreement.

57. In October 2010, DNAE entered into a Research and Development Collaboration Agreement with F. Hoffman-La Roche Ltd ("Roche") with the aim to developing and bringing to the market new products, systems, components, methods, processes or services using DNAe's ion sensitive field effect transistors technology ("ISFET") for use in DNA sequencing for research and diagnostic purposes. As part of the collaboration, DNAe also entered into a Patent and Technology Licence Agreement with Roche ("Roche Licence Agreement") whereby relevant intellectual property relating to the use of ISFET and semiconductor technology in nucleic acid sequencing was granted by DNAe to Roche on a non-exclusive basis. This was, in Mr Chong's view, a significant milestone for DNAe because its technology was being validated by a major industry player like Roche. Prior to this, in June 2010, DNAe entered into a Patent Licence Agreement with Ion Torrent Systems, Inc. ("Ion Torrent")

whereby Ion Torrent was granted a non-exclusive licence for DNAe's rights relating to ISFET for use in developing and commercialising certain devices for conducting DNA sequencing.

58. Mr Chong said that in the light of the validation of its technology by Roche and Ion Torrent, DNAe was better placed for fund raising from external parties. The DNAe Board (which included 3 directors nominated by EGL) unanimously agreed that the right of first refusal granted to EGL as DNAe 's exclusive agent and sole licensee on a worldwide basis under the 2008 Subscription Agreement could represent an obstacle to any third party investing in or acquiring DNAe. Therefore, discussions were held with EGL to narrow the scope of rights granted to EGL, in contemplation of a potential acquisition of DNAe by an external party. Mr Chong emphasised that the GB Group was not involved in the business of developing or manufacturing DNA sequencers. EGL considered any collaboration between DNAe and industry players like Roche and Ion Torrent as value-enhancing in any potential sale of DNAE.

59. It was against this background, Mr Chong explained, that in February 2012, the 2008 Subscription Agreement was amended by the 2012 Supplemental Agreement, to limit the rights granted to EGL to the field of agriculture and palm oil i.e. fields which DNAe was not interested in pursuing given DNAe's earlier exploratory study (see Mr Stephansen's evidence at paragraph 83 below). The licences in the First and Second Fields of Operation were entered into by EGL as a potential way in which a financial return could be derived from its investment in DNAe; it would enable EGL to obtain future income streams from the commercialisation of DNAe's technology for its application in the agricultural/oil palm field, should such opportunities ever present themselves. However, no action was taken by EGL or any GB Group company to exploit those licences. Mr Chong explained that EGL saw no harm in obtaining the two licences in case they turned out to be valuable – there was no cost entailed for EGL. In the event, EGL and the GB Group did not follow up on the licences and no further work was undertaken in that area by them.

Efforts to realise investment in DNAe

60. During the same period in 2012, DNAe requested additional funding from shareholders to fund its working capital requirements by means of an offering of redeemable convertible unsecured loan notes to all shareholders on a pro rata basis. EGL continued to fund DNAe via the convertible loan note to provide a way for DNAe to reach a point where it could attract new investors or have a commercially viable product, all with the ultimate goal of providing EGL a profitable exit at the right time.

61. When Roche handed back the semiconductor sequencing research to DNAe in 2013, DNAe continued its R&D efforts to bring to market a device for the rapid detection of blood stream infection at the point of need. EGL continued to support DNAe after 2012 (including through shareholder funding) in order to bring DNAe's R&D efforts to a point where a viable product existed, all with the end goal of realising its investment in DNAe through to a trade sale, IPO, or any other means to maximise its return on its investment.

62. In November 2017, the board of DNAe approved the appointment of Citibank as DNAE's exclusive placement agent in connection with a proposed private placement of DNAE's shares to third parties.

63. From November 2017 to February 2018, Citibank contacted more than 150 potential investors, with management presentations made to more than 20 investors that were shortlisted. A data room was also set up to allow investors to conduct their due diligence on DNAe, with a focus on DNAe's direct-from-specimen test for blood stream infection as DNAe's first product. However, the offers presented by the potential investors were unfavourable and the fund raising exercise by Citibank was not completed.

Other investments by the GB Group and genomics work by the GB Group

Synthetic Genomics Inc. ("SGI")

64. In October 2008 GGL invested in SGI through its wholly-owned subsidiary Dragasac Ltd – a sister company of EGL.

65. SGI is a company incorporated in the United States and develops and commercialises genomic-driven solutions to address global sustainability challenges.

66. GPB had, through ACGT, first invested in SGI in December 2006 via the purchase of stock under the Series B Convertible Preferred Stock Purchase Agreement ("2006 Series B SPA"). ACGT at that time was wholly owned by GPB. In February 2007, shortly after the execution of the 2006 Series B SPA, ACGT entered into a Joint Venture Formation Agreement ("Joint Venture") with SGI whereby SGI and ACGT agreed to form a joint venture entity for the purpose of undertaking mutually agreed research and development projects involving the use of genomics-based techniques and other ancillary methods to increase the yield and potential profit stream from oil palm, coconut and jatropha plants. In addition the joint venture intended commercially to exploit products, processes and methods relating to the plants that incorporated or embodied intellectual property resulting from such research and development. SGSI-Asiatic Limited ("SAL") was the 50:50 joint venture formed by GPB and SGI.

67. In July 2007, ACGT further entered into a Technical Assistance Agreement with the J. Craig Venter Institute (a major shareholder in SGI), through which ACGT's scientists received training and technical assistance.

68. In 2008, Dr Craig Venter, the founder of SGI, approached GB's chairman and CEO Mr Lim to offer to sell some of his SGI shares to meet some personal financial obligations. Mr Lim had been impressed with the advances SGI had made in the field of synthetic genomics, which presented a wide range of applications with potential upside in the future. Dragasac entered into a Stock Purchase Agreement with Dr Venter on 17 October 2008 to purchase 1 million shares of Class A Common Stock from Dr Venter. GGL (via Dragasac) acted when the opportunity presented itself unexpectedly as Dr Venter wanted to sell part of his shareholding for personal reasons.

69. In 2010, SAL, which was equally held by ACGT and SGI at that time, was restructured and became a wholly owned subsidiary of ACGT. SGI, in turn, took a direct 8% equity interest in ACGT, with GPB holding the remaining 92% of ACGT as a result (as described at paragraph 31 above).

70. The collaborative activities with SGI were performed within a short time after GPB's Investment into SGI in 2006. Mr Chong's evidence was that this demonstrated that GPB's investment in SGI was made to carry out an overall GPB strategic purpose to leverage on SGI's technology and know-how for ACGT's work.

Agradis Inc. ("Agradis")

71. In 2011, GGL invested in Agradis Inc. ("Agradis") via Dragasac Ltd. Agradis was an agricultural biotechnology company that aimed to develop and commercialise natural products to improve crop production. GPB and GGL participated in Agradis' initial fund raising in 2011. Agradis was a spin out of SGI in partnership with a Mexico-based SGI shareholder. GGL invested in Agradis via Dragasac and the investment was made to maximise a financial return from a speculative venture as Agradis was exploring a method of coating seeds with specially developed microbes that would fend off disease, rather than adding chemical-based fertilisers. GGL's investment was not conditional on any collaboration or licensing rights being granted to GPB Group or any GB Group company. Mr Chong did not consider Agradis to be a particular benefit in relation to the palm oil business, or at least could not remember that it was, but it

was a benefit in relation to other oils – he described it as a pure investment opportunity. The purpose was to produce better crops. It was an example of Mr Lim's approach of backing eminent scientists.

Elevance Renewable Sciences Inc. ("Elevance")

72. In 2012, GGL invested in Elevance Renewable Sciences Inc. ("Elevance") via its wholly-owned subsidiary Lacustrine Ltd – a sister subsidiary of EGL. It was not a condition of GGL's investment in Elevance that Elevance collaborated with GPB or any GB Group company. Elevance was a chemicals company that created novel specialty chemicals that could be used in personal care products like shampoos (as well as detergents, cleaners and lubricants) from renewable feedstock.

73. In 2014, GPB began a venture with Elevance which would see GPB transform into a fully integrated palm oil producer i.e. GPB was seeking to move from just being an upstream palm oil producer into also being a palm oil refiner. Mr Chong explained that Elevance discussed with GPB moving into the palm oil refinery business. As a result, GPB saw a different way of competing in the refining market using technology which was less damaging to the environment. GPB then signed a joint venture agreement with Elevance. Mr Chong considered that this was simply the way that the market had evolved and that the joint venture did not come about because of GGL's investment in Elevance.

Mr Stephansen's evidence

74. As already indicated, I accept Mr Stephansen's evidence, save as otherwise stated.

75. Mr Stephansen confirmed Mr Chong's evidence about the meeting between Mr Lim and Professor Toumazou in 2008 which led to EGL's investment in DNAe. Mr Stephansen understood that Mr Lim had been intrigued by the applications of semiconductor technology to genetics and the potential of rapid sequencing of DNA to detect genetic mutations or identify pathogens. This led to an invitation to meet GB's senior management in Malaysia. Following a formal presentation of DNAE's technology and the potential applications in healthcare, GB expressed interest in investing in DNAE. Although Mr Stephansen was not present at either the meeting or the presentation, his understanding was derived from Professor Toumazou.

76. It was Mr Stephansen's understanding, gained from his conversations with board members of DNAe, that the intention of GB was to fund DNAe's research and development until a strategic partner would be interested to acquire the business or DNAe was in a position to list its shares on a public stock market (IPO). He commented that the language used was that of milestones and value creation – the language of venture capital investors.

77. Mr Stephansen was challenged in cross-examination on his understanding of the meeting, presentations and recollection of conversations with directors of DNAe. He maintained that that his understanding and recollections were correct. He was asked whether Mr Lim had recognised the potential significance of DNAe's technology for palm oil production. Mr Stephansen's evidence was that he had never heard a statement to that effect. He accepted that he was not party to discussions with GB concerning the scope of use of DNAe's technology.

78. DNAE's initial core technology and intellectual property included the design and development of microchips to analyse and sequence DNA (Deoxyribonucleic acid is the double helix included in all cells carrying the genetic instruction to all organic life). Over the years a number of additional related patents had been registered.

79. The commercial exploitation plan was initially to develop a handheld device which could analyse a small number of DNA base pairs to extract useful DNA information. Base pairs were "rungs" or "steps" in the ladder in the double helix. This could be used for applications related to human predispositions or to identify certain bacteria.

80. Traditional sequencing instruments in 2008 were based on optical technology. They were large, complex and expensive and could only be used in a sophisticated laboratory environment by qualified personnel. Sequencing large numbers of base pairs required a large laboratory environment to process the DNA samples. The DNAe technology, enabling the analysis and sequencing of DNA on a microchip, opened the possibility for faster, smaller and lower cost instruments. The concept was that by 2012 DNAe would have produced a hand-held device which could be operated by an unskilled person. A saliva swab would be put into the device. The device would, however, only read one base pair which Mr Stephansen explained meant that it was not suitable for agricultural purposes. In any event, speed was not important in analysing agricultural products but was important for human beings and, possibly, animals.

81. In 2008 the technology was at a "proof of concept" stage. Scientists were able to confirm that a microchip could register a base-pair from a DNA sample put on the chip. However, the complex preparation of DNA samples had to be done in laboratory prior to the test. The main goal of the Company was to develop an integrated prototype for a 'point of care' device for real-time DNA analysis without the need for laboratory preparation.

82. During the 2010-2012 period the focus of the R&D activities were (1) the Roche Licence Agreement of October 2010 consisting of the development of a high capacity DNA sequencing microchip for use in instruments aimed at the human genomic research market and large-scale sequencing and (2) to continue the development of a handheld 'point of need' device (including a contract with GeneOnyx Ltd.).

83. DNAe also carried out market studies to assess potential future applications in other fields. Whilst the focus of DNAe was on human healthcare, applications related to animals and agriculture were also explored. This included some exploratory work by DNAe on applications for horse breeding and palm oil production, but no further initiatives were taken in these fields. The decision to explore agricultural and palm oil use of DNAe's technology was an internal routine management decision – it was not taken at the suggestion of EGL or GB.

84. Mr Stephansen said that in December 2010, following the licence agreements to Ion Torrent and Roche, the Board of DNAe reviewed Schedule 8 of the 2008 Subscription Agreement and resolved to remove the right of first refusal to EGL. In fact, I note that the Board did not resolve to remove the right of first refusal but resolved that Schedule 8 needed further discussion to ensure that it did not restrict DNAe's capability and enabled them to enter into discussions with potential partners from a position of strength. Mr Stephansen noted that agriculture and palm oil were not target markets for DNAe and no research effort was planned for these markets. Consequently, the 2012 Supplemental Agreement was concluded.

85. Mr Stephansen was questioned by Mr Blakely about the 2012 Supplemental Agreement. Mr Blakely suggested that the licences granted under that agreement indicated that EGL wanted DNAe's technology in the agricultural sphere. Mr Stephansen said that no transfer of intellectual property was planned at the time and none had ever taken place since then. The licences were put in place in case the technology developed so that it could become useful – a right that EGL had but which it had never used.

86. In April 2013 Roche decided to close down its collaboration with DNAe and returned the development work to DNAe. Following a strategic review by management and the Board, it was decided to use the DNAe's technology and know-how to develop an instrument enabling rapid and integrated sample to result DNA sequencing tests at the point of need in hospitals (which was different from the hand-held device referred to previously). The first application was a test to diagnose blood stream infections which could lead to septicaemia. This would be followed by applications to diagnose other infections and in oncology. It was a shift in strategy

from the development high capacity large lab-based instruments to small, integrated, rapid and easy to use instruments for diagnostic purposes where clinicians need rapid information.

87. During the period 2008 to 2012, GB personnel did not participate in the day-to-day management of DNAe such as operational decisions related to R&D work, HR decisions and routine financial transactions. The interactions with EGL/GB were related to Board meetings which were generally held two or three times per year. Other than board matters, Mr Stephansen had no other interactions or contact with GB.

88. Mr Stephansen considered that the investment by GB/ EGL was a financial investment to fund the development of DNAe's technology and create value until it could be sold to a strategic investor or be listed on a stock exchange. DNAe management therefore established relationships with potential strategic parties which could lead to cooperation and eventually an acquisition or an IPO e.g. Roche and the discussions in 2016 – 2017 with Citibank about a potential IPO.

89. Mr Stephansen was asked about the applications of DNAe's technology referred to in the 2008 management paper (see paragraph 42 above). Although he recognised those applications, he said that DNAe focused only on the human side. DNAe did check other applications but agriculture was not a target market of DNAe because it quickly became clear that speed and ease-of-use of the hand-held technology was not important for agricultural products. DNAe's exploratory review of uses for its technology in other areas was, in Mr Stephansen's view, normal for a company developing new technology – it was simply in the normal course of DNAe's business. As mentioned in paragraph 83 above, Mr Stephansen said that DNAe had considered whether the technology would be useful as regards palm oil because it would then open up new licensing possibilities – DNAe wanted as many licences as possible – but DNAe's technology was simply not suited to agricultural products. The initial plan had been to exploit the technology in, what Mr Stephansen described as, the "human space" but it also undertook investigations in other areas. However, Mr Stephansen was clear that there was no initial plan to use the technology in relation to agricultural products and there was no change to the plan to use the technology other than in the "human space". DNA sequencing could be used in any living organism. DNAe had links with GB which had an interest in palm oil so it was natural for DNAe to consider any potential use in case GB became a customer.

90. Mr Stephansen was questioned about an email from Mr Tan Kong Han (CEO of GB from the end of 2010) dated 7 August 2013 in which Mr Tan described agriculture as having been carved out of DNAe "and given to ACGT" when EGL invested in DNAe. Mr Stephansen said that this was simply a mistake in the email. There had never been a licence agreement between DNAe and ACGT – the licence was between DNAe and EGL. Mr Stephansen accepted that he had made the same mistake in a subsequent email.

91. Mr Stephansen confirmed that GB currently indirectly owned 93% of DNAe.

DISCUSSION

92. It was common ground that the burden of proof lay upon DNAe to show that EGL was a venture capital company and that the standard of proof was the usual civil standard, viz the balance of probabilities.

93. This appeal turns on whether EGL falls within the definition of "venture capital companies" in paragraph 2(a) of Article 3 of the Annex to the Recommendation. It was common ground that if EGL was a venture capital company for these purposes then it was entitled to an additional deduction (125%) for SMEs for R&D expenditure under section 1044 CTA 2009.

94. The expression "venture capital companies" is undefined.

95. The CJEU in *HaTeFo GmbH v Finanzamt Haldensleben* Case C-110/13 held that the definition of SMEs should be interpreted strictly and, therefore, held that the definition of SMEs should "not circumvented by purely formal means." The rationale for this strict interpretation was that the advantages afforded to SMEs are in most cases exceptions to the general rules, such as for example in the area of State Aid. I do not know whether the tax treatment of SMEs afforded by section 1049 CTA would otherwise fall foul of the State Aid rules. I received no submissions on this issue.

96. Nonetheless, I shall proceed on the basis that I should construe the expression "venture capital companies" strictly in the light of that decision.

97. As has been noted in the context of exemptions from VAT, the concept of interpreting strictly a loosely worded expression is something of a paradox (see e.g. Jonathan Parker LJ in *HMRC v Abbey National Plc* [2006] EWCA Civ 886 at [53]).

98. Also, by analogous reasoning with the exemptions from VAT, it has been held that an exemption, although to be construed strictly, must not be construed so restrictively as to deprive the exemptions of their intended effect and the interpretation must be consistent with the objectives pursued by those exemptions (see e.g. *Future Health Technologies* C-86/09, at [30]). I think, in other words, the provisions of paragraph 2(a) of Article 3 of the Annex to the Recommendation should be construed in accordance with their purpose (as set out in paragraph 16 above).

99. Therefore, bearing in mind those principles of interpretation, it is necessary to consider what is meant by "venture capital companies".

100. I have set out above the helpful decisions in *Pyreos* and *Monitor Audio* (see paragraphs 20 and 21 above).

101. I note that in both decisions, which although not binding upon me are of persuasive authority, it was considered that the meaning of "venture capital companies" was a matter of judicial notice. I have some reservations about this, particularly since the venture capital sector has a tendency to evolve, and I question whether in some instances the issue as to exactly what falls within the ambit of "venture capital companies" may more appropriately be a matter for expert evidence as to market practice. For example, there has been a recent trend for some start-up businesses to seek "venture capital" from actual or potential customers rather than solely from external sources. Nonetheless, since neither party in this appeal queried the approach of the FTT in *Pyreos* and *Monitor Audio* nor suggested that the matter should be determined by expert evidence, I shall proceed on the basis that the meaning of "venture capital companies" is a matter within judicial notice.

102. In my judgment, building on the tests outlined in *Pyreos* and *Monitor Audio*, a venture capital company will usually exhibit a number of the following characteristics:

> (1) it invests in a high risk, speculative new (or relatively new) ventures – which promises significant growth potential – with a view to a high reward;
>
> (2) it intends to maximise the return on its investment usually by an exit strategy e.g. a trade sale or an IPO, a combination of the foregoing or by some other route;
>
> (3) the investment is usually medium to long term, rather than a short-term dealing;
>
> (4) it focuses on the balance sheet value of the investee company rather than its day-to-day trading – although its profitability and its liquidity (working capital) will also be matters of scrutiny – and it will pay attention to questions of risk and methods of mitigating risk;

(5) it may offer strategic advice but will not be concerned with the day-to-day management of the investee company's business;

(6) notwithstanding (5) above, it may sometimes provide its expertise to the investee company in, for example, marketing, management and planning;

(7) it will usually have board representation on the investee company commensurate with the scale of its investment; and

(8) its obligation or right to inject additional finance may be subject to the attainment of certain objective criteria.

103. I think it is important to appreciate that these characteristics should not be seen as some form of tick-the-box exercise to be applied in a prescriptive or mechanical manner. Indeed, I doubt whether it is possible to give a fully comprehensive definition of a venture capital company.

104. In any event, as Mr Yates observed, Mr Blakely did not appear to dispute that the characteristics identified in *Pyreos* and *Monitor Audio* were satisfied by EGL.

105. In this case, HMRC seek to apply a further test based on its guidance – which of course is not legally binding – based on CIRD92100 states:

> "We have seen examples of large groups that, through a group member, make strategic investments in new activities that have an obvious link with the overall business of the group. In these circumstances we would be unlikely to consider that the company was acting as a venture capital company if its aims were closely linked with the strategic aims of the group business. In these circumstances we would be more inclined to view this activity as the carrying out of an overall group purpose to expand the business by strategic investments rather than to invest for high growth and a lucrative realisation. But each case will need to be judged on its own facts."

106. In HMRC's view, EGL did not meet the definition of a "venture capital company" as regards any of the three years to the year ended 31 December 2012. HMRC say that EGL's interest in DNAe extended beyond the tests outlined in *Pyreos* and *Monitor Audio*, as set out above. Essentially, HMRC argue that EGL invested in DNAe with a view to benefiting the GB Group (including GPB) i.e. that the investment was made for a strategic purpose of the GB Group, something that would be uncharacteristic of a true venture capital company. HMRC argued in this case that there was a link between DNAe with the overall business of the GB Group. I shall call this the "strategic benefit" argument.

107. I am minded to accept HMRC's view that such a strategic investment would not be characteristic of a venture capital company. Indeed, Mr Yates accepted that if an investor is sacrificed its commercial return for a group-wide strategic benefit it would not be a venture capital company.

108. However, I consider that the question whether an investment was made for such a strategic purpose is a question of fact and degree, with each case being decided on its own facts and circumstances.

109. As *Pyreos* itself shows[2], the fact that a corporate group sets up a venture capital arm does not of itself prevent the companies within the venture capital business being "venture capital companies" for the purposes of the Recommendation. In the present case, I did not understand

[2] I note, in this context, that in *Pyreos* the intellectual property concerned was no longer of use to the parent Siemens group.

HMRC to be advancing a contrary argument. Rather, Mr Blakely submitted that the approach taken by GGL and the GB Group as regards other investments made by subsidiaries of GGL supported HMRC's view that EGL's investment was made for the benefit of the parent group rather than for the purposes of a venture capital business. Mr Blakely submitted that the GB Group, and particularly GPB, was moving into the biotechnology and life sciences sector throughout the relevant periods and the group had specific and strategic aims of improving its DNA sequencing and bioinformatics capabilities, an area in which the DNAe was developing technology. In other words, that it was a common feature of investments made indirectly by GGL that they benefited the parent GB Group in the genome and biotechnology sphere.

110. In the present case, I am satisfied on the evidence before me that the characteristics set out in paragraph 102 above are substantially satisfied by EGL. Mr Blakely did not submit to the contrary. On the basis of those criteria, viewed in isolation, EGL would *prima facie* be a venture capital company.

111. In relation to the "strategic benefit" argument put forward by Mr Blakely, I do not accept that EGL's main purpose was to achieve a strategic benefit for the GB Group. In my judgment the primary objective of EGL in investing in DNAe was to make a speculative, high-risk investment with a view to achieving a high return by some form of exit – albeit that the investment was in the area of genomics, a field in which the GB Group had some experience, especially in the field of agriculture. Mr Chong and Mr Stephansen's evidence on these points was clear.

112. Any strategic benefit to the GB Group (including GPB) seemed to me purely ancillary. I think it was well-recognised that the primary market for DNAe's technology related predominantly to human testing – i.e. medical applications – but not agriculture. Indeed, it was soon established by DNAe's internal investigations that the use of its technology for agriculture was impractical.

113. Furthermore, the milestones contained in Schedule 8 to the 2008 Subscription Agreement contained no reference to any collateral benefit being achieved for the GB Group. There was no reference to any benefit relating to plantations, palm oil, seeds or agriculture. The only conceivable agricultural benefit related to veterinary laboratories and there was no suggestion made to me that this was an area in which GB or GPB could benefit.

114. In this context I would note that HMRC's Statement of Case contained an error which may have coloured HMRC's approach in this appeal. The Statement of Case contained the following assertion:

> "At the time of Edith Grove's investment in the Appellant, the Appellant and ACGT entered into a licensing agreement under which the right to develop the Appellant's technology in agriculture was assigned to ACGT."

115. This was incorrect. I have set out at paragraph 40 above the right of first refusal contained in the 2008 Subscription Agreement. There was no evidence before me that indicated that the right to develop the DNAe's technology in the agricultural field was assigned to ACGT. Moreover, this perhaps confuses aspects of the 2008 Subscription Agreement with the 2012 Supplemental Agreement. In any event, even taking into account the right of first refusal, I am satisfied on the basis of Mr Chong's and Mr Stephansen's evidence that this right was a purely ancillary benefit and the main purpose of EGL's investment was as set out above at paragraph 111.

116. The 2008 management paper referred to potential applications of DNAe's technology and included a reference to: "Agricultural and Food application…." This reference came after a more detailed description of the "Medical Application" as follows:

> "Medical application - predisposition and infectious disease screening; pharmacogenomic personalised medicine; clinic and home use diagnostics and hospital bedside screening…."

117. In my view, from the way that the 2008 management paper was written, and viewed against the background of the evidence of Mr Chong and Mr Stephansen, the primary application which was being recommended to the GGL board was a medical application of the technology and any agricultural/food application being a secondary consideration.

118. Similarly, as regards the 2012 Supplemental Agreement, I accept Mr Chong's evidence that the grant of the licences in respect of agriculture to EGL was of limited benefit to the GB Group. By 2012 it was clear that DNAe's technology was not suitable for agriculture. Mr Chong's evidence was that the licences were granted just in case the technology unexpectedly turned out to be beneficial for agriculture. As Mr Chong put it, EGL took the licences for "FOMO" ("Fear of Missing Out"), rather than from any conviction that the licences were of any particular value. I formed the clear view from the evidence that the grant of the licences simply safeguarded EGL's position in the unlikely event that the technology was found to have a use in the agricultural sphere.

119. As regards the other investments made by GGL (through intermediate holding companies) in Agradis, Elevance and SGI, I accept that there may have been some potential benefit to the GB Group from those investments. However, these other ventures seemed to me distinct from EGL's investment in DNAe, since they mainly focused on biochemical and genomic research in relation to agricultural matters (particularly in relation to palm oil) and in each case post-dated EGL's initial subscription for shares in DNAe (albeit in the case of investment in SGI, only by about a month). SGI was something of an exception in that it also carried out research into vaccines. Nonetheless, I do not consider that that is material to the question before me in relation to DNAe.

120. The fact that other parts of the GB Group were involved in genomics and biotechnology – mainly in the field of agriculture, particularly relating to palm oil and crops – does not seem to me a sufficiently close connection with the activities of DNAe to establish a strategic benefit to the GB Group.

121. I should add, in this context, that at no stage in the proceedings before me and, having reviewed the correspondence and document bundle with which I was provided, have HMRC clearly articulated exactly what benefit, strategic or otherwise, the investment that DNAe was supposed to have afforded to the GB Group. Indeed, as the facts show, DNAe's technology has not been used by the GB Group. HMRC's arguments and submissions seemed largely to focus on an argument that because DNAe and other parts of the GB Group (including GPB) were also involved in genome technology the benefit was obvious – an argument which seemed to me unspecific. I do not think that that argument is correct. That DNAe was concerned with genome sequencing is clear enough. But its technology was primarily aimed at the medical field. The other genome activities of the GB Group mainly related to other fields. Genomics is a very wide field covering, potentially, almost every living organism. It is not clear to me exactly how the technology being developed by DNAe was intended to benefit the wider GB Group in the genome sequencing and biotechnology activities which it pursued in other fields.

122. Mr Blakely spent some time seeking to distinguish the facts of the present appeal from those in *Pyreos*. In that case, he submitted, the technology concerned was technology which the parent company, Siemens, no longer wished to use. In other words, the technology contained in the investee company was no longer of benefit to Siemens. That may be so, but it does not follow, as I have said, that in this case DNAe's technology was of any clear benefit to the wider GB Group.

123. In its Statement of Case, HMRC advanced arguments on the basis that DNAe was EGL's only investment and, secondly, arguments based on the 2015 User Guide to the SME Definition. Neither of these arguments was advanced before me, either in Mr Blakely's skeleton argument or orally, and appeared to have been abandoned. Accordingly, I shall not address them.

124. In short, I am unconvinced by HMRC's argument that EGL's investment in DNAe (which was increased as the milestones were achieved) was carried out for strategic purposes in order to benefit the wider GB Group. It seems to me more likely that the investment was an opportunistic one, as Mr Chong explained, involving the investment of surplus cash in the GB Group and represented Mr Lim's policy of backing eminent scientists. As I have said, I consider that the investment by EGL in DNAe satisfied the characteristics set out in in paragraph 102 above and that its investment was not carried out for strategic purposes to benefit the wider GB Group or at least, to the extent that it was, this was purely ancillary to its main purpose to achieve a high return on realising its investment.

125. Accordingly, I allow this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 10 AUGUST 2021