Neutral Citation: [2023] UKFTT 385 (TC)

Case Number: TC08799

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Location Edinburgh

Appeal reference: TC/2022/02199

*Information Notice – Schedule 16 Finance (No 2) Act 2017 – whether suspicion of possible Enabler Penalty in relation to remuneration trusts using fiduciary receipt arrangements – whether information reasonably required for purpose of checking – yes – whether abuse of process in relation to other proceedings – no – whether self-incrimination privilege in terms of Article 6 breached – no – appeal dismissed*

**Heard on:** 20 and 21 December 2022
**Judgment date:** 19 April 2023

**Before**

**TRIBUNAL JUDGE ANNE SCOTT**

**Between**

**ASSET HOUSE PICCADILLY LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Rory Mullan, KC, instructed by Griffin Law

For the Respondents: Philip Simpson, KC, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

**INTRODUCTION**

1. The appellant appeals against a Notice to provide information ("the Notice") dated 15 July 2021, issued by HMRC, pursuant to powers conferred by paragraph 40 Schedule 16 Finance (No 2) Act 2017 and Schedule 36 Finance Act 2008 ("Schedule 36").

2. The background to the appeal is that HMRC suspect that the appellant was an "enabler" of certain abusive tax arrangements and therefore the appellant may be liable to a penalty under Schedule 16 Finance (No. 2) Act 2017 ("Schedule 16") which is entitled "Penalties for Enablers of Defeated Tax Avoidance".

3. The arrangements in question were described by HMRC as being remuneration trusts using fiduciary receipt arrangements.

### The hearing

4. I had a Hearing Bundle extending to 396 pages together with an Authorities Bundle extending to 1,265 pages. I had Skeleton Arguments for both parties. I heard evidence from HMRC Officer Teresa McCormack.

### Preliminary Issues

5. At the outset it was confirmed that the evidence of Ms Matthews, a director of the appellant, was not relied upon. Mr Simpson, KC moved that her witness statement and exhibits should not be admitted and that motion was not opposed at that juncture. On the second day of the hearing, Mr Mullan, KC argued that I should look at her witness statement and exhibits, on the basis that although she had not given evidence the appropriate weight should be given to them. Mr Simpson conceded that since they were in the Bundle it was not incompetent for the Tribunal to look at them but he opposed the motion.

6. I had regard to Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules"). The rationale for looking at them was to consider the appellant's view of the tax arrangements. In his Skeleton Argument Mr Mullan referenced one of the exhibits and an argument advanced by Ms Matthews and described by her as being of "greater importance" than her first argument. It was the appellant's informed choice not to call Ms Matthews and, that being the case, I decided that they should not be admitted in evidence as that would be introducing them by the back door without the possibility of cross-examination.

7. As far as HMRC are concerned, they now accept that the Notice was neither given nor approved by an Authorised Officer so the Notice could not have imposed an obligation to produce information or documentation originating more than six years previously. In the event that the Notice was approved in whole or in part, the appellant wished an express qualification to that effect to be inserted into the Notice. HMRC did not argue that point.

### Grounds of Appeal

8. On 28 November 2022, Mr Mullan had lodged with the Tribunal an application to amend the Grounds of Appeal. That was not opposed by Mr Simpson.

9. At the outset of this hearing, it was confirmed that the appellant was no longer insisting on previously stated Grounds of Appeal covering data protection or power and possession.

10. The Grounds of Appeal before the Tribunal were therefore:-

(1) The description of the activities ascribed to the appellant is incorrect and the appellant is not an intermediary and has neither enabled nor promoted arrangements. Specifically it has not designed, managed or marketed the arrangements and was not an enabling participant in the arrangements or a financial enabler in relation to the arrangements. Therefore the information sought is neither relevant nor applicable and therefore not reasonably required.

(2) The Notice cannot be used to obtain information of relevance to related ongoing proceedings; effectively an argument based on abuse of process.

(3) The Notice is contrary to Article 6 of the European Convention on Human Rights ("ECHR") as it infringes the appellant's right against self-incrimination.

**The Law**

11. The parties are agreed that the modifications of Schedule 36 Finance Act 2008 specified by Schedule 16 means that paragraph 1 Schedule 36 Finance Act 2008 applies as follows:-

> (1) An officer of Revenue and Customs may by notice in writing require a person ("the relevant person") –
>
> (a) To provide information, or
>
> (b) To produce a document.
>
> if the information or document is reasonably required by the officer for the purpose of checking the relevant person's position as regards liability for a penalty under paragraph 1 of Schedule 16 Finance Act (No 2) 2017 in relation to particular tax arrangements or ascertaining the identity of any other person who has or may have enabled those arrangements.
>
> …"

12. The full text, insofar as relevant, of the provisions of Schedule 16 is set out in Appendix 1.

13. In summary, where a person has entered into abusive tax arrangements and incurs a defeat in respect of the arrangements, the penalty is payable by each person who enabled the arrangements. Arrangements are "tax arrangements" if, having regard to all of the circumstances, it will be reasonable to conclude that the obtaining of a tax advantage was the main, or one of the main purposes, of the arrangements. One of the mandatory considerations must be whether the arrangements involve one or more contrived or abnormal steps. The arrangements would be likely to be abusive if they result in an amount of income or deductions that is significantly different to the amount that would be expected for economic purposes. An enabler would include those who design, manage or market the arrangements, or are an enabling participant or a financial enabler.

**The Information Notice**

14. Officer McCormack stated in the Notice that:-

> "I suspect you may have enabled the tax arrangements shown in the enclosed schedule. Those tax arrangements were used by the persons ('users') named on the enclosed schedule.
>
> I also suspect you may have information about the identity of one or more other persons who have, or who may have, enabled those arrangements.

> I'm checking whether you may be liable to pay penalties for enabling those arrangements. We call this type of penalty an 'enabler penalty'. I am also checking if you have information about the identity of one or more other persons who have, or who may have, enabled those arrangements."

She said that she was issuing the Notice because she believed that the information and documents for which she was asking were reasonably required for her check.

15. Attached to the Notice was a Schedule, the full text of which I annex at Appendix 2.

16. In summary, Part A stated that HMRC required the documents and information "about the enabling you carried out for each person" relating to "Remuneration trusts using fiduciary receipt arrangements…(arrangements)". Under a heading "Please send us the following information" there were 35 questions and five requests for details of payments and communications. Under a heading for documentation, there were nine requests for copies of various documents.

17. The Officer confirmed that she had drafted the questions but that the Notice itself and the headings for Parts A and B were HMRC templates.

18. Part B of the Schedule asked for "The name and address for every other person who has, or may have, enabled the arrangements" for the named users. The named users of the arrangements were Pullman Consulting Limited ("Pullman"), Hurstwood Projects Limited ("Hurstwood") and Management and Healthcare Solutions Limited ("MAHCS").

19. On 10 August 2021, the appellant appealed the Notice. However, as Mr Simpson points out, there are no specific objections to any of the individual points of information or descriptions of documents sought by the Notice. Further, in neither the letter of objection dated 10 August 2021 nor the appellant's application for review dated 1 November 2021 was any specific request challenged.

**The Documentation**

20. Believed to be common to all three of the named users is the fact that Baxendale Walker, LLP had established a Trust, WUT No. 1 Remuneration Trust dated 21 February 2011 ("the Trust"). The parties were WUT No. 1 Ltd, a Scottish company which was the Founder, and Bay Trust International Limited ("Bay"), a Belize company, who were the Original Trustees. On 21 June 2012, the terms of the Trust were replaced by a Deed of Amendment.

21. As I narrate below, the appellant invoiced the Trust at its own address in Edinburgh.

*Pullman*

22. On 13 June 2019, an Information Notice in terms of Schedule 36 had been issued requiring a response by 19 August 2018.

23. On 22 July 2019, Pullman wrote to Griffin Trustees Limited ("Griffin") requesting some of the information sought by HMRC.

24. On 13 September 2019, Pullman's accountants wrote to HMRC replying to a letter, that I have not seen, enclosing some information.

25. On the same day Pullman wrote to Griffin asking for information about the "irrevocable contributions" made to the Trust.

26. Apart from the Deed for the Trust, HMRC has, at some stage been provided with:-

(a) Deed of Amendment dated 21 June 2012, whereby "Protectors" based in Scotland contracted with Bay to supplement and amend the Trust.

(b) A signed engagement letter with the appellant dated 10 January 2018, stating that:-

(i) They would only keep records for seven years and would work with Pullman in connection with its "asset protection".

(ii) The appellant would discuss with Pullman and any "third party specialists" to whom they referred Pullman, "the implications of any proposed transactions that are designed to protect your assets against creditor risk" and liaise with Pullman and those third parties in regard to implementation of any "recommended solutions".

(iii) The letter was described as being for "Business & Management Consultancy".

(c) The Deed of Adherence dated 5 February 2018 was between the Trust, Pullman and Bay. The Trust's address is the appellant's office in Edinburgh. The Protectors are described as CZB Ltd. They have the same address as Bay.

(d) A copy of a Resolution of the sole director of Pullman, Darren Goddard, dated 5 April 2018, to the effect that Pullman would adhere, and make contributions, to what was described as the Scheme but was the Trust. It provided that the "periodic contributions" would depend on "commercial cashflow" circumstances and would "reflect part of the economic cost to the company of earning its profits…". It then recorded that £20,000 would be paid for the Accounting Period Ending ("APE") 30 April 2018 which would be the first of such contributions.

(e) The Fiduciary Receipts Agreement ("FRA") dated 5 April 2018 between Darren Goddard ("the Obligated") and DJGTD Ltd ("the Principal") whereby the rights of the Principal (not defined) were assigned to the Obligated as Fiduciary for the Principal. Attached to that were Schedules of "Fiduciary Receipts" specifying:

| | |
|---|---|
| 25/06/18 | £ 9,000 |
| 09/07/18 | £18,000 |
| 21/09/18 | £ 7,500 |
| 19/10/18 | £10,000 |
| 16/11/18 | £ 6,200 |
| 18/12/18 | £13,000 |
| 04/02/19 | £ 7,000 |

(f) A letter from Pullman dated 11 April 2018 from Pullman to Bay stating that:-

"We would like the Trustees to give consideration to transfer the trust assets, comprising the contribution to the Remuneration Trust of £18,000 on 11th April 2018, to be managed by the PMC [personal management company], DJGTD Ltd, upon commercial terms to be agreed for the purpose of general investment."

(g) A letter dated 9 July 2018, to Griffin as Trustees for the Trust at an address in the British Virgin Islands ("BVI") in exactly the same terms as the letter to Bay other than that the date of the letter and the date of transfer was given as 9 July 2018.

(h) Copy invoices from the appellant writing from its Pall Mall, London address to the Trust at the appellant's Edinburgh address and they include:-

(i) One stating that it was for work completed on a "Commercial Incentive Scheme arrangement" and it was dated 18 December 2018; it included "Minerva Fee". The contribution totalled £16,000 and the fee was £1,600 (ie 10%).

(ii) One stating that it was for work on the "Umbrella Remuneration Trust Arrangement" for Pullman and included the "Contribution to the Trust and Minerva Fee" of £11,000 and £1,100 respectively. It was dated 16 November 2018.

(iii) There are similar invoices for "Umbrella Trust Remuneration" and "Minerva Fee" dated 19 October, 21 September, 9 July 2018 and 25 June 2018 where the contributions are £16,000, £12,000, £20,000 and £10,000 respectively and the fees are at 10% again.

(i) There are ten receipted invoices from the appellant at Wilton Road, London, and all of them are for £240 (inclusive of VAT) but showing payment details for what is described as "Ongoing advice and services" or "Admin and support services". They are all marked as receipted on the day of invoice. There is no discernible pattern as one can see:-

| Date | Ongoing advice and services | Admin and support services |
|---|---|---|
| 01/05/18 | Ongoing advice and services | |
| 01/06/18 | Ongoing advice and services | |
| 02/07/18 | Ongoing advice and services | |
| 01/08/18 | Ongoing advice and services | |
| 03/09/18 | | Admin and support services |
| 01/10/18 | Ongoing advice and services | |
| 01/11/18 | | Admin and support services |
| 03/12/18 | | Admin and support services |
| 02/01/19 | | Admin and support services |
| 01/03/19 | | Admin and support services |

(j) The bank statements for the PMC, DJGTD, for the months of February, March and April 2018. There were no transactions before April 2018.

(k) The statements disclose payments from Pullman on 5 April, 13 April of £18,000 each and three payments on 30 April 2018 of £14,400, £13,500 and £12,600 respectively. The payments are then recorded as being paid out on those days to "Darren Goddard DJGTD LTD".

*MAHCS*

27. I have used the acronym MAHCS since that is what the appellant frequently used. As can be seen the correct name is not entirely clear.

28. On 11 June 2019, HMRC had issued an Information Notice in terms of Schedule 36 requiring a response by 19 August 2018. It was issued to "MAHCS (Management & Health Care Solutions) Ltd". The Schedule referred to the company as being "MAHCS (Management & Health Care Solutions) Ltd Projects Ltd"

29. On 21 November 2019, Management and Healthcare Solutions Ltd replied to HMRC complaining, in particular, that the Notice was a fishing exercise but enclosed some of the information that had been requested.

30. On the same day MAHCS wrote to Griffin seeking information for HMRC.

31. Apart from the Deed of Trust, at some stage, HMRC had been provided with the same Deed of Amendment dated 21 June 2012 as in Pullman and:-

(a) A signed engagement letter with the appellant dated 25 October 2017, in almost identical terms to that for Pullman.

(b) A copy of a Resolution of the sole director of MAHCS (described as "MAHCS (Management and Health Care Solutions) Ltd", and then "MAHCS Ltd"), Parveen Brown, dated 15 December 2017, to the effect that MAHCS would adhere to what was described as the Scheme but was the Trust. It provided that contributions would depend on "commercial cashflow" circumstances and would "reflect part of the economic cost to the company of earning its profits…". It then recorded that £20,000 would be paid for the APE 30 April 2018 which would be the first of such periodic contributions. The company was the PMC.

(c) The Deed of Adherence dated 19 December 2017 between the Trust, MAHCS Ltd and Bay. The Trust's address is the appellant's office in Edinburgh. The Protectors are described as CZB Ltd. They have the same address as Bay.

(d) The Fiduciary Services Agreement ("FSA") was dated 19 December 2017 between UTW Holdings Limited, a Belize registered company, described as the "Principal" (with the same address as Bay and CZB) and PTB Management Limited ("PTB") which was Parveen Brown's PMC. The PMC was given full power to deal with property and the right to charge fees for its services.

(e) The Fiduciary Receipts Agreement ("FRA") dated 17 December 2018 between Parveen Brown ("the Fiduciary Custodian") and PTB ("the Principal") whereby the rights of the Principal in the Trust were delivered to "the Fiduciary Custodian".

(f) There was one receipt from the appellant and that was from Pall Mall, London and for £240 per month and described as being for "ongoing advice and services". It was dated 29 December 2017.

(g) On 15 November 2020, Parveen Brown, writing as "Management and Healthcare Solutions Ltd", wrote to HMRC stating that a payment of £2,640 that had been queried had not been a contribution to the Trust but "relates entirely to general administration expenses for the trust".

(h) The bank statements for PTB for the month of January 2018 showed payments from MAHCS of £18,000 and £81,000 on 17 and 30 January 2018.

*Hurstwood*

32. At some stage, HMRC had been provided with:-

(a) A Fiduciary Receipts Agreement ("FRA") dated 10 April 2018 between Susan Cave, the Obligated, and SMJC Ltd, the Principal, which described the position as at 8 December 2017 whereby the rights of the Principal in the obligation were vested in Susan Cave as fiduciary for SMJC.

(b) The Schedule of Fiduciary receipts disclosed:-

| | |
|---|---|
| 15/05/18 | £ 9,000 |
| 15/06/18 | £10,800 |
| 17/07/18 | £16,000 |
| 12/10/18 | £8,500 |
| 16/11/18 | £ 7,200 |
| 07/12/18 | £10,000 |
| 15/01/19 | £ 8,000 |
| 08/02/19 | £5,400 |

(c) That was precisely matched by the Schedule of "Donations to Trust Transactions" for the period 1 April 2018 to 31 March 2019 which recorded eight payments totalling £79,200 described as "Gift to Trust" by SMJC Ltd. The source was described as "Spend Money". As can be seen, there were no payments in August and September 2018.

(d) Bank Statements for SMJC Ltd from 2 April 2018 to 31 March 2019 with the last transaction being on 15 March 2019.

(e) A Schedule of Legal and Professional Expenses in the period 1 April 2017 to 31 March 2018. That commenced with an "Establishment fee" of £5,000 plus VAT on 6 November 2017 followed by various fees and another Establishment fee (described as being at 2%) on 22 January 2018 and another on 19 March 2018. All of the fees were to the appellant except three fees (described as being at 10%) paid to the Trustees.

(f) Receipted invoices from the appellant's Pall Mall, London office addressed to the Trust at the appellant's Edinburgh office for "work completed on the Umbrella Trust Arrangement" but described as a "Contribution to the Trust of and Minerva fee". In each case the fee was 10% of the stated contribution starting at £10,000 on 15 May 2018. On 15 June 2018 it was £12,000, £17,000 on 17 July 2018, £12,000 on 12 October 2018 and £10,000 on 16 November 2018. On 7 December 2018, it was described as being a fee for a "Commercial Incentive Scheme arrangement" at £12,000 but fell to £9,000 on 15 January 2019 and £6,000 on 8 February 2019. All of the payments were described as being outside the scope of VAT.

(g) The appellant's invoices for £200 plus VAT for the months of April 2018 until March 2019. The invoices until August 2018 were described as being for "ongoing advice and services" but thereafter they were for "admin and support services".

**The correspondence**

33. On 1 December 2020, Officer Cormack issued an informal enquiry letter with a schedule of information and documents.

34. On 13 January 2021, the appellant wrote to HMRC explaining that, in their view, none of the five descriptions of enabler activities or actions applied to the appellant and pointing out that HMRC's "suspicions" were unfounded.

35. On 10 May 2021, the officer replied again requesting the information previously sought. That letter was misleading since it was capable of being interpreted as saying that HMRC suspected that Ms Matthews was an enabler.

36. On 2 July 2021, the appellant responded pointing out that Ms Matthews certainly was not an enabler and also stating that the information and documentation requested in the letter of 1 December 2020 was not "relevant, applicable, proportionate or reasonable".

37. On 15 July 2021, the Notice was issued.

38. On 10 August 2021, the appellant responded, again reiterating that it had not been an enabler and appealing the Notice. In particular it argued that:-

(a) The request for information about the identity of persons who have or may have enabled the arrangements and for documentation in that regard was in breach of the General Data Protection Regulations.

(b) The majority of the information and documentation would not have been retained due to the elapse of time and because they were not statutory records.

(c) The Notice specified no particular period to which it related and was therefore unduly onerous.

(d) The Notice was flawed and invalid.

39. On 4 October 2021, Officer Cormack issued a View of the Matter letter. That letter explained that:-

(a) The Finance Act 2021 now provided that a defeat of the relevant arrangements was not required before a formal notice for information could be issued.

(b) HMRC were in possession of "documents and information" relating to arrangements which were entered into on or after 16 November 2017 including invoices from the appellant to users for "ongoing advice and services". The officer therefore believed that the request for information and documents was reasonably required, in particular, to establish the appellant's role in respect of the arrangements.

(c) As far as Part B of the Schedule was concerned, HMRC were simply wanting names and addresses of every person to whom the appellant had made payments or had received payments from because HMRC required to ascertain the identity of any person who had, or may have, enabled arrangements.

(d) The officer did not accept the Grounds of Appeal.

40. On 1 November 2021, the appellant requested an independent review and on 17 December 2021, the Review Conclusion letter was issued.

**Discussion**

41. It is not disputed that the role of the Tribunal is not supervisory and that this is a full appellate hearing. In terms of paragraph 32 of Schedule 16 the Tribunal has power to confirm, vary or set aside the Notice or any requirement contained in the Notice.

42. It is also not in dispute that this is not a standard Information Notice and I accept the appellant's argument that Schedule 16 adopts the machinery of Schedule 36 but does it in a different context and for a different purpose.

43. Mr Simpson argued that paragraph 29(2) of Schedule 36 applies and that there is no appeal available in respect of anything that counts as "statutory records". I note that those have not been provided and some of the items listed in the Schedule fall into that category.

44. Mr Mullan argued that the production of statutory records was not appropriate in the context of the Notice since the appellant's tax position was not being checked. He gave as examples items 31, 32 and 47.

45. Mr Simpson relied on paragraphs 19 to 21 in *Couldwell Concrete Flooring Ltd v HMRC* [2015] UKFTT 136 ("Couldwell") which described such records as being both documents and information so it is not just a record of receipts and expenses but also the matters in respct of which those arise. I also agree with the findings of Judge Cannan and Mr Robertson at paragraphs 23 to 25 of *Couldwell* that:-

> "23. In our view paragraph 21(1)(a) requires a company to keep all records which are necessary to establish, without doubt, that a return is accurate. That will include all documents and information necessary to establish the sales, purchases, assets and liabilities of the company in the relevant accounting period and at the end of the accounting period. The requirement that the return must be correct and complete implies a requirement that the documents and information to be kept must evidence that the return is correct and complete.
>
> 24. What is needed may depend to some extent on the nature of the company's business…
>
> 25. In our view it is plainly necessary for any company seeking to prepare a correct and complete tax return to have records of sales, purchases, receipts, payments, trade debtors and other debtors.…..".

46. I observe that Part 9 of Schedule 16 does not specifically exclude paragraph 29(2) of Schedule 36. The only possible exclusion would be in terms of paragraph 41 of Schedule 16 but, firstly, I do think that the names and addresses of those making or receiving fees or commission etc would be part of the statutory records. I agree with Mr Simpson that items 31 and 32 are statutory records within the *Couldwell* description thereof.

47. Those records would be relevant in checking whether the appellant fell within the categories set out in paragraph 7 of Schedule 16.

48. Secondly, paragraph 41 is very limited in application since a provision in Schedule 36 can only be excluded if it can have "no application" for the purpose of (a) checking whether the appellant might be liable for a penalty or (b) ascertaining the identity of any other person who may have enabled the arrangements. That is a very narrow possibility and in my view does not apply here.

49. The Schedule is very wide ranging but, as Judge Popplewell stated at paragraph 32 in *Phillipou v HMRC* [2017] UKFTT 20 (TC), "Schedule 36 gives HMRC very wide powers…the concept of checking…includes carrying out an investigation or enquiry of any kind".

50. Mr Simpson accepted that HMRC bore the burden of proof, on the balance of probabilities, to provide evidence that it was objectively reasonable for Officer Cormack to have suspicions. For that proposition he relied on paragraph 57 of *Newton v HMRC* [2018] UKFTT 513(TC), with which I agree.

51. However, although I was not referred to it but it is cited in *Hackmey v HMRC I* [2022] UKFTT 160 (TC), I also agree with Judge Vos in *Hargreaves and Others v HMRC* [2021] UKFTT 0080 (TC) at paragraphs 52 to 65 from which I highlight the following quotations:-

(a) "… the Tribunal is to determine not just whether the officer's belief is reasonable but to take its own view as to whether the information is reasonably required for the purposes of checking the taxpayers tax position." [55]

(b) "In the case of a taxpayer notice, the Tribunal will only exercise its oversight if the taxpayer appeals … It follows from this that the Tribunal's role is not simply to review the officer's decision by determining whether their belief that the information is reasonably required is a reasonable one; instead it is to come to its own conclusion as to whether the information is, objectively, reasonably required. In doing so it follows in my view that the Tribunal must assess this based on the circumstances at the time of the hearing." [56]

(c) "In the case of a taxpayer notice, it must be right that, in the same way, HMRC initially has the burden of explaining they believe that the information is reasonably required and that, only then, does the taxpayer have the burden of proving that it is not." [64]

52. In his Skeleton Argument Mr Mullan redefined the first ground of appeal, stating that HMRC had not properly exercised their powers in regard to the Notice because they had failed to identify the component parts of the penalty. In particular the officer had not identified the arrangements and how they operated, why they were tax arrangements and why they were abusive.

53. Further they had not addressed the issue that "important aspects of the evidence they rely on pre-dates the introduction" of Schedule 16. For the latter proposition he relied on the fact that the Trust was dated 21 February 2011, the first payment from Hurstwood was made on 6 November 2017 and the engagement letter for MAHCS was dated 25 October 2017.

54. Both Mr Simpson and Mr Mullan had set out, in different ways, what they considered were the requirements for a valid notice. However, both were agreed that Officer Cormack must have had reason to suspect that the appellant might be liable to an enabler penalty because:

(a) one or more of the users had entered into particular tax arrangements that are "abusive" and

(b) that she reasonably required the information and documents for the purposes of checking whether there might be such a liability.

She must also reasonably require the information for the purpose of ascertaining the identity of anyone else who may have enabled the same tax arrangements. They both agreed that Schedule 16 only applies to arrangements that were entered into on or after 16 November 2017.

55. Lastly, in that context, both were agreed that the bar was low for whether the officer suspected that there might be a liability to a penalty but that the suspicion must be rational.

*Officer Cormack's evidence*

56. The starting point is Officer Cormack's evidence.

57. Mr Mullan argued, with some justification, that the officer's evidence was not convincing and, in some ways, it was not. However, she explained that, as it was new legislation, like others she had learnt as she went along.

58. Her witness statement was adopted and she expanded on her understanding of the documentation.

59. She explained that HMRC enquiry officers had referred cases to the Enablers Operations Team within which she had worked since September 2020. The enquiry teams had identified taxpayers, such as the appellant, from "users" who had declared contributions to what she called "the arrangement" on their corporation tax returns.

60. In the case of the appellant she had checked the information held in HMRC's systems which she did not exhibit to her witness statement. She was adamant that the enquiry teams had not passed information to her with the referral.

61. Both counsel and I had difficulty in ascertaining what information the Officer had seen and when, and it is for that reason that I have deliberately stated, in respect of each user, that "at some stage" HMRC had received the documentation to which she and I both refer. She stated that the information had come in as part of an ongoing process and could best be described as coming in in "dribs and drabs".

62. I simply cannot find as fact what HMRC knew and when; it was simply at some stage.

63. She could not remember any detail and could only say that she would have looked at everything that had come in and, at that stage, reviewed its relevance, or not.

64. She said that she had ascertained that the enquiry teams had asked both MAHCS and Pullman to identify the name of the company which had introduced them to the concept of the Trust arrangements and both had answered that it was the appellant. On that basis, and because there were management charges and fee invoices, that had made her suspect that the appellant had enabled the arrangements by both marketing and managing the arrangements.

65. She was aware that there could be no penalty in respect of any arrangements which had been entered into prior to 16 November 2017 because that was the date of implementation of the Enablers Legislation in Schedule 16. She had formed the view that the Deed of Adherence would have been the date on which the taxpayer in question entered the tax arrangements.

66. No such Deed has been produced for Hurstwood but the Deeds of Adherence for Pullman and MAHCS post-dated that.

67. She was taken to the Schedule of Legal and Professional Fees for Hurstwood (see paragraph 32(e)) and asked whether she had considered whether the establishment fee of £5,000 plus VAT paid to the appellant on 6 November 2017 might have been Hurstwood entering into arrangements.

68. She said that she was sure that she would have considered that possibility but she did not have a Deed of Adherence so she had thought that it was not. That was one of the reasons that she wanted the Notice in order to find out what had happened and when. She said that she had never received anything in relation to the Deed of Adherence.

69. There is no evidence that she asked for a copy of it and it is not referred to in the Notice.

70. When asked if signing an engagement letter could be viewed as being introduced to the arrangements her clear evidence was that her understanding was that a user was introduced to the arrangements only when they had joined, ie when they signed the Deed of Adherence.

71. She did not know whether she had had sight of the engagement letter for MAHCS dated 25 October 2017 before issuing the Notice but said that she did not consider that that had been MAHCS entering into arrangements. It was her view that the letter could have covered a very wide range of issues and she had seen that there were invoices for ongoing advice.

72. I accept that Officer Cormack did know the significance of the dates in the documentation and that she did give that consideration.

73. She said that although she did not have a checklist she "would have had a list" for each user in respect of what she had received and what she needed.

74. One problem was her use of the word "user" which she had deployed in different contexts. An example is that she said at paragraph 32 in her witness statement that the FRA "establishes a fiduciary arrangement between User and PMC". If one looks at the FRA for Hurstwood it is between Susan Cave and SMJC Ltd. Further exploration of that with her exposed her thinking that she conflated the user, Hurstwood, with the PMC, SMJC Ltd, and Susan Cave because she was a director of each and therefore, in my words, the controlling mind.

75. In a similar vein, in her witness statement she also states that the FSA "establishes a fiduciary arrangement between **users** Personal Management Company (PMC) and a third party". Of course it is the director's PMC and not the user's PMC.

76. There is similar confusion with bank statements in that, in her witness statement and in oral evidence, she described transfers into the PMC's accounts and transfers out to the "Users accounts". In the case of Pullman (see paragraph 26(k) above) it can be seen that although Pullman paid monies into the account what was paid out went either to another bank account for the PMC (since it is named) or to the Director. The same can be seen with Hurstwood.

77. She argued that the user claimed a corporation tax deduction in its accounts and, contrary to the Resolutions, payments never went to the Trust but simply passed through the PMC's bank account and were paid out tax-free to the director in question. The director held the money as a "fiduciary receipt". She believed that effectively the company in question (user) entered into the documentation establishing the arrangements in order to pay money to its director.

78. Her view was that the arrangements were contrived because the money appeared to go around in a circle achieving a deduction in the company and if the arrangements were contrived then they would be abusive.

79. She was clear that she suspected that the appellant was an enabler because they had introduced at least Pullman and MAHCS to the Trust. No information had been provided by the appellant so the Notice was both necessary and reasonable.

80. She had drafted the 49 items in the Schedule "with advice from the team".

81. I take the view that the test is that, objectively viewed, Officer Cormack should have had a genuine suspicion that the appellant would, or might, be liable to an enabler penalty if the arrangements suffered defeat. That suspicion must be on the basis that the arrangements in

question are reasonably considered to be abusive and that the arrangements do not fall outside Schedule 16 because of the commencement provisions.

82. Furthermore, Officer Cormack must have reasonably required the information and documents for the purpose of checking whether the appellant might have been liable to a penalty and to ascertain the identity of other enablers of the same arrangement.

83. Paragraph 40(3) of Schedule 16 makes it clear that "particular tax arrangements" must be identified. However, as can be seen from paragraph 56 of Schedule 16, "arrangements" is very widely defined being any agreement, understanding, scheme, transaction or series of transactions.

84. Officer Cormack's thinking could be described as lacking in precision but that does not mean that, objectively, she could not have identified the tax arrangements or had reason to suspect that those arrangements might be defeated, thereby exposing the appellant to possible liability for a penalty.

85. Mr Mullan argues that the officer had not identified what she considered the arrangements to be, when they commenced or how they operated and that that was a problem. I disagree.

86. I agree with Judge Mosedale in *Spring Capital Limited v HMRC* [2016] UKFTT 246 (TC) at paragraph 53 where she states that "the question asked by the legislation is whether [the officer] … 'has reason to suspect [tax]…may not have been assessed'. It did not ask if a particular officer actually suspected …".

87. In that context, whilst, I do accept Mr Mullan's argument that Officer Cormack may not have fully understood the detail of the meaning of "abusive tax arrangements" in the context of the GAAR I do not accept that that means that "her suspicion that the Appellant is liable to a penalty cannot have been reasonably formed". All that is required is that she had reason to suspect and the evidence on that was clear. She did.

88. Mr Simpson relied on Mrs Justice Simler in *Kotton v FTT and Others* [2019] EWHC 1327 (Admin) ("Kotton") where she said:-

> "60. Secondly, the question for the HMRC officer (and therefore the FTT judge) is an expressly limited one: the officer must be satisfied that the information or documents to be sought by a third party notice are 'reasonably required' for the purpose of 'checking' the tax position of the taxpayer. It is not for the officer to investigate the merits of the underlying tax investigation, or whether the investigation is itself reasonably required or justified as a precondition for the giving of a notice. That is unsurprising given that the scheme is directed at an early investigatory stage and in any investigation some lines of enquiry may prove more fruitful than others but nevertheless may need to be pursued. As the Court of Appeal observed in Derrin Brothers,
>
> > "68. … It is inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory stage it will be difficult, if not impossible, for HMRC to be definitive as to the precise way in which particular documents will establish tax liability. It is also clear that in many cases disclosure of HMRC's emerging analysis and strategy and of sources of information to the taxpayer or those associated with the taxpayer may endanger the investigation by forewarning them."

Thus, provided there is a genuine and legitimate investigation or enquiry of any kind into the tax position of a taxpayer that is neither irrational nor in bad faith, that is sufficient. The challenge is not to the lawfulness of the investigation, but is limited to the rationality of the conclusion that the information/documents are reasonably required for checking the taxpayer's tax.

> 61. Nor is it necessary (as Mr Simpson submits) as a precondition for giving a third party notice to show that a positive liability to tax will arise or that; liability will arise in a particular way. A valid investigation may result in no tax charge at all."

89. I would add to that quotation:

> "62. … the FTT must be satisfied that in all the circumstances, the officer giving the notice is justified in concluding that the information or documents are reasonably required for checking the tax position of the taxpayer. Again, that does not require any examination of the nature and extent of the underlying tax investigation, but rather a focus on whether there is a rational connection between the information and documents sought and the underlying investigation." (emphasis added).

90. Of course the Notice is not concerned with checking the tax position but rather the potential penalty but the principle is the same.

91. Mr Mullan argued, correctly, that paragraph 59 of *Kotton* was relevant in that it is important to recognise the purpose of the statutory scheme (in that instance Schedule 36 Finance Act 2008). However, where I disagree with him is that he argues that the purpose in this instance is to punish tax enablers. That is the purpose of the penalty but it is not the purpose of powers in paragraph 40 which are for checking liability or potential liability.

92. He also argued that when the Notice was issued it was not at an early stage because the enquiry had already happened, there were a lot of other cases involving the Trust and so HMRC must have known a great deal more.

93. It is trite law that HMRC's institutional knowledge cannot be attributed to an individual officer. Officer Cormack was credible and readily, and repeatedly, stated what she did not know.

94. In this case, in fact, I find that Officer Cormack did have reason to suspect, but she did not know, that there were tax arrangements which she believed were likely to be abusive because they appeared to her to be contrived. The fact that the monies received by the director in each case were to held as "fiduciary receipts" was capable of being interpreted as a means of avoiding the provisions on disguised remuneration or avoiding loans to participators provisions.

95. Suspicion covers a range from, at one end of the spectrum, a near certainty to, at the other end, a number of nebulous doubts.

96. She did not know the detail because the information held by her could at best be described as "patchy". However, the information that she did have was based on opaque documentation and convoluted movements of money. I accept that she did not know what the Deeds of Adherence actually meant but I understand why she had formed the possibly erroneous view that that meant "signing up" to the arrangements.

97. She did consider the possibility that the engagement letter for MAHCS and the payment from Hurstwood, which antedated the commencement date for Schedule 16, might have been arrangements but she simply did not know what those encompassed. The purpose of a notice

in terms of Schedule 16 is to check the position. If those were arrangements, and it is within the bounds of possibilities that they were, then there would be no penalty and thus no liability for the appellant. It would be relevant to find out more about both the payment and the engagement letter.

98. An example, pointed out by Mr Simpson in relation to the convoluted movements of money, was that the two payments in January 2018 by MAHCS were made before the FRA. Before the FRA was signed any payment should have been made direct to UTW. It appears that these were not. The movement of monies therefore did not implement the provisions in the documentation and bypassed the prescribed route.

99. As far as opaque documentation is concerned it is difficult to see how, what the engagement letters described as, "protecting assets" could be aligned with making the contributions that the various Resolutions described as both periodic and fitting with their economic costs.

100. The inconsistent description of services the appellant was providing in exchange for the invoices for £240 could reasonably give rise to concern as to what the actual services involved. In the case of MAHCS (see paragraph 30(g)) the payment of "general administration expenses" is unexplained and, in the context of a denial that it is a contribution to the Trust, raises questions as to the nature of the payment.

101. Officer Cormack had evidence that it appeared that the companies were obtaining tax deductions for contributions paid but the monies paid appeared to end up with the controlling mind of the companies or their PMCs with no tax paid by the recipients.

102. I accept that Officer Cormack believed that, at a minimum, in the case of Pullman, the appellant having invoiced the Trust at its own office for work for Pullman (see paragraph 25(h) above) and similarly for Hurstwood (see paragraph 31(f) above), the appellant either managed or marketed the arrangements in terms of paragraphs 9 and 10 of Schedule 16. No explanation has been provided as to the relationship between the appellant and any of the users and, or as to what services were actually provided in respect of the invoiced fees. What she did not know was whether arrangements ante-dated 16 November 2017.

103. Another factor is the fairly obvious point that the proliferation of offshore vehicles operating from the same address might well raise suspicions in any HMRC officer.

104. In summary, objectively considered, there were a number of reasons why Officer Cormack would have had reason to suspect that:-

(a) There were tax arrangements in place where the gaining of a tax advantage was at least one of the main purposes.

(b) It seemed probable that those tax arrangements would be attacked by HMRC and they might be found to be abusive tax arrangements.

(c) It was possible that those arrangements might be defeated.

(d) In that event the appellant, which was known to have introduced at least two of the users to the arrangements, might be liable to an enabler penalty.

105. I therefore find that Officer Cormack rationally and reasonably embarked on a "genuine and legitimate investigation or enquiry". She acted in good faith.

***Abuse of process***

106. Whilst Mr Mullan accepted that there was no deliberate abuse of process, he argued that that was not the test. He relies on *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at page 536C ("Hunter") where Lord Diplock stated a court should entertain an abuse of process argument:-

> "… to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its rules of procedure, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

That is a high bar and I do not accept that it is met in this instance for the following reasons.

107. The appellant is a party to related proceedings (Ref: TC/2021/02692) involving an application by HMRC under section 314A and/or 306A Finance Act 2004. A central issue in those proceedings is whether the appellant is a "promoter" for the purposes of section 307 Finance Act 2004.

108. The Notice was issued on 15 July 2021 and the related proceedings were initiated by a Notice of Application by HMRC dated 22 July 2021.

109. Mr Mullan argues that there is a considerable overlap between the definition of "a person who enabled arrangements" in paragraph 7 of Schedule 16 and the definition of a promoter.

110. Insofar as relevant, section 307 Finance Act 2004 reads:-

> "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 irrelevant business, he is to any extent responsible for –
>
> (i) the design of the arrangements, or
>
> (ii) the organisation or management of the arrangements…".

111. Paragraph 7, Schedule 16 reads:-

> (1) "A person is a person who 'enabled' the arrangements mentioned in paragraph 1 if that person is –
>
> (a) a designer of the arrangements (see paragraph 8),

(b) a manager of the arrangements (see paragraph 9),

(c) a person who marketed the arrangements to T (see paragraph 10),

(d) an enabling participant in the arrangements (see paragraph 11), or

(e) a financial enabler in relation to the arrangements (see paragraph 12)."

112. As can be seen, Mr Mullan is correct in the sense that design and management appear in both provisions.

113. I have very little information about the other proceedings. However, Mr Simpson's argument, that the other proceedings involve a different timescale, as they relate to matters that ante-date 17 August 2017 when HMRC issued the notice under section 313C Finance Act 2004 which led to those proceedings, has not been challenged.

114. Further, HMRC are not arguing that any of the users of the arrangements to which a penalty might relate had participated in arrangements in respect of which the appellant may, or may not have been a promoter, involving payments by way of a loan as opposed to holding monies as "fiduciary receipts". The devil, as ever, is in the detail. They are different arrangements at different times.

115. The appellant argues that the information sought by the Notice is not only not reasonably required but the Notice is manifestly unfair to the appellant. That is because HMRC are exercising a unilateral power to demand information in circumstances where another appeal is still before the Tribunal and has not been determined. Mr Mullan argues that the proper course of action is for HMRC to either await the outcome of the proceedings in the other case, or to make an application for disclosure in the course of those proceedings.

116. I was not referred to the case in this context but I note that in *R(oao) Derrin Brothers Properties Ltd and Others* [2016] EWCA Civ 15, in relation to a third party Information Notice, the Chancellor of the High Court stated:-

> "77. The non-taxpayer entity itself is not required by the third party notice to do anything. Any documents and information relating to the non-taxpayer entity delivered to HMRC by the third party can be used only by HMRC for <u>its statutory purposes</u> (or, in the present case, the ATO pursuant to the DTC) in connection with the collection of tax properly due and management and enforcement functions. If the documents or information support the tax liability of the taxpayer, the entity cannot complain about the confidentiality of the documents and information. If the documents do not support the tax liability of the taxpayer, there is no reason to think that HMRC (or the ATO) would deploy any confidential information or documents in an improper way or for an improper purpose in excess of their powers.
>
> 78. The fact that the documents and information of, or relating to, the non-taxpayer entity may incidentally disclose an unsatisfied tax liability of some person, including the non-taxpayer entity, other than the taxpayer in relation to whose affairs the third party notice is served, is not a justifiable ground for complaint by the non-taxpayer entity. It is sufficient that the documentation and information specified in the third party notice are reasonably required for the investigation of the named taxpayer. It is the fulfilment of that condition which is monitored by the FTT."

117. I have underlined the words in the quotation because in this case the statutory purpose is limited to checking the appellant's potential liability for a penalty in terms of Schedule 16 and to identify enablers more generally.

118. I therefore take the view that the time and place to argue about abuse of process would be as and when and if HMRC attempt to utilise any documentation or information provided in response to the Notice.

119. In popular parlance, to argue abuse of process at this juncture is to put the cart before the horse. It is premature.

120. I do not accept that the issue of the Notice is an abuse of process.

***Article 6***

121. Mr Mullan is invoking Article 6 on the basis that the obligations imposed by the Notice infringe the appellant's privilege against self-incrimination ("the Privilege") thereby infringing the appellant's rights under Article 6.

122. The first, and most obvious, point is that insofar as the Notice relates to other parties there can be no self-incrimination.

123. I think that Mr Mullan goes too far in stating that the Notice has been issued "with a view to imposing a penalty upon persons including the Appellant". The Notice has been issued in order to check whether the appellant may be liable for a penalty and to ascertain the identity of any other person who has or may have enabled the arrangements in question. Of course the ultimate outcome may be the imposition of penalties but that is not the purpose of the Notice.

124. Another argument with which I had difficulty, was that the Privilege applies at the investigative stage and that it is no answer that the Privilege is engaged because of the unfairness of subsequent penalty proceedings. Even if that was the case, any information obtained by the Notice "cannot be utilised" in those proceedings and so therefore that information cannot be reasonably required.

125. This matter is at an investigative stage and there is no guarantee that the appellant will be issued with a penalty or that any challenge to the use of information obtained under the Notice would be successful.

126. It is not in doubt that, because of the existence of penalties for non-compliance with the Notice, there is the requisite element of compulsion which gives rise to concerns about self-incrimination.

127. Mr Mullan argued that *Gold Nuts Ltd and Others v HMRC* [2017] UKFTT 84 (TC) ("Gold Nuts") was wrongly decided and was not consistent with *Ibrahim v UK* [2017] ECHR 50541/08 ("Ibrahim") or *Volaw Trust and Corporate Services Ltd v Office of the Comptroller of Taxes* [2020] 1 All ER 941 ("Volaw").

128. I am afraid that I disagree. Mr Mullan quoted Lord Reed in *Volaw* where he stated:-

> "Article 6(1) of the ECHR provides, so far as material, that in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Under art 6(3)(c), everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing. The right not to incriminate oneself is treated by the European Court of Human Rights as implicit in the latter guarantee". (emphasis added")

129. In *Ibrahim* at paragraph 272 the Court stated:-

> "The Court therefore finds that it is inherent in the privilege against self-incrimination, the right to silence and the right to legal assistance that a person 'charged with a criminal

offence' for the purposes of Article 6 has the right to be notified of these rights." (emphasis added")

130. At paragraph 249, the Court had previously stated that:-

> "A 'criminal charge' exists from the moment that an individual has been officially notified by the competent authority of an allegation that he has committed a criminal offence or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him".

The Court went on to expand on that at paragraph 296 stating that that suspicion must have "crystallised". The only actions that have been taken by HMRC at this juncture are the issue of the Notice.

131. At paragraphs 76 *et seq* in *Kishore v HMRC* [2020] UKUTT 233 (TCC) the Upper Tribunal considered the question of when a person becomes subject to a criminal charge for the purposes of Article 6. That makes it clear that it is not engaged in the preliminary or investigative stages.

132. As I have pointed out, in this instance, Officer Cormack was clear that she did not know the detail as to what the appellant might have done or when. She was clear that she was simply collating information. The decision, if any, in relation to possible penalties would not be taken by her.

133. If Mr Mullan is correct in stating that because the Trust was dated long before 16 November 2017, the arrangements, if any, could not be subject to any penalty, then there never would be a "charge" or potential liability to a penalty.

134. It is not in dispute that in the context of Article 6 and the jurisprudence of the Court "criminal charge" has an autonomous meaning.

135. I have annexed at Appendix 3 the text of paragraphs 151 to 159 of Judge Redston's decision in *Gold Nuts* where she analysed some of the law on Article 6 and self-incrimination where information is obtained before there is a criminal charge and I adopt it.

136. At paragraphs 154 to 159 Judge Redston considered cases concerning the use of incriminating information compulsorily obtained before a person has been charged. In particular I agree with Judge Redston where, at paragraph 160, in relation to a situation where matters were at an investigative stage she said:-

> "160. …the position is clear: a person cannot refuse to answer questions on the basis that he might thereby incriminate himself. Article 6 is only engaged if there is a subsequent prosecution. The defendant can then challenge the use of any such information on the basis that it would be unfair to rely on it."

137. On that basis alone, I find that, as argued by Mr Simpson, the use of the Notice does not infringe the Privilege.

138. However, if I am wrong in that, I turn to the other arguments.

139. Mr Mullan suggested, and I disagree with him for the reasons given, that the Notice has been issued once HMRC's suspicions had crystallised so therefore it would be information sought after there was a criminal charge. Judge Redston went on to consider the jurisprudence in that regard and also some other issues arising from Article 6 and self-incrimination. Again I adopt her analysis and, in particular, her conclusion at paragraph 204 that there is not an

Article 6 right to refuse to respond to an Information Notice. If HMRC seek to rely on material derived from the Notice, then that can be challenged at an appropriate juncture

140. Mr Mullan argued that, based on paragraph 47 of *Volaw,* HMRC could not justify serving the Notice on the appellant as they should obtain information from the users as an alternative. I am not persuaded because they have already used Schedule 36 in respect of both Pullman and MAHCS, and probably also in relation to Hurstwood, and it is evident that there are huge gaps in the information. Further, as can be seen from the Schedule, much of the information sought would not be in the hands of the users.

141. As can be seen, Judge Redston referred to *Saunders v The United Kingdom* Case 43/1994/490/572 ("Saunders"). In relation to the request for documents, Mr Simpson relied on paragraph 69 of *Saunders* where the Court stated:-

> "As commonly understood in the legal systems of the contracting parties to the convention and elsewhere, it (the privilege) does not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant …".

142. Mr Mullan acknowledges that the documents listed at 41 to 49 exist independently of the will of the appellant but argues that simply acknowledging the existence of such documents would be self-incriminating.

143. Even if that were the case, there is the safeguard which lies in the right to challenge any penalty and the use of information underpinning such a penalty both within HMRC and at the Tribunal.

144. As Judge Redston pointed out at paragraphs 201 to 204 of *Gold Nuts,* (the text of which is also set out in Appendix 3) the Privy Council has made it clear that Article 6 rights are not themselves absolute because there is a "need for a fair balance between the general interest of the community and the personal rights of the individual".

145. Mr Simpson argued that the general interest of the community, or the public, is the prevention of tax avoidance by means of the use of abusive tax arrangements. Schedule 16 was enacted to implement that policy and is a proportionate measure.

146. Mr Mullan relied on paragraph 66 to 68 in *R (oao Unison) v Lord Chancellor* [2017] UKSC 51 ("Unison") for the proposition that the penalties for enablers of defeated tax avoidance legislation deliberately seeks to undermine the public interest. For that proposition, he relied on the Revenue Bar Association's Response dated 12 October 2016 to the consultation document on an enabler legislation. Whilst I accept that that was the view of a vested interest, nevertheless I do not have the consultation document and I do have the legislation. I am not aware of any challenge to the legislation.

147. He also argued that the public interest in the legislative code for penalties for enablers of defeated tax avoidance is far from clear and so it does not follow that because there is some public interest in discouraging tax avoidance, anything done in pursuit of that is in the public interest.

148. Obviously "anything done" is far too wide a concept and in any event that had not been argued by HMRC who simply rely on Schedule 16. At paragraphs 80 and 88 in *Unison,* Lord Reed made it clear that any legislation that restricts the right of access to the courts must be stated in clear terms (restricting the right of access is at the heart of Article 6). Further, viewed

objectively, any such restriction must be interpreted "as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provisions in question." Or put another way, "the degree of intrusion must not be greater than is justified by the objectives which the measure is intended to serve.".

149. The objective of the information powers in Schedule 16 is to gather such information as is necessary to check the position. That is what the Notice sets out to achieve.

150. The wording in Schedule 16 is clear in its terms. As can routinely be seen in the press, and in reports of tax cases, there is a considerable public interest in the principle of deterring those who avoid tax and those who assist them to do so.

151. In summary, I find that:-

(1) The present challenges under Article 6 have been brought at the stage of gathering information.

(2) Whilst there is compulsion in the form of a first penalty of £300 and thereafter daily default penalties of £60 per day, which may be increased to a maximum of £1,000 there are significant safeguards. The increase to a maximum of £1,000, which is rare, can only be achieved after notice of that possibility is given to the taxpayer and only by a decision of the Tribunal. Other safeguards include the opportunity to appeal against any penalty and to argue the existence of a reasonable excuse. This appeal is in itself an example of another safeguard.

(3) There is a clear public interest in deterring professional advisors from assisting taxpayers to participate in abusive tax arrangements.

(4) The use to which any material obtained in terms of the Notice may be put is limited to its statutory purpose and if a penalty is imposed, the appellant has the right to challenge the use of the material.

(5) Accordingly, I do not accept that Article 6 is engaged at this juncture.

**DECISION**

152. I find that the Notice is valid and the appeal is dismissed.

153. The Notice is amended to the effect that in the sentences under the heading "Part A…" reading "Please send us the following information" and "Please send us the documents" the words "insofar as originating in the six years prior to the issue of this Information Notice" are inserted at the end of those sentences.

154. This document contains full findings of fact and reasons for the decision. Paragraph 32(5) Schedule 36 Finance Act 2008 provides that the decision of the Tribunal regarding an appeal made by a taxpayer against a notice is final.`

**ANNE SCOTT**
**TRIBUNAL JUDGE**

**Release date: 19th APRIL 2023**

**Appendix 1**

**Schedule 16**

**Part 1 Liability to Penalty**

1. Paragraph 1 states:-

"(1) Where –

(a) A person ('T') has entered into abusive tax arrangements; and

(b) T incurs a defeat in respect of the arrangements,

A penalty is payable by each person who enabled the arrangements."

**Part 2 "Abusive" and "Tax Arrangements": Meaning**

2. Paragraph 3 states:-

(1) Arrangements are "tax arrangements" for the purposes of this Schedule if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes of the arrangements.

(2) Tax arrangements are "abusive" for the purposes of this Schedule if they are arrangements the entering into or carrying out of which cannot reasonably be regarded as a reasonable course of action in relation to the relevant tax provisions, having regard to all the circumstances.

(3) The circumstances to which regard must be had under sub-paragraph (2) include—

(a) whether the substantive results, or the intended substantive results, of the arrangements are consistent with any principles on which the relevant tax provisions are based (whether express or implied) and the policy objectives of those provisions,

(b) whether the means of achieving those results involves one or more contrived or abnormal steps, and

(c) whether the arrangements are intended to exploit any shortcomings in those provisions.

(4) Where the tax arrangements form part of any other arrangements regard must also be had to those other arrangements.

(5) Each of the following is an example of something which might indicate that tax arrangements are abusive—

(a) the arrangements result in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes;

(b) the arrangements result in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes;

(c) the arrangements result in a claim for the repayment of crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid;

but a result mentioned in paragraph (a), (b) or (c) is to be taken to be such an example only if it is reasonable to assume that such a result was not the anticipated result when the relevant tax provisions were enacted.

…

**Part 4 Persons who "enable" the Arrangements**

3. Paragraph 7 states:-

(1) A person is a person who "enabled" the arrangements mentioned in paragraph 1 if that person is –

(a) a designer of the arrangements (see paragraph 8),

(b) a manager of the arrangements (see paragraph 9),

(c) a person who marketed the arrangements to T (see paragraph 10),

(d) an enabling participant in the arrangements (see paragraph 11), or

(e) a financial enabler in relation to the arrangements (see paragraph 12),

(2) This paragraph is subject to paragraph 13 (excluded persons).

4. Paragraph 8 states:-

(1) For the purposes of paragraph 7 a person is a "designer" of the arrangements if that person was, in the course of a business carried on by that person, to any extent responsible for the design of –

(a) the arrangements, or

(b) a proposal which was implemented by the arrangements;

but this is subject to sub-paragraph (2).

(2) Where a person would (in the absence of this sub-paragraph) fall within sub-paragraph (1) because of having provided advice which was used in the design of the arrangements or of a proposal, that person does not because of that advice fall within that sub-paragraph unless –

(a) the advice is relevant advice, and

(b) the knowledge condition is met.

(3) Advice is "relevant advice" if –

(a) the advice or any part of it suggests arrangements or an alteration of proposed arrangements, and

(b) it is reasonable to assume that the suggestion was made with a view to arrangements being designed in such a way that a tax advantage (or a greater tax advantage) might be expected to arise from them.

(4) The knowledge condition is that, when the advice was provided, the person providing it knew or could reasonably be expected to know –

(a) that the advice would be used in the design of abusive tax arrangements or of a proposal for such arrangements, or

(b) that it was likely that the advice would be so used.

(5) For the purposes of sub-paragraph (3), advice is not to be taken to "suggest" anything–

(a) which is put forward by the advice for consideration, but

(b) which the advice can reasonably be read as recommending against.

(6) In sub-paragraph (3) –

(a) the reference in paragraph (a) to arrangements or an alteration of proposed arrangements includes a proposal for arrangements or an alteration of a proposal for arrangements, and

(b) the reference in paragraph (b) to arrangements includes arrangements proposed by a proposal.

(7) For the purposes of this paragraph –

(a) references to advice include an opinion;

(b) advice is "used" in a design if the advice is taken account of in that design.

5. Paragraph 9 states:-

(1) For the purposes of paragraph 7 a person is a "manager" of the arrangements if that person –

(a) was, in the course of a business carried on by that person, to any extent responsible for the organisation or management of the arrangements, and

(b) when carrying out any functions in relation to the organisation or management of the arrangements, knew or could reasonably be expected to know that the arrangements involved were abusive tax arrangements.

(2) Where –

(a) a person is, in the course of a business carried on by the person, to any extent responsible for facilitating T's withdrawal from the arrangements, and

(b) it is reasonable to assume that the obtaining of a tax advantage is not T's purpose (or one of T's purposes) in withdrawing from the arrangements,

that person is not because of anything done in the course of facilitating that withdrawal to be regarded as to any extent responsible for the organisation or management of the arrangements.

6. Paragraph 10 states:-

"For the purposes of paragraph 7 a person "marketed" the arrangements to T if, in the course of a business carried on by that person –

(a) that person made available for implementation by T a proposal which has since been implemented, in relation to T, by the arrangements, or

(b) that person –

(i) communicated information to T or another person about a proposal which has since been implemented, in relation to T, by the arrangements, and

(ii) did so with a view to T entering into the arrangements or transactions forming part of the arrangements."

7. Paragraph 11 states:-

"For the purposes of paragraph 7 a person is "an enabling participant" in the arrangements if –

(a) that person is a person (other than T) who enters into the arrangements or a transaction forming part of the arrangements,

(b) without that person's participation in the arrangements or transaction (or the participation of another person in the arrangements or transaction in the same capacity as that person), the arrangements could not be expected to result in a tax advantage for T, and

(c) when that person entered into the arrangements or transaction, that person knew or could reasonably be expected to know that what was being entered into was abusive tax arrangements or a transaction forming part of such arrangements."

**Part 9 Information**

8. Paragraph 40 reads:-

"(1) Schedule 36 to FA 2008 (information and inspection powers) applies for the purpose of –

(a) checking a relevant person's position as regards liability for a penalty under paragraph 1 in relation to particular tax arrangements;

(b) ascertaining the identity of any other person who has or may have enabled those arrangements,

as it applies for the purpose of checking a person's tax position, subject to modifications in paragraphs 41 to 43.

(2) In this paragraph and paragraphs 41 to 43 –

'relevant person' means a person an officer of Revenue and Customs has reason to suspect is or maybe liable to a penalty under paragraph 1 (or will become or may become so liable if T incurs a defeat);

…

(3) References in this paragraph and paragraphs 41 and 42 to a person who has or may have enabled particular tax arrangements are to be read in accordance with Part 4 of this Schedule (persons who 'enabled' the arrangements), save that –

(a) references in that Part to the arrangements mentioned in paragraph 1 (however expressed) are to be read as references to the particular tax arrangements; and

(b) references in that Part to 'T' are to be read as references to the person who entered into the particular tax arrangements."

**Other definitions**

9. Paragraph 56(1) includes this definition:

"'arrangements' includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)."

10. Paragraph 62(2) reads:-

"(2) In determining in relation to any particular arrangements whether a person is a person who enabled the arrangements, any action of the person carried out before the day on which this Act is passed is to be disregarded".

**General modifications of Schedule 36 to FA 2008 as applied**

11. Paragraph 41 reads:-

"In its application for [a purpose] mentioned in paragraph 40(1) above, the Schedule has effect as if—

(a) any provisions which can have no application for that purpose were omitted,

(b) references to 'the taxpayer' were references to the relevant person whose position as regards liability for a penalty under paragraph 1 is to be checked, and references to 'a taxpayer' were references to a relevant person,

(c) references to a person's 'tax position' were to the relevant person's position as regards liability for a penalty under paragraph 1,

(d) references to prejudice to the assessment or collection of tax included prejudice to –

(i) the investigation of the relevant person's position as regards liability for a penalty under paragraph 1 in relation to particular tax arrangements, or (as the case may be)

(ii) the identification of any person who has or may have enabled those arrangements, and

(e) references to a pending appeal relating to tax were to a pending appeal relating to an assessment of liability for a penalty under paragraph 1."

HM Revenue & Customs

**Your name:** Asset House Piccadilly Ltd
**Our reference:** CFS-1864440
**Description of the arrangements:** Remuneration trusts using fiduciary receipt arrangements (hereinafter referred to as arrangements)

## Part A: Documents and information we need from you about your enabling

We need you to send us documents and information about the enabling you carried out for each person named below, relating to their use of the arrangements shown above.

**Please send us the following information:**

1. Who first contacted you about the arrangements? (*Please provide full name and address details)*

2. What was your role in relation to these arrangements?

3. What services did you provide?

4. Who was the promoter/designer of the arrangements? (*Please provide full name and address details*)

5. Did you receive promotional/marketing material in respect of the arrangements and your role within the arrangements? For example, but not limited to written, verbal, visual presentation.

6. If yes, from who? (please *provide full name and address details*)

7. How did you market the arrangements?

8. Did you present any promotional/marketing information in respect of the arrangement to your clients, please provide a summary of the information provided? E.g. if verbal please provide a brief written summary of the content.

9. Do you have a contract/agreement/letter of engagement with the companies, trustees and any other third parties?

10. Did you recommend the use of this arrangement to the clients listed below?

11. If yes, why?

12. If no, who did recommend this arrangement? (*Please provide full name and address details*)

13. Did you receive any stock letters, templates and/or suggested wording?

14. If yes, from whom? (*Please provide full name and address details*)

15. Were you given any advice/instructions on how to complete, use and/or share the stock letters, templates and/or suggested wording?

16. If yes, from whom? (*Please provide full name and address details*)

17. Did you create any stock letters, templates and/or suggested wording?

18. Did you share any stock letters, templates and/or suggested wording with companies, trustees and any other third parties?

19. If yes, who? (*please provide full name and address details*)

20. Did you provide any advice/instructions on how to complete, use and/or share the stock letters/ templates?

21. If yes, how did you provide this advice? E.g. if verbal please provide a brief written summary of the content

22. It is noted on invoices the arrangement is referred to as ‘Umbrella remuneration trust’ what is your understanding of this arrangement?

23. It is noted on later invoices the arrangement is referred to as “Commercial Incentive Scheme” what is your understanding of this arrangement?

24. It is noted the arrangement is referred to as the WUT No1 Remuneration Trust what is your understanding of this arrangement?

25. What is the difference between the Umbrella remuneration trust and WUT No1 remuneration trust?

26. What is the difference between the Umbrella remuneration trust and the Commercial Incentive Scheme?

27. Did you establish the WUT No1 Remuneration trust?

28. If yes, why?

29. What is your understanding of the role of UTR (Holdings) Ltd within the execution of the trust?

30. Provide full details of any communication, written or verbally held with UTR (Holdings) Ltd and your contact name (*Please provide full name and address details*)

31. Provide full breakdown of all fees/payment /reward i.e. referral fee/commission payments made in relation to your clients use of the arrangements. Including full name and address of recipients and amounts

32. Provide full breakdown of all fees/payment/reward i.e. referral fee/commission payments received in relation to your clients use of the arrangements? Including full name and address details of payees and amounts

33. What services do you provide to Bay Trust International?

34. What services do Bay Trust International provide to you?

35. What services do you provide to Griffin Trustees?

36. What services do Griffin Trustees provide to you?

37. Why are Asset House Piccadilly raising invoices on behalf of Minerva?

38. How are the initial and ongoing fees for invoices issued on behalf of Minerva to the trust calculated?

39. Provide full details of any communications with company accountants and/or any tax advisors with regards to the client’s use of the arrangement.

40. Provide full details of advice given to the client and/or agent on how the annual tax return should be completed with regards to the trust payments?

**Please send us the following documents:**

41. Copies of all correspondence, including but not limited to; notes of meetings/telephone calls, emails, letters, communications transmitted through multimedia platforms etc with regards to the use of the remuneration trust using fiduciary receipt arrangements.

42. Copies of any promotional/marketing material received/created/used for remuneration trust using fiduciary receipt arrangements.

43. Copies of stock letters and/or templates

44. Copies of your contract/agreement with the promoter/designer/trustees

45. Copy of letter of engagement and/or contract with client in connection with client's use of remuneration trust using fiduciary receipt arrangements.

46. Copies of your invoice(s) in connection with client's use of remuneration trust using fiduciary receipt arrangements.

47. Copies of invoices raised on behalf of Minerva and/or any other third party in connection with client's use of remuneration trust using fiduciary receipt arrangements.

48. Copies of any advice received in connection with the use of remuneration trust using fiduciary receipt arrangements.

49. Copies of any advice given to clients, and or agents

In this context 'document' means anything in which information of any description is recorded. This includes any records held on computer, magnetic tape, optical disk (CD-ROM/DVD), hard disk, memory stick, flash drive, floppy disk or other recording media.

**Persons who used the arrangements**

- Pullman Consulting Ltd
- Hurstwood Projects Ltd
- Management & Healthcare Solutions Ltd

## Part B: Information we need from you about other enablers

Please send us the name and address for every other person who has, or who may have, enabled the arrangements described above, for the persons named above (who used the arrangements). You should include the name and address of every person who you:

- received payment from, or will receive payment from
- made a payment to, or will make a payment to

Payment includes consideration of any kind. For example, fees or commission.

## Notes:

Part 4 of Schedule 16 to the Finance (No. 2) Act 2017 defines 5 types of enabling:

- designing the arrangements
- managing the arrangements
- marketing the arrangements
- being an enabling participant in the arrangements
- being a financial enabler for the arrangements

You can find more information about each of these types in our technical guidance. Go to www.gov.uk and search for 'tax avoidance enablers'.

***Judge Redston: Gold Nuts Ltd and others v HMRC* [2017] UKFTT 84 (TC)**

*Structure of discussion*

151. There is a considerable body of case law relating to the use of arguably coercive measures to obtain information. Some is from the ECtHR; others are UK judgments which discuss that case law. Many cross-refer and rely on other decisions, including those cited by the parties.
152. In deciding how to approach these cases I found the ECtHR analysis in *Weh v Austria* [2004] (App 38544/97) ("*Weh*") to be helpful. In *Weh* the ECtHR said:

> "41. A perusal of the Court's case-law shows that there are two types of cases in which it found violations of the right to silence and the privilege against self-incrimination.
>
> 42. First, there are cases relating to the use of compulsion for the purpose of obtaining information which might incriminate the person concerned in pending or anticipated criminal proceedings against him, or - in other words - in respect of an offence with which that person has been 'charged' within the autonomous meaning of art 6(1) (see *Funke* para 44; *Heaney and McGuinness* paras 55-59; JB, paras 66-71…).
>
> 43. Second, there are cases concerning the use of incriminating information compulsorily obtained outside the context of criminal proceedings in a subsequent criminal prosecution (*Saunders* para 67, IJL v UK [2000] ECHR 29522/95 at para 82-83)."

153. The first type of case is therefore one where the information is compulsorily obtained *after* the person has been charged with a criminal offence, and the second is where information obtained *before* the person is charged is then used in subsequent criminal proceedings.

154. The next part of my decision considers these two types of cases, but in reverse order, so I begin by considering the second category – cases concerning the use of incriminating information compulsorily obtained before a person has been charged.

*The second type of case*

155. The leading case here is *Saunders*. As already noted at §142, the ECtHR found at [67] that the investigation by the DTI inspectors itself did not constitute the 30 determination of a criminal charge. As the ECtHR later said in *Shannon v UK* [2005] (App 6563/03) ("*Shannon")* at [45]:

> "…it has not been suggested in Saunders that the procedure whereby the applicant was requested to answer questions on his company and financial affairs, with a possible penalty of up to two years' imprisonment, in itself raised an issue under art 6(1)."

156. Other individuals involved in the takeover of Distillers were also investigated by the DTI inspectors, and brought similar complaints to the ECtHR. In IJL and Others v UK [2000] (App 29522/95 and others) ("IJL") the ECtHR reiterated its decision in *Saunders*, see [83] and said at [100]:

> "The Court considers that whether or not information obtained under compulsory powers by such a body [the DTI] violates the right to a fair hearing must be seen from the standpoint of the use made of that information at the trial. It is the applicants' view that, at the interview stage, the inspectors were in effect determining a 'criminal charge' within the meaning of Article 6 § 1 and on that account the guarantees laid down in Article 6 should have been applied to them. The Court does not accept that submission and refers in this connection to the nature and purpose of investigations conducted by DTI inspectors."

157. Saunders was also followed in *Allen v UK* [2002] (App 76574/01) ("*Allen v UK*"). Having lost his appeal against conviction (see §147), Mr Allen applied to the ECtHR. The ECtHR said:

> "The right not to incriminate oneself is primarily concerned, however, with respecting the will of an accused person to remain silent in the context of criminal proceedings and the use made of compulsorily obtained information in criminal prosecutions. It does not *per se* prohibit the use of compulsory powers to require persons to provide information about their financial or company affairs (see the above mentioned *Saunders* judgment, where the procedure whereby the applicant was required to answer the questions of the Department of Trade Inspectors was not in issue). In the present case, therefore, the Court finds that the requirement on the applicant to make a declaration of his assets to the Inland Revenue does not disclose any issue under Article 6 §1, even though a penalty was attached to a failure to do so. 35 The obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is indeed a common feature of the taxation systems of Contracting States and it would be difficult to envisage them functioning effectively without it."

158. This echoes the words of Lord Hutton at [30] of *Allen*, cited §149 above, that "the s 20(1) notice requiring information cannot constitute a violation of the right against self-incrimination."

159. A similar position was taken in *Weh* at [45], referring to *Saunders*, *IJL* and *Allen v UK*.

...

*The Privy Council in* "Brown v Stott"

201. I have also briefly considered *Brown v Stott* [2001] 2 WLR 817 at p. 836, in 30 which all the members of the Privy Council concluded that the rights not to incriminate oneself was not absolute, see the judgments of Lord Bingham at p.836, Lord Steyn at pp.841 and 844, Lord Hope at p.853, Lord Clyde at p.859, and the Rt Hon Ian Kirkwood, at p.862.

202. Lord Bingham, in a speech relied on in Allen at [30] said at p.704:

> "The jurisprudence of the European Court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for...The court has also recognised the need for a fair balance between the general interest of the community and the personal rights of the individual, the search for which balance has been described as inherent in the whole of the

Convention: see *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 52, para 69; *Sheffield and Horsham v United Kingdom* (1998) 27 5 EHRR 163, 191, para 52."

203. *Brown v Stott* was later approved and followed by the Court of Appeal in *R v Kearns* [2002] 1 WLR 2815, see [29].

204. I have found that Mr Budhdeo does not have an Article 6 right to refuse to respond to a Sch 36 Notice, but that if HMRC seek to rely on that material in a criminal trial, the judge must consider PACE s 78 in the light of the guidance given in *Beghal*. That conclusion is in accordance with the "need for a fair balance between the general interest of the community and the personal rights of the individual" as required by *Brown v Stott*. It pays proper regard to the right of the state, in the interests of the community, to require citizens to provide information about his income. But it allows evidence gathered unfairly to be excluded from a subsequent criminal trial.