[2019] UKFTT 598 (TC)

TC07381

TAX AVOIDANCE - application for declaration Delta arrangements were notifiable arrangements under DOTAS - consideration of facts – application ALLOWED

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/7950

BETWEEN

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

-and-

EDF TAX LIMITED (IN CREDITORS' VOLUNTARY LIQUIDATION) **Respondent**

TRIBUNAL: JUDGE BARBARA MOSEDALE

Sitting in public at Taylor House, Rosebery Avenue, London on 29 January 2019

The respondent was not represented at the hearing.

Mr J Carey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the applicant

DECISION

INTRODUCTION

1. The respondent, which I shall refer to as EDF, offered tax advice for which it was paid. It offered advice on certain arrangements, which it referred to as the Delta arrangements, to a number of persons; HMRC became aware of the Delta arrangements in about October 2015. HMRC investigated the arrangements on the basis Delta appeared to them to be a tax avoidance scheme which was required to be, but was not, disclosed under the disclosure of tax avoidance scheme legislation ('DOTAS').

2. EDF denied that the Delta arrangements were disclosable under DOTAS. In the course of correspondence, EDF provided HMRC with two brochures which, said EDF, were the only marketing material available to potential users of the arrangements. EDF also maintained that the steps taken by users were not pre-determined.

3. EDF ceased offering tax advice and trading on 31 January 2017 and entered into creditors' voluntary liquidation.

4. On 23 October 2017, HMRC made an application under s 314A (and s 306A) of Finance Act 2004 ('FA 2004') that the Delta arrangements were (or, in the alternative, were to be treated as) notifiable arrangements within the meaning of s 306(1) FA 2004. The application was served on the respondent on the basis that, in HMRC's view, as stated in the application, it was a promoter of the arrangements.

Non-attendance of the respondent

5. The respondent was not represented at the hearing. This was as expected as the liquidators for the respondent had stated on a number of occasions that, although they did not concede the application, they would take no part in the proceedings nor attend the hearing.

6. HMRC had applied in advance of the hearing for a ruling that the hearing would proceed in the respondent's absence as HMRC did not wish to be put to the expense of preparing for a hearing that might not go ahead. I declined to make such a ruling in advance as there was always a possibility circumstances might change before the hearing.

7. But, as expected, on the day the respondent did not attend nor did it seek a postponement. It was clear to me that the respondent had been notified of the hearing and that it was in the interests of justice to proceed in its absence as its failure to attend was intentional and it was most unlikely to attend the hearing even if it was postponed to a later date. It was therefore right to proceed with the hearing in the absence of the respondent.

Application to amend application

8. HMRC applied in the hearing to amend its application which had originally stated that the fee charged by EDF for the arrangements was 12%; the evidence showed that the fee charged was sometimes 13%. I allowed the application to amend in the hearing. I was satisfied it had been served on respondent and it had not objected. In the event, I found the evidence showed that in one case the fee was only 3%. I deal with the significance of this below.

THE FACTS

THE EVIDENCE

9. The Tribunal had the witness evidence of Officer Jack Lloyd who provided a witness statement and gave oral evidence at the end of the hearing. As the respondent did not attend the hearing, he was not cross examined and I accept his evidence as it was unchallenged. His evidence set out HMRC's investigation into the Delta arrangements.

10. Mr Lloyd had established that there were approximately 60 users of the Delta arrangements. HMRC selected 6 for formal enquiries and then produced to the tribunal the Delta documentation relating to 4 of these taxpayers:

(1) 2020 Innovations Ltd which I shall refer to as 2020

(2) Myriad Contracts Ltd which I shall refer to as Myriad;

(3) Toucan Systems Ltd which I shall refer to as Toucan; and

(4) Acacia Carpentry Ltd which I shall refer to as Acacia.

11. There was no evidence from the respondent as they did not attend the hearing. I understood from Mr Lloyd's evidence that, apart from the two brochures referred to above which were produced to HMRC by EDF, the documentary evidence produced by HMRC was obtained by HMRC from the four users of the Delta arrangements listed above. These documents comprised the bulk of the evidence before me and, with the brochures and a few letters written by EDF to HMRC, are on what I base my following findings of fact.

Virtually identical letters and documentation

12. I find that, in very large part, the documents and letters from EDF produced by each of the four above companies in response to HMRC's enquiries were, bar differing names and amounts of payment, virtually identical to the equivalent letter/document produced by the other three users. In the hearing, I was mostly just referred to the Toucan documentation but had the documentation for all four sample cases in the bundles and have considered all of them in writing this decision.

13. I find that, in each of the four cases, there were a distinct series of documents and letters. This series of documents and letters were all virtually identical in all four cases and were all in exactly the same chronological order (albeit that each of the four companies' documents and letters were all dated differently to those of the other companies.) For this reason, counsel referred to each new letter or document as a stage or step in the Delta arrangements. As I agree with him, for reasons given below, that the documents did comprise a pre-planned and off-the-shelf scheme, I will also refer to them as 'stages' or 'steps'.

14. It was also apparent that the letters and documents fell into two halves. Within a relatively short period of time, EDF would send out a series of letters and certain documents would be executed. I shall refer to this as Part I. Then, after a gap of approximately 6 months, a further batch of letters would be sent by EDF and certain other documents executed again within a relatively short period of time. I will refer to this as Part II.

The steps in the Delta arrangements

Part I Stage 1: The engagement letter

15. The engagement letter was very long, as is to be expected, with EDF setting out the limits of its liability and its policy on data protection and so on. A large part of the letter was not relevant to the matters at issue in this hearing.

16. What was relevant includes as follows. The purpose of the engagement was stated to be:

> ...you have instructed us to provide tax advice in connection with the reward of employees, further details of which will be provided in a letter of advice to follow.

Under the heading of 'fees' it stated:

> Our fees for advice regarding the reward of employees will be [X]% of the value of awards made….

There was no definition or explanation of what was meant by the 'value of awards'. The precise % fee, which I have represented as an X, varied between the four users, as mentioned above, and I will revert to this aspect of the arrangements below.

17. I find the letter also made clear to the recipients of it that if they implemented the advice they received, HMRC might challenge the tax effectiveness of it. This is because the letter also required a payment to Defence Services Ltd, for the

> 'defence of the employee reward planning'

There was also reference to DOTAS disclosure to HMRC; further, the letter stated that the fees were not contingent upon the successful implementation of the planning, thereby necessarily implying that there was tax planning and that it might be challenged.

Part I Stage 2: The first advice letter

18. EDF's letter of advice to Toucan, promised in the engagement letter, was sent two days after it. Its first paragraph was about 'Delta Rewards' which was described as a 'flexible platform' which allowed the company to set aside funds for rewarding employees immediately but deferring the choice of actual reward until after the year end.

19. It talked about ensuring that the 'reward package' was tax efficient. It then stated the company had a range of options to reward its employees, such as cash bonuses, pension contributions, shares, health club membership, cars, loans and employee trusts. The next few pages proceeded to advise on the tax consequences of each method.

20. At the end of the letter, the author advised that the Delta rewards platform required the company to use a 'deed of variation' in order to set aside the money intended to reward its directors in the current accounting period, and make the decision on exactly how to reward them after the end of the accounting period. It later went on to point out that a deed of variation could not be used unless an employee benefit trust was first established.

21. Properly understood, therefore, the letter advised the recipient to set up an EBT and to later implement a deed of variation in respect of it in order to implement the Delta rewards platform. Indeed, the letter included a further report on EBTs. Certainly Toucan understood and accepted the advice as within a few days it had set up an EBT as recommended by EDF.

22. I note that the bundle did not contain EDF's equivalent letters of advice to the other 3 user companies; I find such letters would have been sent because (a) they were promised in the engagement letter (b) the other 3 user companies did set up EBTs in the same form as Toucan's within 2-3 weeks of the engagement letter and (c) bearing in mind that all the stages were mirrored, it is more likely than not that they had all received a very similar letter of advice.

Part I Step 3: Establishment of EBT

23. This EBT was made between the scheme user and IFM Corporate Trustees Ltd ('IFM'), which was a Jersey company whose place of business was stated to be in Jersey. These were very long documents and appeared intended to be effective to create EBTs. The sum settled was nominal (£100).

24. In all four cases, the documents appeared virtually identical other than the date and name of settlor.

Part I Step 4: The sub-fund of the EBT

25. Within a few days of creation of the EBT, a further deed was executed by IFM which appeared intended to create a sub-fund of £10 of the £100 originally settled. Again, I find that the deeds were virtually identical for all four users bar the difference in dates and name of the EBT.

Part I Step 5: The second advice letter

26. After the creation of the EBT and sub-fund, EDF again wrote to the scheme user. This letter ostensibly advised on the company's 'options' after creation of the EBT. It stated that

> '…we have developed a mechanism alongside leading counsel…'

which the letter explained made it possible for the client to set aside profits in this accounting period to reward its employees after the end of the accounting period. It said, consistent with what was said in the first letter of advice:

> '…the manner in which the rewards are to be made does not need to be decided at this point and can be decided after the end of the accounting period'

27. The only 'options' offered by EDF at this point therefore appeared to be to execute the deeds of variation to the employment contracts of those intended to benefit from the reward, or not to execute them. The letter did, however, state that there were different options for the company once it had executed the deed of variation in how it settled its obligations arising under it (discussed below), such as direct payment to the employee or payment into an EFRBS.

28. It is clear that, by some point earlier in time to this, the user had communicated to EDF how much money it intended to reward its employees with under the Delta arrangements as the letter referred to the specific amount and EDF's invoice was issued at this time which was calculated as a percentage of the reward amount.

29. The major part of the text of this letter gave advice on the legislation on marketed tax avoidance, and risks of failure of the planning. On the face of the letter, there was no obvious reason for such advice as the letter had only advised on the execution of the deed of variation to the employment contracts and the only tax advice in the letter appeared to be that money set aside to reward the employments would be tax deductible.

30. In so far as the advice on risks was concerned, the letter said:

> We have consulted with Tax Counsel who advised that it is not necessary to disclose the proposed planning under the DOTAS regime. As such APNs should not apply to this planning.
>
> …
>
> [HMRC] may enquire into this planning and it may at some point be the subject of litigation.
>
> …
>
> Ultimately if HMRC are successful and a tax liability arises then an interest charge would arise on the unpaid tax form the normal due date….
>
> However, this solution has been developed alongside leading Tax Counsel and we are confident that it will achieve the tax efficiencies set out above.

There was also a long section on the risk of retrospective legislation.

31. The letter was sent to Myriad electronically under a covering email. I was not shown a copy of any such email to Toucan. The covering email to Myriad enclosed draft board minutes and letters to be sent on Myriad headed notepaper. I was shown the same email sent to 2020 with the same enclosures sent to 2020. I find it, taking into account the similarity of the advice and documentation given to all the users, not to mention the evidence referred to below of virtually identical board minutes being executed by all four companies, that it was considerably more likely than not that the other users were also provided with a similar email, and draft identical board minutes and letters.

32. The effect of the user being given draft board minutes and letters was to make the formalities of entering into the deeds of variation as simple and easy as possible by presenting the users with all the necessary paperwork which they needed to sign or adopt.

Part I Step 6 Execution of Deeds of variation to employment contracts

33. Each user executed a single deed of variation to which the employees/directors intended to benefit from the Delta arrangements was a party. So three such employees/directors were a party to the Toucan Deed of Variation. While the user covenanted a stated amount (in the case of Toucan, £300,000) there was nothing in the deeds which stated how the sum was to be split between the employees/directors.

34. Three of the four users also provided to HMRC copies of emails they had received from EDF on receipt of the deed of variation. In fact, the emails were all from an email address called 'implementers'; and while the identity of the person who put their name to the email varied, they all indicated that the email was sent on behalf of EDF.

35. The emails to the three users appeared identical. Each enclosed a draft report on the disclosures which the user would need to make in their statutory accounts for that year explaining the covenants they had entered into; the email went on to say that EDF wanted the user to prepare its accounts and tax returns in accordance with the enclosed report and to then forward to EDF the draft accounts 'for our review prior to submission'.

36. There was no copy of an email enclosing the draft disclosure report to Acacia but I consider it more likely than not, taking into account the similarities of the advice and documentation produced by EDF for all four users, that Acacia would have received a very similar email as well.

Part II Step 7: The further advice letters

37. That brought an end to the first part of the arrangements. There was then a gap of some months until EDF wrote to each user again. I accept Mr Lloyd's evidence that this letter was written just before the end of each of the user's accounting period. This makes sense as the payments under the Deeds of Variation were due at that point.

38. Again, the letters to the various users were virtually identical allowing for differences in names and amounts of money mentioned. Again, the proforma letter ostensibly advised the user on four possible methods of fulfilment of the covenants it had made, which were (a) cash payment to the director, (b) to the director's family, (c) payment to an EFRBS or (d) to an EBT. Advice on the tax implications of the first three options were included in the letter; advice on payment to the EBT was stated to be in an enclosed report.

39. There were no enclosed reports, but there was produced to me in respect of Toucan a separate letter sent 12 days after the initial letter. The bundle did not contain copies of any reports sent to the other 3 scheme users, although it seems likely that such reports were sent by EDF Tax and in virtually identical form to the one sent to Toucan.

40. This report letter advised Toucan to enter into deeds of covenant with the sub-fund as this would discharge its obligations under the deeds of variation. The bulk of the letter was about the tax implications and risks of doing so. In summary, it explained EDF's view that there would be no charge under the disguised remuneration legislation. It explained its view that there were no adverse inheritance tax implications at some length. It also warned about the risk of challenge by HMRC but went on to say:

> The planning proposed has been prepared using leading Tax Counsel and we are confident it should achieve the planned tax efficiencies.

The letter also said that a further letter would be sent explaining the tax implications 'relevant to the extraction solution chosen'.

Part II Step 8 The deeds of covenant

41. Each of the users then entered into a number of deeds of covenant with IFM as trustee of their EBT sub-fund. Each of the covenants made by each user were absolutely identical save as to sums covenanted. For instance, Toucan executed 3 deeds. They were identical save that one covenanted £70K, the next £115,001 and the last £114,999. The total covenanted was £300K and it would not be immediately obvious to a reader why the total sum had not been covenanted by a single deed.

42. The covenants entered into by Toucan were identical to those entered into by the other users save as to the names of the company and sub-fund and the amounts.

Part II Step 9 The solution letter

43. EDF's next letter of advice was dated only 3 days after the execution of the deeds of covenant by Toucan. I will call it the solution letter, because, having set out that the company had recently entered into deeds of variation and then covenants, under the heading 'solution' it said:

> We are pleased to confirm that we have developed a mechanism alongside leading tax counsel whereby it is possible for the company to be released from its obligations under the deeds of covenant.

44. The letter went on to give advice on the tax effect of implementing this mechanism. This mechanism was explained to be a tripartite deed under which, in consideration of the company paying the money to their employees, the employees would agree to take over the company's debt to the trustees.

45. The next paragraph switches between describing this obligation to pay the EBT as a debt and a loan; it is stated not to be repayable for 20 years and to only carry interest at trustee's discretion. The letter went on to explain why EDF did not consider the disguised remuneration legislation or benefits in kind legislation would apply to impose a tax charge. Avoiding a tax charge was, I find, clearly the thrust of the letter. For an example it said

> '…it is imperative that the trustees do not take a relevant step at any time so as to avoid a tax charge.'

46. Moreover, the letter says later that

> 'As set out in our previous advice letters to you, [HMRC] may enquire into this planning and it may at some point be the subject of litigation.'

47. The letters on Myriad, Acacia and 2020 were not identical to this one; each one was tailored to a different situation. In particular, it appeared these other users had already paid loans to the employee/directors intended to be rewarded and so, while the basic thrust of the advice was the same, the advice in those letters dealt with the additional need to repay the directors' loan account.

Part II Step 9 The Tripartite deeds

48. These were executed between the user, IFM and each employee/director who was a party to the Deed of Variation. So, for instance, Toucan executed 3 tripartite deeds. Each tripartite deed referred back to one of the deeds of covenant. As each of the three deeds of covenant specified separate amounts, it was possible for each tripartite deed to identify to which deed of covenant it related. It appears a reasonable inference this was why one of Toucan's deeds of covenant had been entered into for £114,999 and one for £115,001; they were effectively the same sum of money but as the deeds of covenant were otherwise completely identical, making

this very slight difference in value was the only way the deeds could be differentiated. A similar tiny difference in sum covenanted existed within some of the Myriad deeds and was also presumably done for the purpose of differentiation.

49. HMRC point out that the emails to the scheme users enclosing the draft tripartite deeds came from a private email address for Colleen Ashmore, and not 'implementers' but I accept their case that EDF did provide the tripartite deeds to the users: not only had EDF said that they would provide these deeds, Ms Ashmore appeared to be, and I find was, an employee of EDF.

Part II Step 10: no repayment

50. The apparent effect of the Tripartite deeds was to put cash in the hands of the employee/directors who were parties to them but with an obligation to pay the equivalent amount to the EBT sub-fund. HMRC's position was that planning must have included the intention that this debt would never be paid.

51. The letters of advice from EBT do not suggest that this was so. Nevertheless, as I have said, the terms were that it was not repayable for 20 years. The solutions letter also suggested that, at the end of 20 years, the trustee might be prepared to renew the loan.

52. I agree with HMRC that it was more likely than not that there was the strong expectation that the debt would never be repaid. Firstly, the money was paid to the employee/director in the context of something that was described as a reward scheme for employees/directors. Secondly, there seemed little concern that it should be paid back: the original repayment term was stated to be 20 years and there was the suggestion it was likely to be extended. Thirdly, it was owed to an EBT whose purpose was to benefit the employees/directors and would therefore be unlikely to have an interest in reclaiming the sum from the employees/directors. But lastly, and most importantly, it seems highly unlikely that the employees/directors who entered into the various deeds and were paid the money covenanted would have agreed to do so if there was a genuine expectation that the money would have to be repaid. All the indications were that the persons in receipt of the money were the persons who controlled the companies and who desired to receive rewards from the company; they agreed to participate in the scheme and it would have been irrational for them to do so if they really thought that they would have to pay back all the money given to them as a reward.

The fees for the delta arrangements

53. HMRC's position was that fees were 12 or 13% of the value of the sum each company put into the scheme. The brochure provided to HMRC by EDF stated that the fee would be 12% of the level of profits set aside for awards plus VAT.

54. And I find this level of fee proved with respect to three of the users. Toucan and Acaica each paid £300,000 into the scheme and were each charged 13% plus VAT (£39,000 plus VAT). Myriad paid £1.785 million into the scheme and was charged 12% plus VAT (£214,200 plus VAT).

55. However, the fee to 2020 was only 3%; 2020 paid £650,000 into the scheme and was charged 3% plus VAT (£19,500 plus VAT). This was not noticed during the hearing and HMRC made no representations on the reason for this. It does not seem significant to me: I do not know why 2020 was charged less but it was clear that 3 out of the 4 users were prepared to pay a very significant fee for the arrangements and that (according to EDF's own brochure) such a large fee was the norm.

Marketing

56. As I have mentioned, EDF provided HMRC with two marketing brochures. In their letter of 23/5/16 EDF said it was the only marketing material provided to potential clients. One page

was a 'cost benefit analysis' showing a worked example of a £500K bonus. It compared the 'effective' rate of tax on that sum as if it was paid as dividend, cash or through the Delta arrangements. As was to be expected, the effective rate of tax on taking the bonus as earnings or dividend was 44%-54%; the effective rate of tax on Delta was stated to be 10.7%; the diagram made it clear that in fact there was no tax if the bonus was paid through the Delta arrangements; the 'effective' tax or deduction of 10.7% was EDF's implementation fee.

What the scheme users' said on the scheme

57. The Board minutes signed by directors of all four companies when entering in the Delta arrangements were virtually identical allowing for the different names and dates. Point 2 of the minutes was with respect to the advice received from EDF; the minutes recorded that it was of 'paramount importance' to the business to reward 'key employees'. The minutes all included the following resolution:

> It was then noted that the use of sub-trusts for the benefit of employees and their families could defer or in certain circumstances even eliminate income tax and national insurance whilst enabling value to be passed to the employee.

58. I find that EDF would have been responsible for the drafting of these minutes: not only is it clear that EDF did produce draft minutes, the minutes of all 4 companies are identical so EDF had to have been the originator of them.

59. In any event, it appears clear that the users' intentions were to reward its key employees without immediate, or any, tax liability.

Speed of implementation

60. Within each Part, I find that the letters and execution of deeds often following swiftly one after another, although this was not always the case.

61. For example, Part 1 for Toucan started on 13 January 2015 with the letter of engagement and finished on 29 January 2015 (just over 2 weeks later) with the execution of the Deed of Variation. Within those two weeks, the Deed of Variation was executed the day after the letter of advice to create it; there was four days between the company's creation of the EBT settlement and the trustees' creation of the sub-fund. This pattern was similar with the other three users; Acacia took 1 month over Part I, 2020 just over 3 weeks and Myriad about the same.

62. Toucan completed Part II in 3 weeks, 2020 in just under month and Myriad in about 7 weeks. In all of these three cases, all of the tripartite deeds were executed within 1 to 6 days of the advice to do so; assuming that was the same with Arcadia (in respect of which I did not have dated copies of the tripartite deed), Acacia would have completed Part II in just over 2 months.

63. It seems that in all cases, the issue of the letters and the execution of the deeds took place swiftly; that finding contributes to my impression that the decision by each of the 4 companies to enter into all the transactions had been made at the outset despite an apparent attempt in the letters to make the various steps look spontaneous.

Were the steps pre-planned?

64. The letters from EDF superficially at least, appear to suggest that EDF (a) was advising on different options (b) was giving advice on the tax implications of the immediate step proposed but not on any overall scheme and (c) was advising on rewarding employees generally and not just the directors and key employees.

65. For instance, one of the brochure described Delta as 'a platform to deliver flexibile employee rewards'; the first advice letter suggested that the engagement of EDF was very

general: they were to provide advice on efficient manner of payment of rewards to employees. The last letter in Part I of the sequence advised that there was no need to decide how to make the rewards at that point in time, indicating that a decision on the subject had not already been taken; the solution letter said EDF was pleased to confirm that it had developed a solution to the situation created by the deeds of covenant, suggesting that the deeds of covenant had been entered into at a time before the decision to enter into the 'solution' was taken.

66. However, at the same time, I consider it clear from consideration of all the evidence this was a false impression. This is clear for a number of reasons:

(1) All four users undertook the identical steps from start to finish (bar the amounts involved). This suggests that none of them had an interest in any other option.

(2) All four of the users implemented the advice from EDF speedily (see above analysis). This suggests they expected the advice and had already taken the decision to implement it;

(3) The only (purported) 'tax free' option presented to users was the 'solution' with the tripartite deed; all other options, such as the cash bonus referred to so often, appeared to result in the normal rate of tax on employee rewards. The user was not presented with a range of purportedly tax efficient products from which to choose despite what was said in engagement letter. More likely than not, the intention from the first was therefore to enter into the solution.

(4) Moreover, the marketing brochure compared the 'Delta arrangements' to dividends and bonuses; in doing so it described the Delta arrangements as resulting in nil tax (because it showed the only deduction from the gross amount of the fee was EDF's fee). Therefore, it is clear that the Delta arrangements was the arrangement which resulted in nil tax; the only arrangement which the advice letters described as having that effect was the 'solution' with the tripartite deed; therefore it is a reasonable inference that EDF and the users intended from the first to execute the scheme culminating in the tripartite deed;

(5) The users, it appears from the very beginning as it was in the engagement letter, were prepared to pay very substantial fees for EDF's advice. In 3 of the cases, the fee was 12-13% of the value of the reward to the employees, which (on a rough calculation) was likely to be about equivalent to a quarter to a third of the tax on alternative methods of reward. To be prepared to pay that level of fee from the start, it is a reasonable inference the user had to expect to save virtually all of tax. The tripartite deed was the only option put forward by EDF which was stated to come close to doing that. This clearly suggests that all the users knew from the first that EDF would be delivering a scheme intended to deliver 100% tax saving. In any event, the board minutes corroborate the users' expected a very significant tax advantage.

(6) It is unlikely that EDF would have written in the terms that they did, and given the advice they gave, if the recipient of the letters had not been expecting it. A fairly glaring example of this is the 'solution' letter which purported to present a solution to the problem created by the deeds of covenant: as the user had just created the deeds of variation on EDF's advice a few days earlier, had the advice to create the tripartite deeds been unexpected, its clients were likely to have been considerably annoyed.

(7) The advice given by EDF from the first was that this was 'planning'. EDF frequently referred to in their letters to the risk of challenge by HMRC and the risk of failure to deliver tax benefits, long before there was any mention of the solution and the tripartite deeds, which were the elements of the scheme which led to the intended tax-free receipt and the likelihood of challenge.

(8) Despite hints in the letter, the solution proposed (the tripartite deed) was not something EDF devised after the problem (the deeds of covenant) were created. Indeed, Toucan's deeds of covenant were dated after the solutions letter was sent to Myriad and 2020. If the deeds of covenant really were a problem, EDF knew this before it advised Toucan to create them. Again, this suggests that all the letters and deeds executed were all pre-planned steps being a part of a single planning scheme

(9) Moreover, just standing back and considering the steps undertaken shows the lack of commercial rational in the steps. A glaring example of this was the stated rationale for the tripartite deed. The problem needing solution was the company's liability to pay a substantial sum of money; but the proposed solution was for the company to pay exactly the same amount of money to a different person. Clearly, the problem of the liability to pay a substantive sum was not solved at all. Looking at it overall, moreover, if the plan was to reward key employees, as it is clear from the minutes it was, it is difficult to see how paying them a sum with an obligation to repay it was much of a reward.

(10) Counsel described the solution letter as 'all so false' and it is easy to see why. The letter appeared to be suggesting that there was no pre-planning and the user was just very fortunate to have made the mistake of the covenant just at the time EDF has come up with a solution; yet it is quite apparent that it EDF had advised in previous letters about 'planning' and planning means taking intended steps. In the context of all the earlier letters, it is not possible to take seriously the suggestion that this was an unplanned step.

(11) Further, as I have said, the reasonable assumption is that the purpose of creating more than one deed of covenant was so that it made it easy for each intended beneficiary of the money to take over the company's debt to the trustees as each tripartite deed refers to a separate deed of covenant. Toucan had 3 directors, each entering into a separate tripartite deed in respect of a separate deed of covenant. This point indicates (were any more indicators needed) that there was a clear intention to execute the tripartite deeds at time the deeds of covenant were entered into.

67. All the steps were pre-planned. It follows that therefore there must have been other, perhaps only oral, advice given by EDF to the scheme users at the outset. The 'advice' contained in the letters could not have been the only advice received. On the contrary, it appears that the letters of advice were actually a part of the scheme, designed to convey an impression that there was no advance planning and that each step was spontaneous.

68. It could not have been otherwise because the users would have been acting irrationally to agree to pay such substantial fees for the rather nebulous advice given in respect of Part I of the scheme.

69. In any event, it is apparent that there were discussions outside the letters as at some point EDF was informed by the user of how much they planned to put into the covenants; moreover, the first sentence of the engagement letter clearly suggested that there had been discussions about EDF's advice before it was sent, the email covering the engagement letters actually referred to 'recent discussions' and stated 'as will already have been explained to you the total costs for this planning are 12% of the value of awards made to employees in connection with our advice…..' .

70. Moreover, the original engagement letter, while it was ostensibly about the tax consequences of a myriad of methods of rewarding directors, nevertheless advised on the immediate creation of an EBT, and was in fact followed by the fairly immediate creation of an EBT; the second advice letter referred to the specific sum that the user intended to settle and

referred to a deed of variation being prepared suitable for the company's requirements. Overall the letters would have been quite startling for a person to receive if they were only seeking general tax advice on how to reward their directors.

71. I consider it considerably more likely than not that the users (in reality, their directors, who were the ones who would benefit from receiving the bonuses tax free) were advised orally on the entire scheme before receiving the letter of engagement. I consider the letters were intended to be a part of the scheme, intended to give the false suggestion to third party readers that each stage of the implementation of the planning was spontaneous.

72. There are many other indicators that the scheme was devised, and all the documents drafted, in advance and it was intended by both adviser and client that a pre-planned series of steps would be entered into:

(1) Counsel was involved;

(2) There were references to 'devised';

(3) The letters and deeds and documents were in standard form and must have taken time to prepare; they were not prepared after the various letters of engagement but must have existed from the first;

(4) Across all four schemes, they were all in standard form without variation apart from names and amounts.

73. I find each and every stage in the planning set out above was devised in advance and intended by both parties to be entered into.

Tax effectiveness

74. HMRC did not really explain to me how the planning was intended to work by reference to the law at the time; HMRC's view, no doubt, was that the arrangement was ineffective to achieve the tax advantage HMRC consider it was intended to obtain. Nor was the purpose of this Tribunal to take a view on whether the Delta arrangements were effective tax avoidance and I make no such decision. But it was clear to me that EDF presented the Delta arrangements as a means of rewarding key employees with cash without tax liability on the company or key employee: the only cost presented was EDF's fee.

75. It is clear to me that the Delta arrangements were engineered to create a situation where a large amount of cash was paid to a key director by the company, purportedly not in recompense for his services as director/employer, but to compensate him for his agreement to take over a debt which the company owed to the EBT. At the same time, it was clear that the cash paid to the director was intended by the scheme user to be a reward for his services and it was not intended that the debt for which he became liable would have to be repaid.

What the respondent had to say on this application

76. I had no representations from the respondent in respect of this application. All I had was the correspondence between HMRC and EDF before EDF entered into liquidation and before HMRC made this application. That correspondence made it clear that EDF's view at that time was that the Delta arrangements were not notifiable because there was no tax advantage; EDF took this view because it considered that the cash received by the scheme users' directors created a debt which had to be repaid and did not represent earnings. It also considered that the steps undertaken by users were not pre-determined.

77. In particular, HMRC had written to EDF on 18 January 2016 with an informal information request about the Delta arrangements. In reply, EDF said the scheme was not notifiable because the employees' tax liability was not reduced without economic

consequences, from which I take it that it meant the cash receipt came with a legal obligation to pay the debt. EDF's description of the planning scheme given in this letter covered only Part I of the steps and omitted mention of Part II. EDF did not provide any of the information requested by HMRC.

78. HMRC responded on 26 February 2016 with a formal request under s 313A FA 2004 asking for a statement whether and why EDF believed the Delta arrangements not to be notifiable. In its reply, EDF made some reference to Part II of the arrangements and reiterated its view that there was no tax advantage because the reduction in tax liability came with economic consequences.

79. HMRC responded on 27 April 2016 with a long letter setting out why they considered DOTAS did apply. EDF responded on 23 May 2016 with detailed comments on HMRC's views. In particular, EDF frequently pointed out in its reply that nothing was pre-determined. But what it appears EDF meant was that the scheme user always had the option not to go ahead and sign any of the documentation provided by EDF. As I have said, I have found as matter of fact that there was a scheme and each of the steps was pre-planned by EDF; EDF might be strictly correct to say that a user always had the ability to refuse to go to the next step of the planning but, the reality was that the user clearly intended to see the planning through to the end because they agreed to pay the substantial fee up-front.

80. EDF denied that the Delta arrangements were designed to reward key employees on the basis that they could be used to reward any employee. I do not accept this: it is not consistent with logic or what was said elsewhere. There is reference in the correspondence from EDF to the need to reward key employees and EDF's marketing material refers to the presumed desire of a potential client company to reward its key employees and directors with substantial payments.

81. EDF pointed out that the debt owed by the employee who received the cash could be repaid early. This must strictly be true but I have found the intention must have been for the debt never to be repaid; otherwise the scheme would have been illogical as its object was to reward the directors of EDF's clients who took the decision to implement the scheme.

82. EDF also said that there was no tax advantage on the basis that there was a real economic difference between receiving cash with no obligation to repay, and cash with an obligation to repay: yet the board minutes, which I find must have been drafted by or on the instructions of EDF, refer to value being passed to the employee without tax charge. Moreover, I have found, for reasons already given, that the intention must have been that the debt would not be repaid. So EDF and the scheme users intended there to be no economic difference between the directors receiving cash outright, or receiving the cash under the scheme implemented.

83. EDF did state the form the documents used was determined by leading counsel and not by EDF. I note that in the letters there is also reference to the legal documents such as the deeds being drafted by a firm of solicitors, independent of EDF. While I would assume that it is true that the documents were drafted by legal professionals, it is clear that, as EDF provided the legal documents to its clients to execute as part of EFDF's scheme, the professionals who drafted them did so on EDF's behalf in order to enable EDF to provide them to its clients and put the scheme into operation.

84. In summary, nothing said by EDF in its correspondence with HMRC or otherwise detracts from my findings of fact that the scheme was pre-planned and tax motivated by EDF and its clients.

THE LAW

THE LAW ON DISCLOSURE OF TAX AVOIDANCE SCHEMES ('DOTAS')

Jurisdiction of Tribunal

85. The jurisdiction of the Tribunal in this matter arose under s 314A and s 306A Finance Act 2004 which provided as follows:

> **S 314A Order to disclose**
>
> (1) HMRC may apply to the tribunal for an order that-
>
> (a) ….
>
> (b) arrangements are notifiable.

And

> **S 306A Order to disclose**
>
> (1) HMRC may apply to the tribunal for an order that-
>
> (a) ….
>
> (b) arrangements are to be treated as notifiable.

86. HMRC's primary case was that arrangements the subject of the application were notifiable; the secondary case was that arrangements the subject of the application were to be treated as notifiable.

87. What HMRC had to prove in each case was different; and the outcome if they could prove either case was also very different. The outcome for the respondent was (potentially) penalties being imposed from the date of implementation if HMRC proved the arrangements were notifiable, but penalties were only (potentially) imposable from a future date if HMRC could only prove the arrangements should be *treated* as notifiable.

88. For an order under s 314A, HMRC had to prove (on the balance of probability) that s 306(1)(a)-(c) applied to the arrangements the subject of the application (see s 314A(3)); for an order under s 306A, HMRC had only to prove:

> (3) ….that HMRC –
>
> (a) have taken all reasonable steps to establish whether the proposal or arrangements are notifiable, and
>
> (b) have reasonable grounds for suspecting that the proposal or arrangements may be notifiable.

As HMRC's primary case was that the arrangements were notifiable, I will deal with that first and only revert to the secondary case on s 306A at the end.

Were the arrangements notifiable under s 306?

89. Are HMRC right that the Delta arrangements were notifiable? S 306 FA 2004 provided as follows:

> **S306 meaning of 'notifiable arrangements' and 'notifiable proposal'**
>
> (1) In this Part 'notifiable arrangements' means any arrangements which-
>
> > (a) fall within any description prescribed by the Treasury by regulations,

> (b) enable, or might be expected to enable, any person to obtain an advantage in relation to any tax that is so prescribed in relation to arrangements of that description, and
>
> (c) are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage.
>
> (2) In this Part 'notifiable proposal' means a proposal for arrangements which, if entered into, would be notifiable arrangements (whether the proposal relates to a particular person or to any person who may seek to take advantage of it).

90. A number of questions arise: I have referred to the Delta arrangements as arrangements but were they arrangements within the meaning of s 306? And if they were, did they meet all of conditions (a), (b) and (c)? I will consider the meaning of 'arrangements' first, but I will then consider conditions (b) and (c) before (a), as (a) requires consideration of the so-called 'hallmarks' and is a lengthy section.

Meaning of arrangements

91. Section 318 contained the definitions for Part 7 and defined 'arrangements' as follows:

> **S 318 Interpretation of Part 7**
>
> (1) In this Part -
>
> …..
>
> *'arrangements'* includes any scheme, transaction or series of transactions;
>
> ……..

92. From this it can be seen that 'arrangements' had a broad meaning. I am satisfied that the Delta arrangements amounted to a scheme and a series of transactions: the evidence on this is clear. While the letters if taken in isolation might in places suggest that the steps were not pre-planned, I have not accepted that that was a true reflection of the position.

93. Logic suggests that the users would not be interested in paying very substantial fees unless they expected a return on it; taking into account all the references to tax, avoidance and tax planning, it is a reasonable and obvious inference that the users were expecting to save tax; Step 9 of Part II (execution of the tripartite deeds) was the critical step in the planning as it was intended to transfer cash to the directors without tax liability. Without that step, no tax saving could be expected to be achieved. The only reasonable inference is that that step was planned from the outset and I find it was.

94. It follows that all the preceding steps were pre-planned. In any event, I have found this to be the case for the many reasons already given above. There was clearly a series of pre-planned transactions: the Delta arrangements were a 'scheme' on any meaning of the words. The arrangements the subject of this application were 'arrangements' within the meaning of s 318 and 306.

THE SECOND CONDITION FOR A NOTIFIABLE ARRANGEMENT

95. Condition (b) was whether the Delta arrangements were arrangements which:

> (b) enable, or might be expected to enable, any person to obtain an advantage in relation to any tax that is so prescribed in relation to arrangements of that description, and

This raises a number of issues.

96. Firstly, I was not concerned with whether the arrangements *enable* a person to obtain a tax advantage. My understanding was that HMRC did not accept that the arrangements were effective so they did not allege that they actually *enable[d]* a person to obtain a tax advantage. HMRC did allege that the arrangements *might be expected to enable any person to obtain a tax advantage.* This was also said at [45] at *Root2tax* [2017] UKFTT 696 (TC) and [21] of *Carlton* [2018] EWHC 130 (Admin). In other words, it does not matter for the purposes of this application whether the arrangements were effective in law to reduce tax liability; it does not matter whether they were implemented as intended nor would it matter if they were a sham. The question is whether they might be expected to enable any person to obtain a tax advantage.

97. Secondly, the advantage must be in relation to *prescribed* tax. That relates to the first condition for a notifiable arrangement which is that that the arrangements fall within a hallmark. Regulation 5 of the Tax Avoidance Schemes (Prescribed etc) Regs 2006/1543 provides that income tax, corporation tax and capital gains tax were prescribed taxes in relation to the three hallmarks relied on by HMRC. I find that, if there was a tax advantage, it included avoiding income tax on the receipt of employment income. The alleged advantage of the Delta arrangements was therefore in relation to a prescribed tax.

98. Thirdly, there is the question of what was meant by 'advantage'. S 318 FA 2004 included the definition of 'advantage' as follows:

> **S 318 Interpretation of Part 7**
>
> (1) In this Part -
>
> '*advantage'* in relation to any tax, means –
>
> (a) relief or increased relief from, or repayment or increased repayment of, that tax, or the avoidance or reduction of a charge to that tax or an assessment to that tax or the avoidance of a possible assessment to that tax,
>
> (b) the deferral of any payment of tax or the advancement of any repayment of tax, or
>
> (c) the avoidance of any obligation to deduct or account for any tax.

The same section provided that 'tax' included income, capital gains, corporation and inheritance tax (and a few other taxes not relevant in this application).

99. Lord Wilberforce gave a definition of 'tax advantage' in the case of *IRC v Parker* [1966] AC 141:

> The paragraph, as I understand it, presupposes a situation in which an assessment to tax, or increased tax, either is made or may possibly be made, that the taxpayer is in a position to resist the assessment by saying that *the way in which he received what it is sought to tax* prevents him from being taxed on it, and that the Crown is in a position to reply that if he had received what it is sought to tax *in another way* he would have had to bear tax. In other words, there must be a contrast as regards the 'receipts' between the actual case where these accrue in a non-taxable way with a possible accrue in a taxable way, and unless this contrast exists the existence of the advantage is not established.

100. That case was not concerned with the Finance Act 2004. It was concerned with s 43(4)(g) Finance Act 1960 which also used the expression 'tax advantage' which was there defined as:

> 'tax advantage' means a relief or increased relief from, or repayment or increased repayment of, income tax, or the avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a

> way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains'

101. This definition was very similar to that in the Finance Act with which this Tribunal is concerned, and the FTT in the case of *Root2Tax Limited* at [40], which did concern the exact legislation as in issue in this application, had relied on Lord Wilberforce's definition because it considered the definition of tax advantage to be 'very similar'. I agreed with this in *Hyrax* [2019] UKFTT 175 (TC).

102. I think Lord Wilberforce's definition of 'tax advantage' is therefore applicable to the 2004 legislation but it really does not matter to this application whether or not it is applicable, because it is plain on the face of s 318 that 'tax advantage' refers to a contrast between the actual (or expected) tax effect of the arrangements and the tax position that would have existed but for the arrangements. In particular, words must be construed in accordance with Parliament's intent and, unless it appears otherwise, that means they should be construed in accordance with their natural and ordinary meaning. The natural and ordinary meaning of 'tax advantage' in s 318 is that it refers to a contrast in tax liability between the position intended as a result of the arrangements and the one that would otherwise have existed. That wide construction seems in accordance with Parliament's intent for certain arrangements (as defined) which involved a tax advantage to be notifiable. The definition is very wide but that is consistent with the construction of the legislation which is to cast the net of 'tax advantage' wide but restrict its application to cases which fulfil the 3 conditions of s 306.

Was there expected to be such a contrast situation in this case?

103. The respondent's position in letters sent before its liquidation was that there was no tax advantage because the scheme users' directors did not receive earnings free of tax, rather they received a loan which was not subject to tax. It seems to me that what they were saying was that the scheme users' directors were not in the same legal position if the company used the scheme compared to the position if the company had not used it. If the company did not use the scheme, the directors would have had the reward as cash in hand which would have added to their overall wealth; if the company used the scheme, the directors lost the greater part of the reward and received instead cash in hand which did not add to their overall wealth because it had to be repaid.

104. *Parker* does not expressly deal with the situation where the contrast situation is not legally identical to the actual situation in point. That is not surprising as the situation did not arise in that case where, either way, the taxpayer got cash in hand without any repayment obligation. It did not arise on the facts of *Root2Tax Ltd* either, as under the scheme in that application, the scheme user received cash in hand in the form of winnings, which there was no obligation to repay.

105. I agree with what I said in *Hyrax.*

> ….. It is a matter of statutory construction. The statute itself does not refer to a contrast situation; it is merely implicit because the statute talks of relief/avoidance/reduction, all of which terms indicate that there would be a contrast situation without the relief/avoidance/reduction. The statute therefore does not define the contrast situation: it does not expressly state whether the contrast situation must be legally or only economically, identical or only similar, to the actual situation which arises.
>
> I have said that the statute should be interpreted in line with Parliament's presumed intent which includes assuming Parliament intended (a) that the legislation would be effective in achieving its aim and (b) that where a person would be penalised for non-compliance, it would be clear to them what obligation was being imposed.

> The aim of the legislation was clearly to combat tax avoidance. It is well understood that there may be tax avoidance where a person adopts a scheme which puts them in a similar economic position to the non-scheme position, but with a lower tax liability. To interpret 'tax advantage' as requiring the contrast situation only to be one where the scheme user was in an identical legal position to the one actually used would be to largely deprive the legislation of much of its effect. It is obvious the objective of tax avoidance is to put the avoider into an economically similar position (but with less tax) than he would otherwise be in, and so it seems obvious to me that Parliament intended the contrast situation to include those that were merely economically similar to the actual situation. Parliament intended the legislation to effectively combat tax avoidance.
>
> While I accept that the legislation is penal and Parliament must therefore have intended the meaning of 'tax advantage' to be clear, I think that it is clear that Parliament intended to refer to economically similar contrast situations (as well as legally identical ones). A layman, including promoters and users of the scheme, when considering a scheme would consider its economic reality and not its legal form and should understand 'tax advantage' in the same way.
>
> In conclusion, I find that the scheme gave, or was expected to give, rise to a tax advantage because it was intended to avoid or reduce the charge to tax on salary which would otherwise have been received by scheme users, had they not adopted the scheme and received equivalent sums in an economically similar, but legally distinct form, of small salary and large loans which were not expected to be repaid (at least not in their lifetime).

106. Therefore, in this case I consider that there was a contrast position because the scheme users' directors were intended to be in a better economic position by receiving the cash with a legal (but unreal) obligation to repay, but no tax liability, rather than receiving the same cash without an obligation to repay, but with a tax liability. Economically if not in law the user was in the same position with as without the scheme, save that with the scheme there was no tax liability. This was a tax advantage. It was therefore correct to say that the arrangements 'might be expected to enable any person to obtain an advantage in relation to any tax'. Condition (b) of s 306 was therefore fulfilled.

THE THIRD CONDITION FOR NOTIFIABLE ARRANGEMENTS

107. The third condition for arrangements to be notifiable arrangements is where the arrangements:

> (c) are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage.

108. I find that the main benefit that might be expected to arise from the Delta arrangements was the obtaining of the tax advantage referred to above. This is obvious from the evidence such as the marketing material which made the tax advantage explicit. In any event, there is no other rational reason for why anyone would implement a convoluted and expensive set of arrangements which left them with a legal (if economically unreal) obligation to repay a sum that they would otherwise have received as salary, save for the expected tax advantage. It seems an obvious and logical inference that the scheme was implemented by scheme users because of the desire to obtain for those persons who controlled the scheme users the tax advantage that was at the heart of the scheme. Objectively speaking, the main benefit that might be expected to arise from the arrangements would be the tax advantage.

109. I find that the third condition has been proved, and must now move on to consider the first condition.

HALLMARKS - THE FIRST CONDITION FOR A NOTIFIABLE ARRANGEMENT

110. As set out above, S306 gave three conditions that 'arrangements' had to meet in order to be 'notifiable arrangements'. The first of those was that the arrangements fell within any description prescribed by the Treasury by regulations.

111. The Treasury had made regulations. They were the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006. These regulations contained a number of descriptions or 'hallmarks'. HMRC only relied on the three of them, Premium Fee, Standardised Tax Products and Employment Income Provided through Third Parties. I consider each in turn.

Description 3: Premium Fee

112. The first description relied on by HMRC for alleging that the arrangements were prescribed by the Treasury were those in Regulation 8 of the Regulations, which provided as follows:

> **8 Description 3: Premium Fee**
>
> (1) Arrangements are prescribed if they are such that it might reasonably be expected that a promoter or a person connected with a promoter or arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements of these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.
>
> But arrangements are not prescribed by this regulation if –
>
> (a) no person is a promoter in relation to them; and
>
> (b) the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.
>
> (2) For the purposes of paragraph (1), and in relation to any arrangements, a 'premium fee' is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises, and which is –
>
> (a) to a significant extent attributable to that tax advantage, or
>
> (b) to any extent contingent upon the obtaining of that tax advantage as a matter of law.

113. I did not understand HMRC to rely on Regulation 8(2)(b) (contingent fees provision). Indeed, as already been pointed out, the letters made clear the fee was payable even if the scheme was unsuccessful. The Tribunal is therefore only concerned with (a) of Regulation 8(2).

114. HMRC's case was that EDF did obtain a premium fee from the four sample users and that therefore demonstrated that a promoter of the same or substantially similar arrangements would be able to obtain a premium fee from a person experienced in receiving services of the type being provided. So I will first address the question of whether a premium fee was actually paid.

Were premium fees actually paid?

115. As HMRC do not rely on (2)(b), whether the fees paid were premium fees depends on whether:

(1) they were charged by virtue of any element of the arrangements (including the way in which they were structured) from which the tax advantage expected to be obtained arose; and

(2) they were to a significant extent attributable to that tax advantage.

Charged by virtue of element arising from expected tax advantage?

116. As Mr Chapman said, it appeared as if the same amount of work was done by EDF in all four the sample cases; they all received substantially the same letters and executed substantially the same deeds. It appeared to have been an 'off-the-shelf' product with minimum individual tailoring. Therefore, if the fee was chargeable by virtue of the amount of work undertaken, the users would have been all asked for a similar absolute amount of fees. Instead, the fees differed radically. For example, the fee charged to Myriad was ten times the fee charged to 2020.

117. I find, on the contrary, as is clear on the face of the documents, that the absolute amount of the fee was calculated by reference to the amount of money paid into the scheme. For instance, Toucan was charged 13% of the £300,000 which it paid into the scheme.

118. The amount paid into the scheme was not the amount of the expected tax advantage; the expected tax advantage could only have been about 50% of that sum (on the assumption that the directors were higher rate taxpayers). So is it right to say that the fee was chargeable by virtue of any element of the arrangements (including the way in which they were structured) from which the tax advantage expected to be obtained arose? I find it is. The fee was charged by reference to the sum paid into the scheme; the absolute sum paid into the scheme was itself directly related to the tax advantage expected to be obtained (in the sense that the more paid in, the greater that tax advantage). In other words, the amount of the fee related directly to the amount of the expected tax advantage.

119. While in practice is appears that some users were charged 12% and others 13% (and in one case 3%) this makes absolutely no difference as it is clear from above factors that the fee was charged as a % of the funds put into the scheme, albeit it was not the identical % for all participants. I agree with Mr Chapman that it appears that in general a higher percentage was charged to those scheme users who were paying less into to the scheme; nevertheless (with the exception of 2020) there was only a 1% difference in fee level overall so it is clear that to a very large extent the fees were charged by reference to the amount paid into the scheme (and therefore to the expected tax advantage) with only a small discount which might reflect that the amount of work undertaken in the cases involving the largest sums was no greater than that undertaken in the cases involving smaller sums. I am aware that the fee charged to 2020 does not entirely fit with this analysis, but it was clear that even that fee was charged as a percentage of the reward and did not relate to the amount of work undertaken. It makes no difference to my overall conclusion that the fees were charged in relation to the expected tax advantage.

Fee attributable to tax advantage?

120. Further, I find the fee paid was to a significant extent attributable to the expected tax advantage. I find this because I find that, on the basis of the evidence in front of me the only reasonable explanation for the payment of fees which normally amounted to 12-13% of the amount paid to the directors and about (very approximately) of about quarter of the expected tax advantage was that the users' directors perceived the payment of the fees as being significantly cheaper than payment of the tax on their earnings. In other words, the fee was paid because the directors and scheme users expected to obtain the tax advantage. It would make no sense whatsoever for the directors and scheme users to have paid such large fees unless there was such an expectation, as to pay the fees and remain liable for the tax on the award paid to the directors would leave them in a much worse economic position than if a cash award had been made to the directors.

Premium fee reasonably expected?

121. In conclusion, the fees paid were within the definition of 'premium fee'. And I agree with HMRC that the evidence that premium fees were paid proves that it might reasonably be expected that a promoter of the arrangements the subject of this appeal (or substantially similar ones) would be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

122. I recognise that I do not actually know whether the users of the schemes were or were not experienced in receiving the type of service provided; but whether or not they were new to tax planning schemes, it seems to me, from the level of sophistication of the letters and deeds and the references to counsel, more likely than not that a person experienced in receiving the type of services provided, as much as the actual users, would be prepared to pay a premium fee if they decided to enter into the planning.

SME Exemption

123. The last element to deal with under this hallmark is the exclusion for small and medium-sized enterprise ('SME'). It seems to me quite possible that the users of the scheme were SME; the directors were certainly individuals. HMRC did not seek to prove that they were not SME. However, the exclusion only applies where no person is a promoter in relation to the arrangements. HMRC's case was that the respondent was a promoter. I deal with this below; suffice it to say here that for the reasons given below I find that the respondent was a promoter and therefore that this hallmark does apply.

124. For the above reasons, I am satisfied that the Delta arrangements fell within one of the descriptions (hallmarks) prescribed by the Regulations and that therefore they were notifiable arrangements within s 306(1). Strictly, therefore, I do not need to consider whether the arrangements fell within any other Hallmarks, but for the sake of completeness, as it was argued, I do so.

Description 5: Standardised tax products

125. The second hallmark on which HMRC relied was the 'standardised tax products' description of arrangements:

> **10 Description 5: standardised tax products**
>
> (1) Arrangements are prescribed if the arrangements are a standardised tax product.
>
> But arrangements are excepted from being prescribed under this regulation if they are specified in regulation 11.
>
> (2) For the purposes of paragraph (1) arrangements are a product if –
>
> (a) the arrangements have standardised, or substantially standardised, documentation –
>
> > (i) the purpose of which is to enable the implementation, by the client, of the arrangements; and
> >
> > (ii) the form of which is determined by the promoter, and not tailored, to any material extent, to reflect the circumstances of the client;
>
> (b) a client must enter into a specific transaction or series of transactions; and
>
> (c) that transaction or that series of transactions are standardised, or substantially standardised in form.
>
> (3) for the purpose of paragraph (1) arrangements are a tax product if it would be reasonable for an informed observer (having studied the arrangements) to

conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage.

(4) For the purpose of paragraph (1) arrangements are standardised if a promoter makes the arrangements available for implementation by more than one other person.

11 Arrangements excepted from Description 5

(1) the arrangements specified in this regulation are -

(a) those described in paragraph (2); and

(b) those which are of the same, or substantially the same, description as arrangements which were first made available for implementation before 1 August 2006

126. I will consider each sub-section in turn.

Sub-section (2) - Are the arrangements a product?

127. Are the arrangements a 'standardised tax product'? The first question is whether they are a product and that is defined as:

(2) For the purposes of paragraph (1) arrangements are a product if –

(a) the arrangements have standardised, or substantially standardised, documentation –

(i) the purpose of which is to enable the implementation, by the client, of the arrangements; and

(ii) the form of which is determined by the promoter, and not tailored, to any material extent, to reflect the circumstances of the client;

(b) a client must enter into a specific transaction or series of transactions; and

(c) that transaction or that series of transactions are standardised, or substantially standardised in form.

Standardised documentation?

128. This question itself breaks into four: (I) was there substantially standardised documentation; (II) was the purpose of such documentation to enable implementation by the client?; (III) and was its form determined by the promoter and (IV) not tailored to a material extent to reflect the circumstances of the client?

(I)Substantially standardised documentation

129. I find that the evidence shows that there was a series of documents which were utilised by the scheme users to implement the scheme; between each document in the series the only differences between one user and another user was normally the scheme user's name and the amount of the reward being paid. I consider that the arrangements did have standardised or substantially standardised documentation.

(II)Purpose of standardised documentation

130. The purpose of the standardised documentation was clearly to enable the scheme to be implemented by the scheme user. If the scheme user did not enter into the various deeds discussed in the 'Facts' section, he could not implement the scheme. The remaining part of this question was whether the standardised documents was to enable the scheme to be implemented by 'the client'?

131. The regulations contained no definition of 'client'. I also note that the regulations were amended with effect from February 2016 to change the word 'client' to 'person' but no reason

for this change was given in the explanatory notes. I take it that Parliament intended the word 'client' to refer to a person using the services of another and that in 2016 it chose to widen the scope of the regulation by removing the requirement that the scheme user had to be a client. But I am concerned with the regulations at the time that the 'client' restriction was a part of the legislation and therefore must consider whether it is correct to describe the Delta scheme users as clients.

132. As Regulation 10(4) refers to a promoter making the arrangements available, so I consider it must have been intended that the 'client' referred to must be the client of the promoter. And it seems clear to me that the scheme users were clients of EDF, the alleged promoter. EDF gave the scheme users advice for which the scheme users paid substantial fees. The scheme users were EDF's clients. So, if EDF was the promoter, which is an issue I consider below, then the scheme users were 'clients' within reg 10(2).

133. In conclusion, on the basis that below I find that EDF was the promoter, I find the arrangements had substantially standardised documentation the purpose of which was to enable the implementation of the arrangements by clients of EDF.

(III) form determined by promoter?

134. Who determined the form of the documents? It seems a reasonable inference that the person who drafted the documents did so on behalf of and on the instructions of EDF; this is for a number of reasons:

(1) because the letters of advice from EDF contained the deeds for signing; in other words, the deeds were given to the users by EDF;

(2) EDF clearly advised on the Delta Arrangements and indicated that they had devised them (albeit with leading tax counsel). It is more than likely that EDF caused the necessary deeds and documents to be drafted in order that their arrangements could be implemented.

(IV) not tailored, to any material extent, to reflect the circumstances of the client?

135. Having considered the evidence above, I find that the documents were not tailored to any material extent to reflect circumstances of the client. Obviously, the documents did reflect the scheme user's individuality in that they used the company name and reflected the sum which the company was putting into the scheme. But the documents appeared to have no other material differences between them. They were 'off the shelf' and not tailored to a material extent to reflect the *circumstances* of the client.

136. I do recognise that the 'solution' letter referred to above was tailored to some extent: see §47 above. However, I do not find that over the documentation was tailored to a material extent. The tailoring was very minor, being contained only in one of a series of letters of advice and not being in a deed which had legal effect of implementing the scheme. It was there only to reflect the minor factual difference that some of the scheme users had already paid some of the cash to the intended beneficiaries before the tripartite deed was entered into. In conclusion, I find the documentation was not tailored to any material extent to reflect the circumstances of the clients.

Was it a requirement that a client enter into a specific transaction/series of transactions?

137. I break up Reg 10(2)(b) into three questions (a) is there a client; (b) was there a requirement to enter into transaction(s) and (c) did it relate to a specific transaction or series of transactions?

(I) Is there a client?

138. If there was a requirement to enter into a transaction, it was a requirement on the scheme user. I have already concluded that the scheme user was the client intended in these regulations.

(II) 'must' the scheme user enter in a specific transaction or series of transactions?

139. What did Parliament intend by the word 'must'? To me it seems obvious that they did not intend that there was any legally binding obligation on the scheme user to enter into the scheme. That would be nonsensical. It would mean this hallmark would catch no one as tax avoidance is always optional.

140. What Parliament meant by the use of 'must', because it is the only reading which makes sense, is that HMRC needs to be shown that the implementation of the scheme was only possible by the scheme user entering into a specific transaction or series of transactions. And the answer to that question in this case is clear. It is obvious that the only way that the scheme user could implement the Delta arrangements was to enter into the various deeds which comprised the scheme as set out above. There was no other way offered to them to engineer the situation which resulted in the directors receiving cash in return for taking on an obligation to repay the company's debt, in circumstances where there was an obligation to repay it to an EBT.

141. I have commented that the letters of advice, on a superficial reading, indicated that each step was optional and the scheme user had a choice to make. And on one level, that was true in that the scheme user always had the option not to proceed right up until the tripartite deeds were executed. However, I have also said that in fact the scheme was pre-ordained and the users would have known from the first that to achieve the tax advantage for which they were paying, it was essential to execute all the deeds recommended by EDF. And indeed the four users did so.

142. So I find that the scheme users 'must' (within the meaning intended by the legislation) enter into a specific series of transactions

(III) was there a specific transaction or series of transactions?

143. The answer to this is clearly yes. There was a series of letters and deeds which were standardised; the effect of executing the deeds was to result in a specific series of transactions.

Was that transaction/series of transactions in substantially standardized form?

144. The last question which must be answered in the affirmative in order for the Delta arrangements to be a product prescribed in reg 10(2)(c), was whether that series of transactions was in substantially standardized form? On the basis of the evidence, I find that the transactions were in substantially standardised form. Obviously, the documents did reflect the scheme user's individual circumstances in that they used the company name and specified the amount concerned. But the transactions appeared to have no other material differences between them. They were 'off the shelf' and not tailored.

145. In conclusion, the Delta arrangements were a product within the meaning of Regulation 10(2). The next question is whether they were a 'tax product'.

Sub-section (3): are the arrangements a tax product?

146. Sub-section (3) defines the arrangements as a tax product if 'it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage'.

147. I have already concluded that the arrangements were such that the main benefit that might be expected to arise from the Delta arrangements was the obtaining of a tax advantage. The test in (3) is almost identical. Taking into account the evidence, an informed observer

having studied the arrangements would have to conclude that the main purpose of the arrangements was to enable the scheme user to obtain a tax advantage. It was sold to potential scheme users on the basis of its tax advantage and it had no rationale apart from the tax advantage. Objectively speaking, that was its only discernible purpose.

148. I have already commented that I find that scheme users were clients.

149. In conclusion, I find that the Delta arrangements were a tax product. The next question is whether the arrangement were standardised.

Sub-section (4): are the arrangements standardised?

150. Regulation 10(4) defines standardised as meaning where a promoter makes the arrangements available for implementation by more than one other person.

151. This condition is clearly met on the evidence. I was presented with evidence of four users, all using the same arrangement and the same standardized documentation.

152. Later in this decision I find that the respondent was a promoter, and that it made the arrangements available for implementation by the scheme users. It clearly made them available for implementation by more than one person as more than one person implemented them.

153. In conclusion, I find that the Delta arrangements were a standardised tax product.

Reg 11 - Exclusion from Description 5

154. Regulation 10(1) provided that arrangements are excepted from it they were specified in Regulation 11. Regulation 11 provided that two kinds of arrangements which were excepted; those listed in R 11(2) or:

> (b) those which are of the same, or substantially the same, description as arrangements which were first made available for implementation before 1 August 2006

155. The respondent did not rely on this regulation; they made no representations at all. In any event, I had no evidence from which I could conclude that the Delta arrangements (which I found were implemented in 2014/15) were first made available for implementation before 1 August 2006 and so (b) does not apply.

156. So far as Reg 11(1)(a) was concerned, this exempted a fairly long list of arrangements which related to reliefs granted by statute, such as EIS, individual savings accounts, and pensions schemes. I do not set out the list here but I consider that the Delta arrangements were not within any of the sub-paragraphs of Reg 11(2) either.

Conclusion

157. I find that HMRC have proved that this hallmark also applied to the Delta arrangements. I go on to consider the last hallmark, although this is not really necessary in that HMRC only have to show that the arrangements fell within one hallmark.

DESCRIPTION 8: EMPLOYMENT INCOME PROVIDED THROUGH THIRD PARTIES

158. The last hallmark alleged by HMRC to apply was 'employment income provided through third parties'. Although I have already found that HMRC have proved that two other hallmarks applied, I consider this third one for the sake of completeness.

> **18. Description 8: Employment income provided through third parties**
>
> (1) Arrangements are prescribed if –
>
> (a) Conditions 1 and 2 are met and Condition 3 is not met; or
>
> (b) ……[not relied upon]

(2) Condition 1 is met if the arrangements involve at least one of the following –

(a) …[not relied on]

(b) any person taking a relevant step under s 554C or 554D; or

(c) ….[not relied on]

(3) Condition 2 is met if the main benefit, or one of the main benefits, of the arrangements is that an amount that would otherwise count as employment income under s 554Z2(1) is reduced or eliminated.

(4) Condition 3 is met if, by reason of at least one of sections 554E to 554X or regulations made under section 554Y, Chapter 2 of Part 7A does not apply.

Condition 1

159. Section 554C ITEPA provided:

554C Relevant steps: payment of sum, transfer of asset etc

(1) A person ('P') takes a step within this section if P -

(a) pays a sum of money to a relevant person,

….

(2) In subsection (1) 'relevant person'–

(a) means A or a person chosen by A or within a class of person chosen by A, and

(b) includes, if P is taking a step on A's behalf of otherwise at A's direction or request, any other person.

(3) In subsection (2) references to A include reference to any person linked with A.

'A' is defined in s 554A as a person who is a current, former or prospective employee of another person (B).

HMRC consider that this condition is fulfilled because the scheme users paid the sum specified to their employee directors under the tripartite deed. I agree.

Condition 2

160. Condition 2 was met if:

…. the main benefit, or one of the main benefits, of the arrangements is that an amount that would otherwise count as employment income under s 554Z2(1) is reduced or eliminated.

161. S554Z2(1) is the charging provision for Part 7A of ITEPA. Where there is a 'relevant step', the value of the 'relevant step' counts as employment income. HMRC's case was that the arrangement was intended to avoid a charge under this provision because loans from a trustee of an EBT would have been a relevant step but the intention was that that charge would be avoided by having the loan from the employer (under the tripartite deed) instead. I agree.

Condition 3

162. Condition 3 is met if, by reason of at least one of sections 554E to 554X or regulations made under section 554Y, Chapter 2 of Part 7A does not apply. These sections set out exclusions.

163. The sections are extremely long and I do not increase the length of this decision by setting them out. HMRC's view was that none of them applied and I agree. Certainly the respondent did not suggest that any of these exceptions applied.

164. It follows that I find that HMRC have proved that this Hallmark applied. As I said at above, I have found that that the Delta arrangements were notifiable arrangements within s 306(1). That does not conclude the application in HMRC's favour. HMRC must show that the respondent was a promoter.

WAS THE RESPONDENT A PROMOTER?

Can I allow HMRC's application if I do not find the respondent was a promoter?

165. I can only make an order under s 314A if satisfied that the conditions of s 306 are fulfilled (s 314A(3)) *and* then only if HMRC's application did specify both 'the arrangements' and 'the promoter' (s 31A(2)). So it seems to me that it is implicit in s 314A(2) that I must be satisfied that the respondent was actually was a promoter, else the requirements of that sub-section would not have been fulfilled as HMRC's application would not have specified 'the promoter'.

166. I agree with Judge Poole in *Curzon Capital Ltd* [2019] UKFTT 63 at [75-77] on this, and with the view I expressed in *Hyrax*. It seems to me that the reason for this is that it is only a true promoter who will have the interest in litigating over whether or not the scheme is notifiable: to ensure that the application is thoroughly aired, therefore, it is important notice of the application, and the right to object to it, is given to an actual promoter of the scheme.

167. I therefore go on to consider whether EDF was a promoter of the Delta arrangements.

The legislation

> **S 307 Meaning of 'promoter'**
>
> (1) For the purposes of this Part a person is a promoter -
>
> (a) in relation to a notifiable proposal, if, in the course of a relevant business, the person ('P') –
>
> > (i) is to any extent responsible for the design of the proposed arrangements,
> >
> > (ii) makes a firm approach to another person ('C') in relation to the notifiable proposal with a view to P making the notifiable proposal available for implementation by C or any other person, or
> >
> > (iii) makes the notifiable proposal available for implementation by other persons,
>
> and
>
> (b) in relation to notifiable arrangements, if he is by virtue of paragraph (a) (ii) or (iii) a promoter, in relation to a notifiable proposal which is implemented by those arrangements or if, in the course of a relevant business, he is to any extent responsible for –
>
> > (i) the design of the arrangements, or
> >
> > (ii) the organisation or management of the arrangements.

168. So s 307(1)(a) contained the definition of 'promoter' in relation to notifiable *proposals* and s 307(1)(b) contained the definition of 'promoter' in relation to notifiable *arrangements*. HMRC therefore relied on s 307(1)(b) as it was their case that there were notifiable *arrangements* rather than just notifiable proposals and I have found that the Delta arrangements were notifiable. Nevertheless, the definition in s 307(1)(a) was relevant as s 307(1)(b) referred

back to it. In summary, a person was a promoter in relation to notifiable arrangements if (in any case) in the course of a relevant business:

(1) He was a promoter under 307(1)(a)(ii) or (iii) in relation to a proposal which was implemented by the arrangements, or

(2) He was to any extent responsible for the design of the arrangements, or

(3) He was to any extent responsible for the organisation and management of the arrangements.

The rest of S 307 went on to define the terms used in s 307(1).

Acting in course of relevant business?

169. To be a promoter, EDF had to be acting in the course of a relevant business and that was defined in s 307(2) as:

> (2) In this section, 'relevant business' means any trade, profession or business which –
>
> (a) involves the provision to other persons of services relating to taxation, or
>
> (b) …..[not relevant]

170. This condition is clearly met by EDF. EDF held themselves out as conducting a business which involved the provision to other persons of services relating to taxation. This was quite clear from the engagement letter which said at the start that EDF was asked by the client to assist it in relation to its taxation affairs. It was quite clear from the later letters in which a significant proportion of the letters was advice on tax.

Alternative 1: Promoter of notifiable proposal implemented by arrangements

171. HMRC's case was that s 307(1)(a)(ii) and (iii) applied. But to succeed, they would only need to prove either:

(1) (ii) EDF made a firm approach to another person (defined as 'C') in relation to the notifiable proposal (being the Delta arrangements) with a view to someone else making the notifiable proposal available for implementation by C or any other person, or

(2) (iii) EDF made the notifiable proposal (Delta) available for implementation by other persons.

172. S 307(1)(a)(iii) appeared clearly to apply. The scheme users were clients of EDF; EDF made the scheme available by sending to them the letters and requisite deeds and other documents for execution or signature. EDF enabled its clients to implement the Delta arrangements. EDF was clearly a promoter of the Delta arrangements.

173. In these circumstances, I do not need to consider whether EDF was a promoter under any other sub-section but will do so for the sake of completeness.

174. S 307(1)(a)(ii) is not so obviously applicable; I consider that EDF did make a firm approach to the scheme users ('C') for the reasons given in the last but one paragraph above; in particular the engagement letter was a firm approach. However, I do not think it was a firm approach with a view to <u>someone else</u> making the notifiable proposal available for implementation. On the contrary, it was EDF itself which made the notifiable proposal available for implementation. It seems to me that (ii) and (iii) are largely, if not entirely, mutually exclusive.

Alternative 2: to some extent responsible for design of arrangements?

175. I find EDF was a promoter under s 307(1)(b)(i) because, by their own admission, they were to some extent responsible for the design of the arrangements: their letters state that they are giving the advice and in the solution letter, they state that they had devised the solution in partnership with leading counsel. Even without that statement, it seems more likely than not that EDF were largely responsible for the design of the arrangements which they were promoting. Not only did they write all the letters and provide all the material for execution, they were paid an extremely large fee.

Alternative 3: to some extent responsible for the organisation or management of the arrangements?

176. I find EDF was a promoter under s 307(1)(b)(ii) because it is clear that they were to some extent responsible for the organisation of the arrangements in that they were in control of the process of when the letters were issued which triggered the clients' execution of the relevant deeds. It is also a reasonable inference that they were in contact with IFM and obtained that company's execution of the sub-fund deed, which was a part of the Delta arrangements. In fact, it seems a reasonable inference from the evidence that EDF was entirely responsible for the organisation of the Delta arrangements. In particular, they wrote the letters, provided all the draft documents and were paid an extremely large fee.

Conclusion

177. On three separate grounds, I have found that EDF was a promoter of the Delta arrangements.

OVERALL CONCLUSION

178. I have also found that HMRC's application under s 314A for an order that the Delta arrangements are notifiable correctly specified the arrangements in respect of the which the order was sought and, as I have found EDF was a promoter, I find the application also correctly specified the promoter.

179. I note that the legislation provides at s 314A that the Tribunal 'may' make the order HMRC seeks if satisfied that s 306(1)(a)-(c) applies to the relevant arrangements. I have been so satisfied for the reasons given above. I was not addressed on how I should exercise my discretion if I was so satisfied; HMRC assumed that if I was so satisfied, I would make the order.

180. I agree with the comments of Judge Poole in *Curzon Capital Ltd* at [45] and my view expressed in *Hyrax*: while the word 'may' gives the Tribunal discretion, it is clearly the intention of Parliament that where the necessary prerequisites to the making of an order are proved, the Tribunal should exercise its discretion to make the order unless there is a compelling reason not to. I am aware of no such reason, compelling or otherwise, in this case. On the contrary, as the Delta arrangements were notifiable, I consider it right to exercise my discretion in favour of making the order sought, so that all the consequences intended by Parliament (such as the making of APNs) can follow.

181. The application is therefore allowed.

DOUBT AS TO NOTIFIABILITY

182. In view of my conclusion above, there is no need to consider HMRC's alternative application under s 306(1). Nevertheless, I do so for the sake of completeness.

The legislation

183. The application was made under S 306(1) which provided:

(3) On an application the tribunal may make the order only if satisfied that HMRC –

(a) have taken all reasonable steps to establish whether the proposal or arrangements are notifiable, and

(b) have reasonable grounds for suspecting that the proposal or arrangements may be notifiable.

(4) Reasonable steps under subsection (3)(a) may (but need not) include taking action under s 313A or 313B.

(5) Grounds for suspicion under section 3(b) may include –

(a) the fact that the relevant arrangements fall within a description prescribed under s 306(1)(a);

(b) an attempt by the promoter to avoid or delay providing information or documents about the proposal or arrangements under or by virtue of section 313A or 313B;

(c) the promoter's failure to comply with a requirement under or by virtue of section 313A or 313B in relation to another proposal or other arrangements.

…..

184. I have found that the arrangements were notifiable on the basis of the evidence adduced by HMRC; it follows that I found that HMRC had, on the basis of the same evidence, reasonable grounds for suspecting that the arrangements may be notifiable.

185. I note that a partial definition of 'grounds of suspicion' is given in s 306A:

(5) Grounds for suspicion under section 3(b) may include –

(a) the fact that the relevant arrangements fall within a description prescribed under s 306(1)(a);

(b) an attempt by the promoter to avoid or delay providing information or documents about the proposal or arrangements under or by virtue of section 313A or 313B;

(c) the promoter's failure to comply with a requirement under or by virtue of section 313A or 313B in relation to another proposal or other arrangements.

186. HMRC clearly had grounds of suspicion under s 306(5)(a).

187. I would have made the order sought under s 306A in respect of EDF had I not made the order sought under s 314A in respect of EDF.

NO RIGHT TO APPLY FOR PERMISSION TO APPEAL

188. By virtue of art 3(a)(i) of the Appeals (Excluded Decisions) Order SI 2009/275 any decision of this tribunal about the applicability of ss 306A and 314A is an excluded decision for the purposes of s 11(1) of the Tribunals, Courts and Enforcement Act 2007 and there is accordingly no right of appeal against this decision.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 20 SEPTEMBER 2019