Neutral Citation: [2024] UKFTT 00136 (TC)

Case Number: TC09071

FIRST-TIER TRIBUNAL
TAX CHAMBER

London

Appeal reference: TC/2022/12453

DISCLOSURE OF TAX AVOIDANCE SCHEMES (DOTAS) – Application by HMRC for determination by the Tribunal of a penalty for failure to provide HMRC with prescribed information relating to notifiable arrangements (FA 2004, s 308(3), TMA ss 98C, 100C) – Whether there were notifiable arrangements – Whether the Respondent was a "promoter" in relation to notifiable arrangements – Period of default – Reasonable excuse – Quantum of the penalty

PROCEDURE – Application made after conclusion of the hearing to advance new ground of contention and to adduce new evidence in support thereof – Application refused

Heard on: 14-16 November 2023
Additional written submissions
to 5 February 2024
Judgment date: 12 February 2024

Before

TRIBUNAL JUDGE CHRISTOPHER STAKER

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Applicants

and

IPS PROGRESSION LIMITED
Respondents

Representation:

For the Applicants: Philip Simpson, KC (Scot) of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

For the Respondent: Julian Hickey, instructed on a public access basis

DECISION

IPS Progression Limited is subject to a penalty under s 98C(1)(a)(i) and (2)(a) of the Taxes Management Act 1970 for failure to comply with s 308(3) of the Finance Act 2004 in the period from 19 April 2016 until 24 April 2022, in the sum of £900,000.

REASONS

SUMMARY

1. This is an application by HMRC for a determination by the Tribunal of a penalty under s 98C of the Taxes Management Act 1970 ("TMA") for the Respondent's failure to comply with s 308(3) of the Finance Act 2004 ("FA 2004").

2. Part 7 FA 2004 deals with disclosure of tax avoidance schemes ("DOTAS"). Section 308(3) FA 2004 requires a promoter of notifiable arrangements to provide HMRC with prescribed information within a prescribed period. The penalty for failure to comply is £600 for each day of non-compliance.

3. In 2016-2018, the Respondent was an umbrella company providing PAYE payroll services in respect of individuals whose personal services were made available by recruitment agencies to end users. Each of those individuals ("employees") entered into three agreements with the Respondent: (1) an employment agreement that provided that they were an employee of the Respondent, (2) a loan agreement that provided that the Respondent would loan "certain monies" to the employee with interest charged at 2% above HMRC's official rate of interest, and (3) a bonus agreement that provided that the employee could participate in a bonus scheme.

4. The end users paid an hourly rate for the employees' personal services. From the payments received from the end users, the Respondent deducted 15% as its own fee. The Respondent issued payslips to employees showing the remaining 85% as paid to the employees, divided into three elements: "salary paid"," rolled-up holiday pay", and "ILO bonus". The "salary paid" element was equivalent to the national minimum wage for the number of hours worked, the "rolled-up holiday pay" element was 12.07% of the "salary paid" element, and the "ILO bonus" was the remainder of the payment to the employee. Tax and National Insurance were deducted in respect of the "salary paid" and "rolled-up holiday pay" elements only.

5. The Respondent contends (1) that each amount of "ILO bonus" was a loan by the Respondent to the employee under the loan agreement, and was accordingly not taxable, and (2) that it was envisaged that the employees would repay the loans and accrued interest from future bonuses to be paid under the bonus agreements, and that these would have been subject to tax and National Insurance when they were paid. However, the generality of the employees ultimately received no bonus.

6. After the conclusion of the hearing of this appeal, but before the Tribunal issued its decision, the Respondent made a written application for permission to raise a new ground of contention, to the effect that HMRC commenced these proceedings for the determination of a penalty after the expiry of the time limit under s 103(4) TMA for so doing. The earliest employment agreement, loan agreement and bonus agreement in evidence at the hearing were dated 7 April 2016. These proceedings were commenced by HMRC in April 2022. Until the end of the hearing, the Respondent did not dispute that this was within the 6 year time limit under s 103(4) TMA. The Respondent's post-hearing application contends that new evidence discovered after the hearing shows that the Respondent's business in fact commenced in January 2016, which would mean that these proceedings have been brought by HMRC out of time. In this decision, the Tribunal rejects that application (paragraphs 52-59 below).

7. In relation to the merits of the appeal, the Tribunal finds in this decision as follows. The Respondent never intended to establish a genuine bonus scheme and never intended that the loans would be repaid. The practical effect was that employees were paid part of their taxable earnings tax-free. These were notifiable arrangements, and the Respondent was a promoter in relation to them. The Respondent did not provide HMRC with the prescribed information until some 6 years after expiry of the time limit for so doing, and has no reasonable excuse for the lateness. The Tribunal considers the approach to be followed in deciding the amount of the penalty, and determines the penalty accordingly.

FACTS

8. The Respondent is one of a number of companies having a common ownership which together form the Income Plus Group. The group's business apparently commenced in 2004, but the Respondent company itself was incorporated only on 1 May 2015.

9. In 2016-2018, the Respondent provided PAYE payroll services in relation to individuals whose personal services were made available by recruitment agencies to businesses and entities requiring those services. For example, the Respondent provided its services in relation to locum doctors and nurses whose services were made available by recruitment agencies to hospitals and other healthcare providers. The Respondent regarded the recruitment agencies as its clients, and the businesses and entities requiring the personal services as "end users".

10. Each of the individuals providing their personal services filled in the Respondent's application form, confirming their right to work in the United Kingdom. Each of those individuals also entered into three agreements with the Respondent, entitled respectively "Statement of Main Terms and Conditions of Employment", "Loan Agreement" and "Bonus, Incentive or Pay Scheme Offer".

(1) The "Statement of Main Terms and Conditions of Employment" (the "**employment agreement**"), relevantly provided as follows.

(a) The Respondent was the employer of the individual concerned (the "**employee**").

(b) The Respondent could make bonus schemes available from time to time, but acceptance of any such scheme did not form part of the employment contract.

(c) Pay was to be performance related and was to be "agreed between you [the employee] and your employer and calculated according to fees your Employer charges for providing your services", but the employee was "always [to] receive at least the National Minimum Wage for the hours [worked]".

(d) The employee was to receive a weekly remittance detailing their gross pay and deductions from this, including tax and National Insurance contributions, and was to receive "an explanatory leaflet as to how your pay is calculated at the commencement of your employment".

(e) Of the weekly payment, 12.07% was to represent rolled-up holiday pay, such that the employee would not receive payment while on holiday.

(f) The employment contract was the whole agreement between the Respondent and the employee, and was governed by English law and subject to the jurisdiction of the English courts and employment tribunals.

(2) The "Loan Agreement" (the "**loan agreement**") relevantly provided as follows.

(a) The Respondent was the lender and the employee was the borrower.

(b) The Respondent promised to lend "certain monies" to the employee, and the employee promised to repay the principal amount, plus interest charged at 2% above HMRC's official rate of interest, within 60 days of the Respondent demanding repayment.

(c) The employee granted to the Respondent a security interest in "any achieved bonus payments" as security for the loan.

(d) The loan agreement constituted the entire agreement between the parties and was governed by English law.

(3) The "Bonus, Incentive or Pay Scheme Offer" (the "**bonus agreement**") provided as follows.

(a) The Respondent invited the employee to participate in a bonus scheme, under which the company would pay a bonus to the employee if "you [the employee] personally generate a profit in excess of 170% of your employment cost".

(b) "The bonus amount will be between 100% and 170% of the profit generated after consideration of the total employment cost attributed to You".

(c) "Payment of the achieved bonus' will be made at a time chosen by the Directors".

(d) "Payment of the achieved bonus' will be subject to normal PAYE deductions".

(e) The offer was the whole offer and was governed by English law and subject to the jurisdiction of the English courts.

11. The end user paid an hourly rate (or in some instances a daily rate) for the employee's services. This payment was received by the Respondent either via the recruitment agency or directly from the end user. From this, the Respondent deducted 15% as its fee. The remaining 85% appeared on payslips issued by the Respondent to the employees as payments to the employees, divided into three separate elements: "salary paid", "rolled-up holiday pay", and "ILO bonus". The "salary paid" element comprised the national minimum wage for the number of hours worked. The "rolled-up holiday pay" element was 12.07% of the "salary paid" (see paragraph 10(1)(e) above). The "ILO bonus" element was the remainder of the payment to the employee. Tax and National Insurance were deducted in respect of the "salary paid" and "rolled-up holiday pay" elements only.

12. In tax years 2016-17 and 2017-18, the Respondent provided these services in respect of 1,593 employees (with those who were employees in both years being counted twice). There may have been some minor variations in the documentation relating to different employees, but it is common ground that these are not material. In a small number of cases the Respondent may have dealt directly with the end user without the involvement of a recruitment agency, but this is also not material.

13. The Respondent states that during the 2016-17 and 2017-2018 tax years the services described above were its only business, and that since the end of the 2017-2018 tax year, it has had no business. At the end of the 2017-2018 tax year, all of its existing and future employees were transferred to another company in the Income Plus Group called IPS Countrywide, which provided similar services pursuant to the same model. An e-mail from the group's compliance manager to "all users" dated 3 April 2018 states that the reason for the transfer of the Respondent's business to another company in the group was that the Respondent "is now full"

and that “We have reach[ed] the maximum liability that the directors are happy to hold in the [Respondent]”.

14. The Respondent was granted a lending licence by the Financial Conduct Authority (“**FCA**”) on 21 August 2017. The 3 April 2018 e-mail referred to above states that the Respondent “will now use its finance licence to generate revenue in the [Respondent] company” and that “This revenue will be used to pay Bonuses to candidates, similarly we expect to recall loans from candidates who receive these bonuses”. However, the Respondent says that it ultimately never engaged in the envisaged lending business for which the licence had been obtained.

15. On 1 November 2017, HMRC wrote to the Respondent stating that HMRC were aware of promotional material in which the Respondent claimed that “Working with IPS Progression Ltd as an employee can offer returns of 85% of your contract value”. The letter requested a meeting to consider the arrangements, and sought an explanation of why the Respondent considered that its arrangements were not notifiable under the determination of tax avoidance schemes (“**DOTAS**”) legislation.

16. In a letter to HMRC dated 5 January 2018, the Respondent’s accountants provided an explanation of why they considered that the arrangements were not notifiable arrangements.

17. Certain further exchanges ensued.

18. In a letter to the Respondent dated 13 December 2018, HMRC stated that they considered that the Respondent’s arrangements constituted notifiable arrangements under s 306 of the Finance Act 2004 (“**FA 2004**”), that attempts to engage with the Respondent’s accountants had stalled, that HMRC proposed to apply to the Tribunal for an order that the arrangements were notifiable under the DOTAS legislation, and that the Respondent should consider disclosing the scheme voluntarily.

19. In a letter to the Respondent’s accountants dated 18 February 2019, in response to a letter from the accountants dated 20 December 2018, HMRC stated that “there is nothing in your letter that dissuades me from my current view that a tax avoidance scheme was/is in operation”, and that HMRC intended to proceed with an application to the Tribunal.

20. In a letter to HMRC dated 27 March 2019, Mr Champion, a director of the Respondent, stated that the directors of the Respondent had reviewed the legislation in great detail, and had obtained an opinion from a specialist barrister, and remained of the opinion that nothing was notifiable under DOTAS.

21. There was no further correspondence until 1 April 2021, when HMRC wrote to the Respondent to reiterate HMRC’s intention to make an application to the Tribunal, setting out in detail why HMRC considered that the arrangements should have been notified under DOTAS.

22. In a letter to the Respondent dated 25 March 2022, HMRC stated that they intended to apply to the Tribunal for the determination of a penalty under s 98C TMA in respect of the Respondent’s failure to comply with its obligation under s 308(3) FA 2004.

23. On 14 April 2022, HMRC commenced the proceedings now before the Tribunal.

24. On 25 April 2022, the Respondent filed a form AAG1 (the form used to provide HMRC with prescribed information required by s 308(3) FA 2004), stating in the form that the disclosure was made on a protective basis as the Respondent did not agree that the DOTAS legislation required this.

25. On 5 May 2022, HMRC rejected the form AAG1 on the basis that disclosure could not be made on a protective basis.

26. On 16 May 2022, the Respondent therefore filed a second form AAG1, containing the same information as in the earlier form, but omitting the statements that the disclosure was being made on a protective basis.

27. On 19 May 2022, HMRC allocated a scheme reference number ("SRN").

28. On 16 June 2022, HMRC amended their application to the Tribunal to take account of these developments. HMRC now apply to the Tribunal for the determination of a penalty under s 98C(1)(a)(i) and (2)(a) of the Taxes Management Act 1970 ("**TMA**") for the Respondent's failure to make the disclosure within the prescribed time limit.

29. The hearing of this application was held on 14, 15 and 16 November 2023. Oral evidence was given by:

(1) James Hughes, Intervention Lead in the Counter-Avoidance Directorate within HMRC;

(2) Peter MacGregor, accountant for the Respondent since May 2017; and

(3) Christopher Champion, a director of the Respondent at all material times.

The Tribunal also had before it a further witness statement of Michael Hall, another director of the Respondent at all material times.

30. HMRC contend as follows.

(1) The scheme operated by the Respondent was of the nature of what is generally called a "contractor loan scheme". This type of scheme has been repeatedly and extensively used by the tax avoidance industry to avoid significant amounts of tax over a number of years, and is currently one of the highest profile types of tax avoidance schemes that HMRC investigate. Such schemes typically consist of payment by salary (normally at the national minimum wage rate), with the rest of the remuneration provided to the scheme user in the form of a loan or advance, which is then never repaid. The scheme in this case is more straightforward than other cases because the loan comes directly from the employer without any third party being involved.

(2) The scheme constituted notifiable arrangements, and the Respondent was a promoter in relation to them. The Respondent was therefore required by s 308(3) FA 2004 to provide HMRC with prescribed information in relation to those arrangements.

(3) The time limit for compliance was 14 April 2016, but disclosure was not made by the Respondent until it filed the second AAG1 form on 16 May 2022. The period of non-compliance was thus 2,222 days (some 6 years).

(4) The Respondent does not have a reasonable excuse for the lateness.

(5) The maximum penalty that the Tribunal can impose is £1,333,200 (£600 per day times 2,222 days). The fees received by the Respondent in relation to the scheme were approximately £3.6 million.

31. HMRC submit that the Tribunal should determine a penalty, and that the quantum should be at or near the maximum amount of £1,333,200.

32. The Respondent submits that the Tribunal should:

(1) dismiss the HMRC application;

alternatively,

(2) if the HMRC application for a penalty is granted, determine that the penalty is a nil amount.

33. The Respondent contends as follows.

(1) Each amount of "ILO bonus" was a loan by the Respondent to the employee under the loan agreement, and was accordingly not taxable. At the time that these loan payments were made, it was envisaged that the employees would repay the loans and accrued interest from future bonuses to be paid under the bonus agreements, and these bonus payments would be subject to tax and National Insurance when they were paid.

(2) The Respondent's business model was simple and not unique. The transactions were not contrived nor artificial and did not involve a series of pre-planned steps. No third parties were involved. An individual by choosing to participate commuted what they could otherwise earn as a fixed salary for a hope of earning a greater sum from their interest in the business bonus pool which was linked to the Respondent's financial performance. This was conceptually akin to a start-up that might give an equity interest to staff where it is not in a position to pay large salaries. Bonuses were in fact paid to 13 of the employees, with deductions of tax and National Insurance. There was no tax advantage.

(3) There were no notifiable arrangements for purposes of Part 7 FA 2004.

(4) Even if there were, the Respondent was not a promoter in relation to them.

(5) The Respondent was therefore under no obligation under s 308(3) FA 2004 and accordingly cannot be liable to any penalty for failing to comply with any such obligation.

(6) Alternatively, if the Respondent is in any breach of s 308(3) FA 2004, the Respondent has a reasonable excuse for the delay in making the disclosure.

(7) Alternatively, a nil penalty should be imposed, given that the law in this area is complex, and that the Respondent obtained appropriate specialist advice, acted in good faith, and cooperated with HMRC.

34. On 30 November 2023, after the conclusion of the hearing, the Respondent made a written application for permission to raise a new ground of contention, and to present new arguments and new evidence in support of the new ground (the Respondent's "**30 November 2023 application**"). Accompanying the application, as evidence in support of both the application itself and the proposed new ground of contention, was a third witness statement of Mr MacGregor with exhibits (the "**third MacGregor statement**"). The proposed new ground of contention is that HMRC commenced these proceedings for the determination of a penalty under s 98C TMA after the expiry of the time limit under s 103(4) TMA for so doing, and that the HMRC application must be rejected on that basis.

35. The 30 November 2023 application contends as follows. The earliest employment agreement, loan agreement and bonus agreement in evidence at the hearing were dated 7 April 2016, relating to employee "MA". These proceedings were commenced by HMRC in April 2022, and given the evidence then before the Tribunal, the Respondent did not dispute at the hearing that they were brought within the six year time limit under s 103(4) TMA. However, new evidence discovered after the hearing now shows that the Respondent's business in fact

commenced in January 2016, such that it now establishes that the HMRC application was not brought within that time limit.

36. On 22 January 2024, HMRC filed a written response opposing the Respondent's 30 November 2023 application. On 5 February 2024, the Respondent filed a reply thereto, accompanied by a fourth witness statement of Mr MacGregor (the "**fourth MacGregor statement**"), and an application for permission to rely on the fourth MacGregor statement. For convenience, the new evidence that the Respondent seeks permission to adduce, as well as the new ground of contention and arguments that the Respondent seeks to advance based on that new evidence, are referred to below as the "**proposed new evidence**".

LEGISLATION

37. References in this decision to provisions of legislation, despite being expressed in the present tense, are to the versions in force on 11 April 2016 (see paragraphs 66 and 70(2) below).

38. Section 306(1) FA 2004 provides:

> (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.

39. Section 307 FA 2004 relevantly provides:

> (1) For the purposes of this Part a person is a promoter—
>
> …
>
> (b) in relation to notifiable arrangements, … if, in the course of a relevant business, he is to any extent responsible for—
>
> …
>
> (ii) the organisation or management of the arrangements.
>
> …
>
> (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 …

40. Section 308(3) FA 2004 provides:

> A person who is a promoter in relation to notifiable arrangements must, within the prescribed period after the date on which he first becomes aware of any transaction forming part of the notifiable arrangements, provide the Board with prescribed information relating to those arrangements …

41. Section 318(1) FA 2004 defines the following expressions for purposes of Part 7 of that Act:

> *"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;

"arrangements" includes any scheme, transaction or series of transactions;

42. The Regulations prescribing the descriptions of arrangements for purposes of s 306(1)(a) FA 2004 are the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 ("**TASPDAR**"). These Regulations currently prescribe nine different descriptions of arrangements, which are referred to in the Regulations as "Description 1" to "Description 9" respectively, and are commonly referred to in HMRC Guidance and in practice as "Hallmark 1" to "Hallmark 9". In order to satisfy s 306(1)(a) FA 2004, arrangements need fall within only one of these Descriptions.

43. Regulation 10 TASPDAR provides:

Description 5: Standardised tax products

(1) … arrangements are prescribed if a promoter makes the arrangements available for implementation by more than one person and the conditions in paragraph (2) are met.

(2) The conditions are that an informed observer (having studied the arrangements and having regard to all relevant circumstances) could reasonably be expected to conclude that—

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

(i) the purpose of which is to enable a person to implement the arrangements;

(ii) the form of which is determined by the promoter; and

(iii) the substance of which does not need to be tailored, to any material extent, to enable a person to implement the arrangements;

(b) a person implementing the arrangements must enter into a specific transaction or series of transactions;

(c) the transaction or series of transactions is standardised, or substantially standardised, in form; and

(d) either the main purpose of the arrangements is to enable a person to obtain a tax advantage or the arrangements would be unlikely to be entered into but for the expectation of obtaining a tax advantage.

44. Regulation 5(5) of the Tax Avoidance Schemes (Information) Regulations 2012 ("**TASIR**") relevantly provides that the prescribed period for purposes of s 308(3) is the period of 5 days beginning on the day after that on which the promoter first becomes aware of any transaction forming part of arrangements to which that subsection applies. Regulation 2(3) provides that in the reckoning of this period, any day that is a non-business day within the meaning of s 92 of the Bills of Exchange Act 1882 is to be disregarded.

45. Section 98C(1) TMA (read together with its sub-section (2)(a)) relevantly provides that a person who fails to comply with an obligation under s 308(3) FA 2004 shall be liable:

(a) to a penalty not exceeding—

(i) … £600 for each day during the initial period …

46. Section 98C(2ZA) TMA relevantly defines "the initial period" to mean the period beginning with the first day after the end of the period prescribed under s 308(3) FA 2004 (the "relevant day") and ending with the last day before the failure ceases.

47. Section 98C(2ZB) TMA relevantly provides:

> The amount of a penalty under subsection (1)(a)(i) is to be arrived at after taking account of all relevant considerations, including the desirability of its being set at a level which appears appropriate for deterring the person, or other persons, from similar failures to comply on future occasions having regard (in particular)—
>
> (a) in the case of a penalty for a promoter's failure to comply with section 308… (3) …, to the amount of any fees received, or likely to have been received, by the promoter in connection with the notifiable proposal (or arrangements implementing the notifiable proposal), or with the notifiable arrangements …

48. Section 98C(2ZC) TMA provides:

> If the maximum penalty under subsection (1)(a)(i) above appears inappropriately low after taking account of those considerations, the penalty is to be of such amount not exceeding £1 million as appears appropriate having regard to those considerations.

49. Section 100C TMA provides for HMRC to commence proceedings before the Tribunal for the determination of a penalty under s 98C(1)(a)(i) and (2)(a).

50. Section 103(4) TMA relevantly provides:

> … proceedings for … a penalty may be commenced before the tribunal … at any time within six years after the date on which the penalty was incurred or began to be incurred.

51. Section 118(2) TMA relevantly provides:

> For the purposes of this Act, … where a person had a reasonable excuse for not doing anything required to be done he shall be deemed not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

THE RESPONDENT'S POST-HEARING APPLICATION TO RELY ON A NEW GROUND OF CONTENTION AND ADDITIONAL EVIDENCE

52. The Respondent's 30 November 2023 application (paragraphs 34-36 above) is refused.

53. The Tribunal has the power, in its discretion, to allow such an application at the post-hearing stage, but the discretion must be exercised in a principled way.

(1) Up until the time that the Tribunal's final decision is communicated to the parties, the Tribunal remains seised of an appeal, and until that time it may in its discretion grant an application for permission to admit new evidence and/or new grounds of contention (*E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] QB 1044 ("***E***") at [27] and [92]; *Karunia Holdings Ltd v Creativityetc Ltd* [2021] EWHC 1864 (Ch) ("***Karunia***") at [48]).

(2) Any such application made after the time limit for presenting evidence, grounds and arguments has already expired should be determined through the application

of the three-stage test in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 at [24]. This requires the Tribunal:

(a) to identify and assess the seriousness and significance of the failure to comply with the time limit for presenting the evidence, grounds and/or arguments;

(b) to consider why the failure occurred; and

(c) to evaluate all the circumstances of the case, so as to enable the Tribunal to deal justly with the application, which will involve a balancing of the merits of the reasons given for the delay and all other relevant factors, including the prejudice which would be caused to both parties by granting or refusing permission, and the importance of the need for litigation to be conducted efficiently and at proportionate cost, and for time limits to be respected.

(See *Karunia* at [52], [56], [59], [61] and [63]; Civil Procedure Rules, rule 3.9(1) (by analogy); The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "**Rules**"), rule 2(1), (2)(a) and (3)(a), and rule 5(2) and (3)(a), (c) and (d).)

(3) Where such an application is made after the hearing of an appeal has already concluded, regard must also be had to the principle of finality, under which each party is generally entitled to expect that the other's full case and evidence will be presented at the hearing (*Karunia* at [47]). It is a duty of every litigant to bring forward their whole case at once, and a tribunal should be astute to discourage applications to put in new evidence and new grounds after the hearing of a case has concluded (compare *Charlesworth v Relay Roads Ltd* [1999] EWHC 829 (Pat), [2000] 1 WLR 230 at 237H and 238H).

(4) Such an application made at the post-hearing stage, but before the Tribunal's final decision is communicated to the parties, is not subject strictly to the test in *Ladd v Marshall* [1954] 1 WLR 1489, according to which leave to adduce further evidence on appeal will only be granted if:

(a) it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial,

(b) the further evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, and

(c) the evidence is such as is presumably to be believed.

However, the *Ladd v Marshall* test can nevertheless be taken into account as a cross-reference (*Karunia* at [53]-[56] and [63]). In practice, such an application at the post-hearing stage may well be unlikely to succeed if it does not satisfy the *Ladd v Marshall* test, although all will depend on the circumstances of the individual case as a whole which need not be exceptional (*Karunia* at [54]).

54. For purposes of determining the Respondent's 30 November 2023 application, the Tribunal admits the third and fourth MacGregor statements and exhibits thereto, to the extent that they are relevant to the consideration of that application.

55. The Tribunal finds that there has been a serious and significant delay in the presentation by the Respondent of the proposed new evidence.

(1) On 1 February 2023 (after the Tribunal issued an "unless" order on 23 January 2023), the Respondent filed its statement of case which, according to rule 25(1)(c)

and (2)(b) of the Rules, was required to set out the Respondent's position in relation to the case.

(2) Case management directions were then issued by the Tribunal on 2 March 2023, requiring the Respondent to provide to HMRC by 13 April 2023 a list of documents on which it intends to rely (and copies of any of those documents not previously provided to HMRC), and to provide to HMRC by 8 June 2023 statements from all witnesses on whose evidence it intends to rely.

(3) The Respondent now applies for permission to advance a new and additional position in relation to the case some 10 months after the filing of its statement of case, to adduce additional documents more than 7 months after the passing of the time limit for doing so, and to produce additional witness statements nearly 6 months after the passing of the time limit for doing so.

(4) The delay is all the more significant and serious given that the hearing of the substantive appeal has in the meantime been held and concluded (see paragraph 53(3) above).

56. The Tribunal finds that no satisfactory explanation has been given by the Respondent for the delay in presenting the proposed new evidence.

(1) The third MacGregor statement states only that "Since the hearing, I have done some further investigating by accessing previously archived records", that "When preparing for another case, myself and our IT manager discovered files which were archived away in a different location from where our files are usually stored", and that "Previously archived backups have now been located that weren't available to me prior to the hearing".

(2) The fourth MacGregor statement adds the following further details. In early 2020, the Respondent adopted a work from home policy due to the Covid-19 pandemic, and staff were given access to its servers via remote desktop. In Summer 2020, the business migrated its data from its own servers to a cloud-based server, Microsoft Azure. The business held massive amounts of historical data, and to save time and storage costs, it uploaded to Azure only what was seen to be needed. The remaining data was held on physical disks. This was an IT decision and staff were not aware of it at the time, and staff did not have access to the data on the physical disks. The business's IT person left on 6 October 2023. His successor started one month prior to this and spent the crossover period learning the systems. The new person thereafter continued to review what data was held and how the systems were structured. It was only after the conclusion of the hearing of this appeal on 16 November 2023 that the old data on which the Respondent now seeks to rely was discovered. Mr MacGregor had been trying to access an old piece of software where old data relating to the Respondent and to IPS Countrywide was stored. Mr MacGregor had been trying to establish if the employee figures were correct, for the Respondent and in anticipation of the Tribunal hearing relating to IPS Countrywide in January 2024. Once they began digging, it became apparent that some data had not been moved to Azure. After a bit of searching through the archive disks, the new IT person was able to restore the relevant files to Azure. The previous IT person had left data on a variety of mediums from old servers to backup USB disks, and the new IT person was until November 2023 still learning about the systems and where data was stored.

(3) This explanation is not satisfactory.

(a) It is the Respondent's own responsibility to maintain and manage its records. If a business manages its information in a way that makes it difficult or impossible for its own staff to be aware of or retrieve some of its records, that is hardly a good reason for a tribunal to allow evidence to be produced at a late stage, especially after the conclusion of a hearing. This is so, regardless of which staff within the Respondent took decisions with respect to data management.

(b) Around the time that the Respondent's statement of case was prepared, the Respondent should have been aware of the importance of finding any evidence that the Respondent's relevant activities had commenced prior to 7 April 2016, if there was any possibility that that was the case.

  (i) In a letter to the Respondent dated 22 March 2022, HMRC had stated that "The earliest contract of employment, loan agreement and bonus agreement held by HMRC is dated 7 April 2016", such that the "relevant day" for purposes of s 98C(2ZA) TMA was 15 April 2016.

  (ii) The revised HMRC application dated 14 June 2022 referred to the time limit in s 103(4) TMA, and stated that the initial period of non-compliance in accordance with s 98C(2ZA) TMA commenced on 15 April 2016.

  (iii) The Respondent should thus have been aware at the time of preparing its statement of case in early 2023 that on HMRC's stated position, the HMRC application had been filed on the very last day of the time limit under s 103(4) TMA for doing so.

  (iv) The decision of the Upper Tribunal in *Revenue And Customs v Root2 Tax Ltd* [2022] UKUT 353 (TCC), [2023] STC 171 ("***Root 2***"), on which the Respondent relies, was published on 20 December 2022, such that the Respondent should have been aware of it when preparing its statement of case that it filed on 1 February 2023 (or at very least shortly thereafter).

  (v) The Respondent should thus have been aware at the time of preparing its statement of case (or at very least shortly thereafter) that it could argue that the entire HMRC application for determination of a penalty was out of time if there was evidence of even a single relevant transaction even a day earlier than 7 April 2016.

(c) However, the third and fourth MacGregor statements give no indication of precisely when any search was commenced for material showing relevant activity by the Respondent prior to 7 April 2016. Indeed, it is not clear whether the Respondent actively searched specifically for such material, or whether the proposed new evidence was simply fortuitously found in the course of other work.

(d) It is difficult to see the relevance of the fact that the business's former IT person left on 6 October 2023, given that the Respondent was required to produce all of the evidence on which it intended to rely well before then (see paragraph 55(2) above).

(e) The third and fourth MacGregor statements do not say that their *former* IT person ever searched for such material. As to their *new* IT person, it is said that he "continued to review what data we held and how our systems were

structured", but it is not said that he was specifically searching for material showing relevant business activity prior to 7 April 2016. It is also said that Mr MacGregor himself "had been trying to establish if employee figures were correct" for both the Respondent and IPS Countrywide, but it is not said that he was trying specifically to find evidence of relevant business activity prior to 7 April 2016.

(f) In any event, according to the fourth MacGregor statement, the new IT person started work around 6 September 2023, and had found the proposed new evidence less than three months later, before the Respondent's 30 November 2023 application was filed. There is no reason to suppose that the former IT person could not have found it in the same or in a shorter amount of time, if he had looked for it. There is therefore no reason to think that it could not have been found within the time limits referred to in paragraph 55(2) above, if a search for it had commenced around the time that the Respondent's statement of case was being prepared.

(g) The Respondent has now had two opportunities, in the third and fourth MacGregor statements respectively, to present all of the facts and circumstances on which it relies in support of the 30 November 2023 application. The Tribunal considers that it would not be in the interests of justice to grant the Respondent any further opportunity to do so.

(h) The Tribunal finds, by way of cross-reference, that for the reasons above, the proposed new evidence does not satisfy the first limb of the *Ladd v Marshall* test.

57. An evaluation of all of the circumstances of the case leads the Tribunal to conclude that it would be just to refuse the Respondent's 30 November 2023 application.

(1) The Tribunal takes into account factors weighing in favour of granting of the 30 November 2023 application. The penalty which HMRC seek to impose on the Respondent is of a most serious nature, and the new ground of contention, if successful, would provide a complete bar to a penalty being imposed. The proper application of the law requires that the time limit in s 103(4) TMA be given effect in accordance with the intention of Parliament (*Root2* at [56]). Certain of the information contained in the proposed new evidence was already in the hands of HMRC. If the 30 November 2023 application were granted, it might not require any further oral hearing or cause significant delay or additional costs, if HMRC did not wish to cross-examine Mr MacGregor on his new witness statements and did not wish to present any evidence in response.

(2) However, the Tribunal finds that these factors are outweighed by the matters referred to in paragraphs 55 and 56 above, together with the following matters.

(3) The Tribunal is satisfied that the new evidence, if given, would probably *not* have an important influence on the result of the case.

(a) The new evidence exhibited to the third MacGregor statement consists of (1) P60s of five employees issued by the Respondent for tax year 2015-2016, (2) the Respondent's VAT return for VAT period 02/16, (3) a document giving details of PAYE due and paid by the Respondent to HMRC in each month of the 2015-16 and 2016-17 tax years (said to be "workings in our old accounts working papers which were downloaded from HMRC when the accounts to 31 December 2016 were prepared"), and (4) a document described as "a

summary of the bank statement for [the Respondent] from the beginning of 2016".

(b) The HMRC case is that the notifiable arrangements, in relation to which the Respondent was required by s 308(3) FA 2004 to provide HMRC with prescribed information, consisted of the business activities involving the elements described in paragraphs 10-11 and 14 above. This business model involved individual employees entering into an employment agreement, loan agreement and bonus agreement with the Respondent, and involved the Respondent issuing payslips dividing payments into "salary paid", "rolled-up holiday pay", and "ILO bonus", with tax and National Insurance being deducted in respect of the first two only, on the basis that the "ILO bonus" payments were loans under the loan agreements, that were intended to be repaid through bonuses paid from profits obtained from a banking business that the Respondent intended to establish.

(c) The proposed new evidence is said to show that the Respondent provided its services in respect of at least five employees in the period from 20 January 2016 to 5 April 2016, one of whom was MA, the very employee who was party to the employment agreement, loan agreement and bonus agreement dated 7 April 2016 (see paragraph 35 above and paragraph 70(2) below). The proposed new evidence is said to show that the Respondent was in fact already making payments to MA and four other employees in the period from January 2016 to 5 April 2016, and that the Respondent submitted RTI returns to HMRC for these payments, and issued P60s to these employees for tax year 2015-16, and submitted a VAT return for VAT period 02/16 in respect this business in this period.

(d) However, even if this evidence were to be admitted, and even if it were to be accepted on the basis thereof that the Respondent was already providing PAYE payroll services in respect of employees in the period from January to 5 April 2016, the evidence before the Tribunal would not establish that any services provided by the Respondent prior to 7 April 2016 was specifically on the model referred to in (b) above. The evidence would still not include, for instance, any employment agreement, loan agreement, bonus agreement or payslip for any employee in this earlier period.

(e) The Respondent asks the Tribunal simply to assume that if the Respondent provided PAYE payroll services in respect of employees prior to 7 April 2016, it must have done so on the same basis as it did so from 7 April 2016. The Respondent argues that the proposed new evidence demonstrates generally that it was carrying on economic activities in the period January to 5 April 2016, and that there is nothing that would differentiate its economic activities in this period from those conducted thereafter. This is said to be confirmed by oral evidence given at the hearing (albeit directed to the period from April 2016 onwards) that the business on the model referred to in (b) above was the only business conducted by the Respondent.

(f) The Tribunal does not consider that this assumption can be made, or that an inference to this effect could be drawn. The Respondent was part of a group of companies that provided PAYE payroll services, apparently since 2004 (paragraph 8 above). There is no suggestion that all of the other companies in the group conducted business on the model referred to in (b) above.

Indeed, Mr Champion confirmed that the various companies in the group all had slightly different models, and when asked whether the Respondent was the only company in the group that applied this particular model, he responded "For the lender licence? … Yes", albeit he subsequently said that IPS Countrywide applied the same model as the Respondent (Transcript ("**T**") Day 2 ("**D2**"), p 238, line 14 to p 229, line 12). There is therefore no reason why the Respondent itself must necessarily have conducted business on the same model from the very beginning of its activities.

(g) MA's employment agreement, loan agreement and bonus agreement were all signed by the Respondent and dated 7 April 2016 (see paragraph 35 above and paragraph 70(2) below). It is difficult to see why the Respondent would have asked MA in April 2016 to sign these documents if MA had already signed such documents in January 2016. The inference to be drawn would rather be that the Respondent, even if it may have provided PAYE payroll services to some employees from January 2016, only began to use the model of business referred to in (b) above from 7 April 2016.

(h) The Tribunal does not accept the Respondent's contention that oral evidence at the hearing suggests that the Respondent only ever conducted business on the model referred to in (b) above. The HMRC case has expressly been that they are *not* aware of the Respondent having provided any services on the model referred to in (b) above prior to 7 April 2016. Evidence as to the nature of the Respondent's business from 6 April 2016 (see (e) above last sentence) of itself says nothing about the nature of any business of the Respondent before then.

(i) The Respondent contends that the proposed new evidence shows that the Respondent made total payments of £26,972.70 to the five employees in question in the period from January to 5 April 2016, but that the P60s issued for those five employees for the 2015-16 tax year indicate total earnings for all five of only £1,915.08. Thus, it is said that the payments made by the Respondent to the five employees in this period were significantly in excess of the gross wages indicated in the P60s, and that it must be deduced from this that the remainder of the payments made to the employees in this period were loans. It is said that this confirms that the Respondent's business in this period must have been based on the same model referred to in (b) above. The Tribunal does not accept this argument. Even if the Respondent was making some kind of loans to the employees in this period (and that is not necessarily the only possible explanation for these payments by the Respondent to the employees), this of itself would not mean that the Respondent was in this period conducting business on the same model referred to in (b) above. The Respondent could well have been operating a very different business model in this period that also involved loans.

(j) The Tribunal considers that the Respondent has not provided any satisfactory explanation for its inability to provide specific evidence that business conducted by it prior to 7 April 2016 was on the model referred to in (b) above, such as copies of employment agreements, loan agreements and bonus agreements for employees in those periods.

(i) Mr MacGregor does not address the question whether paper originals of these documents were kept in relation to any of the employees. It is not said that any paper records have been destroyed or lost.

(ii) Mr MacGregor also does not state that any electronic records have been destroyed or lost. He states merely that the electronic records have been kept in disparate locations, including a cloud based server, a physical server and various disks. However, the Respondent has had many months to search the various different electronic archives.

(iii) The fourth MacGregor statement says that old data was stored on software called Accentra, which "still runs but has not been updated for years and therefore reports are not fully functional including payslips". However, it does not say specifically that electronic copies of documents such as employment agreements, loan agreements and bonus agreements would have been held within its Accentra software, or if so, that the Respondent could not now extract them from that software, which is said to be still partially functional.

(iv) More generally, Mr MacGregor does not state specifically what resources have been devoted to seeking to recover any missing data or documents from the January to 6 April 2016 period. Given the amount at stake in these proceedings, it would have been proportionate for the Respondent to have devoted appropriate resources to this, including if necessary by seeking assistance from Accentra or from external data-recovery experts. There is no evidence to suggest, for instance, that the Accentra software contains relevant material that would be irrecoverable even with such expert assistance.

(v) The Respondent has had an adequate opportunity to explain exactly what steps it has taken to find evidence of the Respondent's activities in the period prior to 7 April 2016 (paragraph 56(3)(g) above).

(vi) In the circumstances, the Tribunal concludes as follows. The Respondent has been unable to find any employment agreements, loan agreements, bonus agreements or payslips relating to the period before 7 April 2016, or any other documents that show specifically that the Respondent conducted business prior to 7 April 2016 on the model referred to in (b) above. On the evidence, the Tribunal sees no reason why the Respondent would have been unable to produce such documents by now if they existed. The Tribunal finds in the circumstances that the most likely explanation is that they never existed because the Respondent never conducted business prior to 7 April 2016 on the model referred to in (b) above.

(k) The Tribunal proceeds on the basis that if the Respondent were permitted to advance the new ground of contention, the burden of proof would be on HMRC to establish that these proceedings were brought by them within the time limit under s 103(4) TMA. However, the Tribunal would need to determine whether HMRC have discharged that burden on the basis of the evidence before it. Even if the proposed new evidence were to be admitted, for the reasons given above, the Tribunal considers that the evidence as a whole would still not establish that any business conducted by the Respondent prior to 7 April 2016 was on the model referred to in (b) above.

In determining whether HMRC have discharged their burden of proof, the Tribunal would also be entitled to take into account that if there were any additional evidence that could specifically establish this, it would be in the hands of the Respondent and not HMRC, and that it would be in the Respondent's interest to produce this evidence.

(l) The Tribunal also finds, by way of cross-reference, that for the reasons above the new material on which the Respondent seeks to rely does not satisfy the second limb of the *Ladd v Marshall* test.

(4) If the proposed new evidence were to be admitted, it would potentially cause delay and prejudice to HMRC.

(a) If the proposed new evidence were admitted, HMRC would be entitled to cross-examine Mr MacGregor on the evidence that he gives in the third and fourth MacGregor statements. HMRC would also be entitled to present additional evidence in response to the proposed new evidence, including potentially witness evidence, on which the Respondent would also be entitled to cross-examine.

(b) HMRC have not yet indicated whether they would wish to cross-examine Mr MacGregor or present additional evidence in response if the 30 November 2023 application were granted, and the Tribunal therefore does not assume that a further hearing *would* be necessary (paragraph 57(1) above), but takes into account that it might be necessary.

(c) The Tribunal does not accept the argument that there is no prejudice to HMRC because information in the proposed new evidence was already in the hands of HMRC at the time of the hearing. Indeed, the Respondent expressly states that "it is not suggested that HMRC had any actual knowledge of the relevance of the evidence prior to it being exhibited in the [30 November 2023 application], and particularly of that relating to the RTI returns". As the Respondent itself acknowledges, at the hearing HMRC produced a table containing information from the Respondent's VAT returns, which included information from the Respondent's 02/16 VAT return. The Respondent itself did not suggest at the time that there might be any significance to be attached to the fact that the table showed that the Respondent was already trading in VAT period 02/16.

(5) This is not a case where it would be "an affront to common sense, or a sense of justice", to refuse the application to rely on new evidence and a new ground of contention (compare *Swift Advances Plc v Ahmed* [2015] EWHC 3265 (Ch) at [26]-[27], as discussed in *Karunia* at [55]).

(6) There is a need for litigation to be conducted efficiently and at proportionate cost, and for time limits to be respected (paragraph 53(2)(c) above).

58. Thus, although the Tribunal has admitted the third and fourth MacGregor statements and exhibits thereto for purposes of determining the Respondent's 30 November 2023 application (paragraph 54 above), those statements and exhibits thereto, and the 30 November 2023 application itself, will not be further considered in the determination of the merits of the appeal.

59. Given that the Tribunal has refused the 30 November 2023 application, the question whether the proceedings have been brought within the time limit in s 103(4) TMA is not a matter in dispute. The Tribunal is not required to determine what findings it would have made if it had granted the application. Nevertheless, for completeness, the Tribunal adds that even

if it had granted the application, it would, for the reasons above, have found on the basis of the evidence as a whole including the new evidence, on the balance of probability, that the Respondent did not conduct any business on the model referred to in paragraph 57(3)(b) above prior to 7 April 2016, and would have found that the proceedings were brought within the time limit in s 103(4) TMA.

FINDINGS OF DISPUTED FACTS

60. The Respondent never intended to operate a bonus scheme, or to pay bonuses to the generality of the employees.

(1) There is no evidence of any source from which money to fund a bonus scheme could plausibly have come.

(a) The funds for a bonus scheme could not have come from the difference between the national minimum wage paid to employees and the actual amount that the end users had paid for their services. The amount of that difference had already been partly taken by the Respondent as its 15% fee, and the remainder of that amount had been paid out to the employees as "ILO bonus". That money was not available for the Respondent to invest in a bonus scheme.

(b) The funds for a bonus scheme could not have come from the 15% fee that the Respondent took. This 15% is described by the Respondent as its "management fee", and must have represented the Respondent's overheads and own profit from its business. The evidence is that employer National Insurance contributions were also paid out of this 15%. The "ILO bonus" was typically a substantial portion of the total amount paid by the end user, sometimes in excess of 50%. It would have required unrealistic returns on any remaining portion of the 15% taken by the Respondent for this to have been able to generate enough funds to pay bonuses equivalent to all of the ILO bonuses that had previously been paid plus any accumulated interest.

(c) The funds for a bonus scheme could not plausibly have come from any lending business conducted by the Respondent.

(i) The Respondent says that it intended to conduct a separate business of lending money to those with impaired credit records, and that it was envisaged that the profits from this would fund a bonus pool. The fact that the Respondent obtained a lending licence from the FCA, and the e-mail from the group's compliance manager to "all users" dated 3 April 2018, are said to evidence this (paragraphs 13 and 14 above).

(ii) However, the Respondent was not granted the licence by the FCA until 21 August 2017, some 16 months after it had already been providing its services. Even then, after obtaining the licence, the Respondent never used it to establish any lending business. No clear reason has been given as to why not. The Respondent's skeleton states that the proposed lending business was subsequently "superseded" by another company in the group. However, there is no suggestion that the other company in the group conducted a lending business in order to generate funds to pay bonuses to the Respondent's employees. If the Respondent had genuinely intended to establish such a business for that purpose, it is difficult to see how that intention could have been superseded by the business of another company in the group.

(iii) Funding would have been needed to establish such a lending business. These funds could not have come from the sources referred to in (1)(a) and (b) above, for the reasons there given. The evidence of Mr Champion is that the Respondent was making approaches to merchant banks to obtain the necessary funds, although there is no evidence or suggestion that it ever succeeded in obtaining funding from them. It is also not plausible that the Respondent, if it had obtained funding for a lending business from sources other than the employees, and had itself taken all the business risk of that lending business, would have wanted to share the profits from it with the employees. The employees would have given nothing to the Respondent in return for a share of the profits of one of the Respondent's businesses. This would have made no commercial sense for the Respondent.

(iv) Contrary to what the Respondent contends, the situation was not akin to a start-up giving an equity interest to staff where it is not in a position to pay large salaries. The Respondent from the outset paid employees the full amount of what the end users had paid for their services (minus the 15% taken by the Respondent), either as salary, rolled-up holiday pay or ILO bonus. The Respondent might just as easily have paid the amount of the ILO bonus to employees as salary. Labelling part of the payment to employees as "ILO bonus" did not reduce the actual amount paid over by the Respondent to the employees every week when salaries were paid.

(v) Furthermore, the suggestion that profits from a lending business would fund bonuses does not appear anywhere in the documentation signed by the employees (paragraph 10 above). The email dated 3 April 2018 (paragraph 13 above) is vague, and it is unclear who were the "all users" to whom it was sent. If there was a genuine intention to establish a lending business to fund a bonus pool, much more concrete and detailed documentary evidence of this would presumably exist. The Tribunal draws no adverse inference from the Respondent's failure to produce such evidence, but the evidence that is before the Tribunal is insufficient to explain away or outweigh the considerations above.

(d) There is no evidence or suggestion of any other source from which funds for a bonus scheme could have come.

(2) In the circumstances, if all of the amounts of "ILO bonus" paid to employees were loans under the loan agreements, the only way that the Respondent could have "paid a bonus" would have been by simply cancelling an employee's loan debt and accumulated interest debt, and by treating the debt cancellation as the payment of a bonus.

(a) In tax years 2016-17 and 2017-18, the Respondent had 1,593 employees, and the Respondent itself claims to have paid bonuses to only 13 of these. There is evidence before the Tribunal of the payment of bonuses to only two of these.

(b) A payslip of one of these employees dated 27 November 2017 shows as follows. In the payments column, there are payments of negligible amounts of salary, rolled-up holiday pay and ILO bonus, and there is then a payment of a bonus of £39,425. Gross pay for tax is stated to be £39,432.90, which is

the sum of the salary, rolled-up holiday pay and the bonus of £39,425, but excludes the amount of ILO bonus. The payments column shows a deduction of tax on the gross pay for tax, as well as an "Advance Deduction" of £23,653.12.

(c) Both of the Respondent's witnesses said that they were not sure what the "Advance Deductions" were, but the Tribunal is satisfied that they cannot have been anything other than purported repayments of ILO bonuses. The Respondent did not suggest anything else that these payments might have been, and it is a central part of the Respondent's case that ILO bonuses were loans that were intended to be repaid at a later date through the payment of bonuses.

(d) Although the bonus paid is stated to be £39,425, the purported loan itself has therefore only been reduced by £23,653.12 as a result of the payment of the bonus. This is because some £15,772 of PAYE tax is deducted from the bonus, leaving only the remainder to be used as repayment of the loan debt.

(e) Another payslip showing payment of a bonus to another employee has all of the same features, but the sums involved are smaller.

(f) There is no evidence (or even suggestion by the Respondent) that the bonuses said by the Respondent to have been paid to 11 other employees were any different.

(3) However, the advancement of a loan, followed by the "payment of a bonus" in the form of a cancellation of part of the loan debt, is not a genuine bonus scheme.

(4) Furthermore, the Respondent could not in fact have afforded to pay bonuses in this way to all employees in amounts sufficient to "repay" the whole of the "ILO bonus" payments previously paid to them plus accumulated loan interest. This is because PAYE tax had to be paid on the bonus payments.

(a) When bonuses were paid by the Respondent to the two employees referred to in (2)(b) and (e) above, the Respondent deducted PAYE tax from the amount of the bonus paid. There is no evidence that any of the employees who received a bonus ever reimbursed the Respondent for the amount of PAYE tax on the bonus. Even if a bonus paid to an employee had been in the full amount of all "ILO bonuses" previously paid to that employee plus accumulated loan interest, the net amount of bonus received by the employee following deduction of the PAYE tax on the bonus would have been insufficient to repay the loan debt in full (as can be seen from (2)(b)-(d) above). There is no evidence that the remaining amount of the loan debt was ever repaid by the employee to the Respondent (see paragraph 61 below). The result in practice was therefore that the PAYE tax on bonus payments was ultimately paid by the Respondent rather than by the employee.

(b) There is no evidence or suggestion of any source from which the Respondent could have obtained sufficient funds to pay PAYE tax on bonuses to all 1,593 employees in sums equivalent to the full amounts of all "ILO bonuses" that had previously been paid plus accumulated loan interest. It would also have made no economic sense for the Respondent to have paid this tax for the employees. The economic result would have been as follows. The Respondent would have paid the employees a part of the amounts that end users had paid for their services (the "ILO bonus") without deduction of

PAYE tax. The Respondent would then instead itself have paid that PAYE tax at the time that a bonus was paid.

(c) This may explain why bonuses were paid to at most 13 of the 1,593 employees, that is to say, less than one per cent. There is furthermore no evidence that the 13 bonuses said to have been paid equalled or exceeded the amounts previously paid to the employees in question as ILO bonuses.

(5) The fact that, even now, over 7 years after the Respondent began providing its services, and over 5 years after it ceased doing so, the Respondent says that it has paid bonuses to only 13 of 1,593 employees, further confirms that it never intended to pay bonuses to the generality of its employees.

(6) There is also no evidence that employees expected to be paid bonuses. One employee has said to HMRC: "I have no understanding why they were doing bonuses. When I asked them about the bonuses no one actually explained it to me besides the fact that that's how they do their wage slips and it's reflective of the income earned on hours worked and is compliant."

61. The Respondent never intended to obtain repayment from the employees of the amounts identified as "ILO bonus", and the employees never expected to repay these amounts.

(1) Although the Respondent claims that each payment of "ILO bonus" was money lent by the Respondent to the employee pursuant to the loan agreement, there is no evidence that the Respondent ever issued any demand to an employee for repayment of any loan (see paragraph 10(2)(b) above), and the Respondent does not specifically allege that this ever occurred. The only instances of (partial) repayment of loans that the Respondent expressly identifies are the instances where bonuses are said to have been paid (see paragraph 60(2)-(4) above). There is no evidence of any instance where an employee or former employee transferred funds to the Respondent by way of loan repayment.

(2) In an e-mail to one of its employees dated 28 December 2018, the Respondent's accountant manager stated that "PAYE would only become necessary if directors decided to write off a loan, however they have no intention of writing-off any employment loans you may have with IPS Progression Ltd".

(3) It is unlikely that 1,593 employees would have been willing to agree to such loans if they had been genuine loans.

(a) The employees would have thereby placed themselves at considerable legal risk.

(i) The loan agreements expressly stipulated that the employee was required to repay the principal amount, plus interest, within 60 days of the Respondent demanding repayment. The bonus agreements provided that any bonus would be paid "at a time chosen by the Directors", meaning that any bonuses, even if they had been paid, might not have been paid before repayment of the loan was demanded.

(ii) There was no guarantee that any bonus paid would be equal to or greater than the amount of the outstanding loan and interest. The Respondent's AAG1 form dated 16 May 2022 confirms the Respondent's position that "a bonus might exceed the amount of the loan, might be less than the amount of the loan or may not be paid at

all. The loans are genuine loans and can be recalled subject to the terms of each particular loan."

(iii) The employment agreement, loan agreement and bonus agreement all contained clauses that those agreements were the whole agreement between the Respondent and the employee (see paragraph 10 above). The employees therefore would not have been entitled to rely on any other understandings or discussions that they had had with the Respondent, to the effect that the loans would only ever be required to be repaid through bonuses received.

(b) It is therefore unlikely that 1,593 employees would have been willing to agree to such loans, if they were genuine loans, unless they could be satisfied that there was a sufficiently good prospect of receiving a bonus in excess of the amount of the loan and accumulated interest. There is no basis on which they could have been so satisfied, for the reasons given in paragraph 60 above.

(4) It is also unlikely that the Respondent would have been willing to agree to such loans if they had been genuine loans of which the Respondent expected to receive repayment. The purported loans were automatically granted to all employees apparently without assessment of creditworthiness, and no regular loan repayments were taken. On the contrary, the Respondent's case is that every week further loans were automatically made to every employee through the payment of additional ILO bonus. The only security said to be taken for the loans consisted of an interest in any future bonus payments. Given that there was no intention to operate a genuine bonus scheme (paragraph 60 above), this meant in practice that there was no security. According to Mr MacGregor, many employees were with the Respondent for only short periods: some only a week and some 400 for only about 6 months. There is no evidence that the Respondent required outstanding loans to be repaid when employees left. The making of genuine loans in such circumstances would have involved taking an implausible business risk.

62. It may be doubted whether the payments identified in payslips as "ILO bonus" were loans at all. They may have been payments of earnings under the employment agreements, or payments of bonuses under the bonus agreements.

(1) The loan agreements contain a vague statement that the Respondent will lend the employee "certain monies". They contain no provisions stating how much the Respondent will lend, or when, or how this will be determined, or by what means the sums lent will be provided by the Respondent to the employee. The loan agreements do not provide that the Respondent will be entitled to add further loan amounts every week to an employee's payslip.

(2) The Respondent contends that the letters "ILO" mean "in lieu of", and that the amounts identified in payslips as "ILO bonus" were loans in lieu of a bonus until such time as a bonus was paid. However, there is no evidence that this was ever explained to employees.

(3) If the Respondent had ever demanded repayment by an employee of the total amount of ILO bonuses received plus interest, and if the employee had disputed that the amounts identified as ILO bonuses were loans, and if Respondent had sued on the claimed loan debt in the County Court, the Tribunal does not find it obvious that the court would have found in favour of the Respondent rather than the employee.

(a) Sums paid by one person to another are not loans as a matter of law, merely because one party considers that this is the case.

(b) The employment agreement did not state that the employee would receive only the national minimum wage. Rather, while providing that the employee would receive "*at least* the National Minimum Wage", it stated that pay was to be "performance related" and "calculated according to fees your Employer charges for providing your services". On payslips, the amount of the ILO bonus was included in the figure stated to be "amount available for salary". In the circumstances, a court might well have found that the ILO bonus payments were in fact the part of the employee's earnings under the employment agreement that exceeded the national minimum wage.

(c) Given that the payments were described in payslips as "ILO bonus", without any explanation of what "ILO" meant, a court might also have found that these were payments of bonus under the bonus agreement.

(d) The accountants of one of the employees wrote a letter to HMRC on 26 November 2018, stating that they did not know what the ILO bonus was, but accepting that it was on its face "other income".

63. Whether the ILO bonus was in law a loan, or a payment of earnings or of bonus, the practical effect of the way that the Respondent provided its services is as follows. The generality of employees received, tax-free, a part of the amount that end users had paid for their personal services: the ILO bonus was not taxed at the time it was paid, and for the generality of employees it was also not taxed at any later time because no bonus was ever intended to be paid, and the ILO bonus itself was never intended to be repaid.

64. The inference to be drawn from all of the findings above is that the method by which the Respondent provided its services, involving a loan agreement and bonus agreement, and the identification of part of the payments to employees as "ILO bonus" rather than as "salary", served no purpose other than to provide a justification (whether or not valid or effective in law) for not paying tax on part of the employees' earnings.

REASONS FOR DECISION

65. HMRC have the burden of proving that the conditions for a penalty are satisfied (compare *Hyrax Resourcing Limited v Revenue & Customs* [2022] UKFTT 218 (TC) ("***Hyrax* No 2**") at [150]).

66. The Tribunal applies the legislation as in force on the date on which the Respondent first became aware of any transaction said to form part of notifiable arrangements (see paragraphs 66 above and 70(2) below, and compare *Revenue & Customs v Curzon Capital Limited* [2019] UKFTT 63 (TC), [2019] SFTD 506 ("***Curzon***") at [46]-[47]; *Revenue & Customs v Premiere Picture Ltd* [2021] UKFTT 58 (TC), [2021] SFTD 977 at [12]).

67. The manner in which the Respondent's services were provided, as described in paragraphs 8-11 and 60-64 above, constituted "arrangements" for purposes of Part 7 FA 2004.

(1) "Arrangements" in this context include "any scheme, transaction or series of transactions" (s 318 FA 2004).

(2) The words "transaction or series of transactions" indicate that there need not be a series of transactions; a single transaction could suffice.

(3) The combination of a number of transactions was integral to the way that the Respondent provided its services:

(a) the Respondent entered into an employment agreement, loan agreement, and bonus agreement with each employee (this alone constituted three transactions);

(b) the Respondent received payments from end users;

(c) the Respondent issued payslips dividing each payment (following deduction of its own 15%) into the different elements of salary, rolled-up holiday pay and ILO bonus, with deductions of tax and National Insurance on the first two elements only;

(d) the respondent paid the deducted PAYE tax and National Insurance to HMRC and the balance to the employee.

(4) Although a letter to HMRC from the Respondent's consultants dated 11 September 2018 denies the existence of a "scheme", one of the Respondent's witnesses referred to the Respondent's services as a "scheme" (Mr MacGregor, T D2, p 36 lines 10-12, p 39 lines 3-4, p 49 lines 21-23, p 50 lines 19 and 24, p 96 line 5; T D3, p 9 lines 12-13), and as "arrangements" (T D2, p 49 lines 22-23). An e-mail from the Respondent's consultants to the Respondent's compliance manager dated 20 December 2017 also says that in the Respondent's case, "the scheme … was designed in house".

68. The arrangements were "notifiable arrangements" within the meaning of s 306(1) FA 2004. This is so, regardless of whether the payments identified as "ILO bonus" were in reality loans made under the loan agreements (see paragraphs 33(1) and 62(2) above), or payments of salary under the employment agreements, or bonus payments under the bonus agreements (see paragraph 62 above).

(1) The element of the definition in s 306(1)(a) FA 2004 is satisfied because the arrangements fell within Description 5 (or "Hallmark 5") prescribed in regulation 10 TASPDAR (Standardised tax products).

(a) The elements of regulation 10(2) are satisfied. An informed observer (having studied the arrangements and having regard to all relevant circumstances) could reasonably be expected to conclude as follows.

(i) The arrangements had standardised, or substantially standardised, documentation. The element in the chapeau to regulation 10(2)(a) is therefore satisfied. It is accepted by the Respondent that the documentation in relation to the generality of the employees was materially identical, and included an employment agreement, loan agreement and bonus agreement in a form similar to the examples in evidence, and payslips identifying amounts equivalent to the national minimum wage as "salary paid", and other amounts as "ILO bonus"(paragraphs 10-12 above).

(ii) The purpose of the standardised documentation was to enable the Respondent (and each of the employees) to implement the same arrangements in relation to each of the employees, of which there were ultimately 1,593. The element in regulation 10(2)(a)(i) is therefore satisfied.

(iii) The form of the standardised documentation was determined by the Respondent. The element in regulation 10(2)(a)(ii) is therefore satisfied. The Respondent decided for itself the model or scheme of

the services that it would offer, and decided for itself which documentation it would use in providing its services. It is immaterial whether or not the Respondent itself designed the scheme or drafted the documentation. It is said by the Respondent that participation in the bonus scheme was voluntary, but the evidence suggests that in practice all employees signed the bonus agreement, as well as the loan agreement and the employment agreement. The Tribunal is satisfied on the evidence that the Respondent offered particular services according to a particular model, and that all employees using its services (rather than the services of another company in the same group, or of a competitor company) had to sign all three agreements. The Respondent therefore determined for itself what documentation in what form would be used for the arrangements.

(iv) The substance of the standardised documentation did not need to be tailored, to any material extent, to enable a person to implement the arrangements. The element in regulation 10(2)(a)(iii) is therefore satisfied. For the standardised documentation to be used in relation to any employee, it was necessary only to fill in the personal details of the individual employee, and to sign it. The Respondent accepts that materially identical documentation was used in relation to all employees. There is no evidence of bespoke changes being made to the documentation for any of the employees.

(v) In order to implement the arrangements, employees had to enter into a specific transaction or series of transactions. The element in regulation 10(2)(b) is therefore satisfied. Each employee had to enter into the employment agreement, loan agreement and bonus agreement. That amounted to three transactions. The Tribunal does not accept that regulation 10(2)(b) requires there to be a series of linear transactions; its wording indicates that a single transaction would suffice.

(vi) The transaction or series of transactions was standardised, or substantially standardised, in form. The element in regulation 10(2)(c) is therefore satisfied. Not only were the employment agreement, loan agreement, bonus agreements and payslips in standardised form in relation to all the employees (with minor immaterial variations), but so was the methodology by which the services of the Respondent was provided (see paragraphs 8-11 above).

(vii) The main purpose of the arrangements was to enable each employee to obtain an advantage in relation to tax (see paragraphs 63-64 above). The element in regulation 10(2)(d) is therefore satisfied.

(A) If payments of ILO bonus were loans, there was a tax advantage. A person obtains a tax advantage where they do not pay the full amount of tax on the salary which they would otherwise have received, by entering into a scheme under which they receive an equivalent sum in an economically similar, but legally distinct, form of smaller salary together with loan amount which is not expected to be repaid (*HMRC v Hyrax Resourcing Ltd and others* [2019] UKFTT 175 at [197]-[200]; *AML Tax (UK) Limited v Revenue & Customs* [2022] UKFTT 174 (TC) at [105]-[107]).

(B) If payments of ILO bonus were in fact payments of salary under the employment agreements, or payments of bonus under the bonus agreements (see paragraph 62 above), there was a tax advantage. A person obtains a tax advantage where they do not pay the full amount of tax on the salary or bonus which they have received, by entering into a scheme under which PAYE tax is not deducted by the employer in respect of part of the salary or in respect of the bonus, and the untaxed element is described in the payslip in a way that obscures this fact. An "advantage" need not necessarily be a reduction of the amount of tax that a person is required by law to pay. An "advantage" (paragraph 41 above) can include an arrangement under which a person in fact pays less than the amount of tax that they *are* required by law to pay, and under which the underpayment is obscured. It is immaterial whether the arrangements succeed in having the effect in law that less tax is payable than would otherwise have been the case (*Root2tax Ltd and Root3tax Ltd v Revenue and Customs* [2017] UKFTT 696 (TC) at [45]).

(b) The elements of regulation 10(1) are also satisfied. The Respondent was a promoter in relation to the arrangements (see paragraph 69 below). The Respondent made the arrangements available for implementation by 1,593 employees by providing individual employees with the necessary documentation, and by itself being party to the employment agreements, loan agreements and bonus agreements.

The Tribunal having found that the arrangements fall within Description 5, it is unnecessary to determine whether they also fall within any of the other Descriptions prescribed in TASPDAR (compare *Revenue & Customs v Smartpay Limited* [2022] UKFTT 146 (TC) ("***Smartpay***") at [26]).

(2) The element of the definition in s 306(1)(b) FA 2004 is satisfied because the arrangements enabled, or might have been expected to enable, the employees to obtain an advantage in relation to income tax and National Insurance (see (1)(a)(vii) above), and it has not been disputed that income tax and National Insurance are taxes prescribed in relation to arrangements of Description 5.

(3) The element of the definition in s 306(1)(c) FA 2004 is satisfied because the arrangements 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 tax advantage (see paragraphs 60-64 above, especially paragraphs 63-64).

69. The Respondent was a "promoter" in relation to those notifiable arrangements within the meaning of FA 2004 s 307(1)(b).

(1) In the 2016-17 and 2017-18 tax years, the Respondent's business was a "relevant business" because it involved "the provision to other persons of services relating to taxation" within the meaning s 307(2)(a) FA 2004.

(a) The services provided by the Respondent to which this appeal relates were its only business at the time (paragraph 13 above).

(b) The practical effect and purpose of the services provided by the Respondent was that the generality of employees received part of their otherwise taxable earnings tax-free, and the method by which the Respondent provided its

services served no purpose other than to provide a justification for not paying tax on the amounts identified as "ILO bonus" (paragraphs 60-64 above, especially paragraphs 63-64). For that reason alone the services related to taxation for purposes of s 307(2)(a) FA 2004 (*Smartpay* at [36] and [39]; *Curzon* at [91]).

(c) Independently of this, the Tribunal finds that a business of providing PAYE payroll services of the kind provided by the Respondent is a business "relating to taxation" within the meaning s 307(2)(a) FA 2004. The services provided by the Respondent were more than tangentially related to taxation (compare *Smartpay* at [36]). According to the Respondent's promotional leaflet, the key value of its services was said to include: "All tax and National Insurance paid, without the need for an accountant", and "One tax code, for multiple contracts which avoids unnecessary over payment of income tax".

(2) In the course of that business, the Respondent was to an extent (and indeed, to a very large extent) responsible for the organisation and/or management of the arrangements (see paragraphs 8-11 above).

70. The Respondent therefore had an obligation under s 308(3) FA 2004 to provide HMRC with prescribed information relating to those arrangements by 18 April 2016 (not 14 April 2016 as contended for by HMRC).

(1) Section 308(3) FA 2004 required the prescribed information to be provided to HMRC within the prescribed period after the date on which the Respondent first became aware of any transaction forming part of the notifiable arrangements.

(2) The evidence includes documentation relating to one of the employees (MA) which includes an employment agreement, loan agreement and bonus agreement, all of which are signed and dated by the Respondent with the date of 7 April 2016, but are not signed by the employee. It appears that these forms, already signed and dated by the Respondent, were sent to the employee under cover of a letter from the Respondent of the same date, asking the employee to sign and return them. It may be that it took a day or two for this letter and accompanying documents to reach the employee, and it is unclear exactly when the employee signed them after receiving them. There is a payslip issued by the Respondent for this employee dated 29 April 2016, showing that the employee worked from 11 to 14 April 2016. It is possible that the employee might in fact have signed the agreements only on 11 April 2016, the date on which they first undertook work pursuant to them. Given that the employee worked on that date, the Tribunal is satisfied that the Respondent would have been aware by that date of the employee's acceptance of the three agreements. The evidence does not establish that the Respondent would have been so aware on any earlier date.

(3) Pursuant to regulations 2(3) and 5(5) TASIR, the prescribed period thus began on Tuesday 12 April 2016 and ended on Monday 18 April 2016 (not 14 April 2016 as contended for by HMRC). The first day of the initial period (that is, the first day on which the Respondent was liable to a daily penalty of £600 absent a reasonable excuse) was thus Tuesday 19 April 2016. (These proceedings were brought by HMRC on 14 April 2022, which was within the time limit in s 103(4) TMA.)

(4) The word "aware" in s 308(3) FA 2004 refers to awareness of the *fact* of a transaction, and awareness of the *facts* of the arrangements that are notifiable arrangements, and awareness of the *fact* that the former forms part of the latter. The obligation under s 308(3) will arise regardless of whether or not there is an

awareness that, as a matter of *law*, the arrangements of which the transaction forms part are notifiable arrangements within the meaning of s 306(1) FA 2004. The Tribunal rejects the Respondent's argument that the obligation under s 308(3) FA 2004 arose only when the Respondent became aware that the arrangements were notifiable.

71. The Respondent complied with its obligation under s 308(3) FA 2004 only on 25 April 2022, when it filed the first form AAG1.

(1) According to the wording of s 308(3) FA 2004, in order to comply with that provision, the promoter need do no more than provide HMRC with the "prescribed information".

(2) At the hearing, counsel for HMRC accepted that the first AAG1 submitted on 25 April 2022 contained all of the material information found in the second AAG1 submitted on 16 May 2022, which HMRC accepted as compliance with s 308(3) FA 2004. The only material difference between the two is that the first AAG1 contained additional language to the effect that it was being filed on a protective basis (see paragraphs 24-26 above).

(3) Counsel for HMRC identified no legislative provision or case law to the effect that a disclosure that would otherwise satisfy the duty in s 308(3) FA 2004 will not do so if such additional language is added. There is no reason in principle why this should be the case.

(4) The Tribunal therefore does not accept the HMRC contention that the first form AAG1 submitted on 25 April 2022 did not constitute compliance with s 308(3) FA 2004 on the ground that it stated that it was filed on a protective basis.

(5) HMRC went even further in its argument, contending also that the filing of the second AAG1 without the additional language amounted to a concession by the Respondent that the arrangements were notifiable under s 308(3) FA 2004.

(6) The Tribunal also cannot accept this argument. It would be unjust and oppressive if it were correct. Situations may arise where there is disagreement between HMRC and a claimed promoter as to whether or not s 308(3) FA 2004 requires disclosure. The claimed promoter should not be faced with a choice of either immediately irrevocably conceding to HMRC that disclosure is required, or of risking continuing £600 daily penalties while seeking resolution of the disagreement. Disclosure on a protective basis should be possible. Indeed, even if disclosure is made without reservation, the person making the disclosure should not be precluded from arguing subsequently that the DOTAS legislation did not in fact require the disclosure that was made.

72. The Respondent does not have a reasonable excuse for its failure to comply with this obligation between 19 April 2016 and 24 April 2022.

(1) For purposes of s 118(2) TMA, a person cannot have a reasonable excuse for failing to do something required to be done within a time limit, if the circumstances relied upon did not exist on or before the date on which the time limit expired.

(a) Thus, if the Respondent did not have a reasonable excuse by 18 April 2016, events occurring thereafter therefore cannot retrospectively provide a reasonable excuse for the failure to have provided the prescribed information by that date.

(b) However, events occurring after expiry of the deadline may nonetheless be taken into account in determining the quantum of the penalty (as to which see paragraph 76 below).

(2) The Respondent does not have a reasonable excuse on the ground that it obtained specialist third party professional advice that disclosure under DOTAS was not required.

(a) The only third party professional advice said to have been obtained by the Respondent prior to 19 April 2016 was an advice from a consultancy firm in 2015. According to the witness statements of Mr Hall and Mr Champion, these consultants held themselves out as experts and were clear that DOTAS did not apply to the arrangements.

(b) This advice was not in evidence. The Respondent claims no longer to be able to locate it. An e-mail exchange in June 2015 between the Respondent's compliance manager and the consultants indicates that the former sent the consultants copies of a draft employment agreement and bonus agreement, asking the consultants to review these. According to Mr MacGregor's oral evidence, that e-mail went on to state that the Respondent intended to give employees a loan against a future bonus, and requested an opinion from the consultants on the question whether the attached documentation "does what we intend". The evidence does not suggest that the consultants were asked to advise on whether what was proposed would need to be disclosed under DOTAS. The e-mail chain ends with the consultants offering to provide an advice within a stated time for a stated sum. There is no further evidence that the advice was ever provided.

(c) The burden of proof is on the Respondent to establish the existence of circumstances relied upon to establish a reasonable excuse. The evidence does not establish on a balance of probability that the consultants gave the advice in question, nor that the advice was clear that DOTAS did not apply, nor that it would have been reasonable in all the circumstances for the Respondent to have relied on that advice. The advice itself is not in evidence. Mr MacGregor said in his evidence that he could not be certain that it was ever received (T D2, page 34 line 24 to page 35 line 15, page 36 lines 9-12). Mr Champion when asked if he had seen a copy of the advice said that it would have been the compliance manager who had dealt with this. Mr Champion also accepted that the e-mail did not appear to request advice on DOTAS.

(3) None of the other matters relied on by the Respondent as providing a reasonable excuse had occurred by 18 April 2016.

73. The Respondent is therefore liable to a £600 penalty for each day from 19 April 2016 to 24 April 2022, being a total of 2,197 days. The maximum penalty that the Tribunal can impose is £1,318,200 (not £1,333,200, as contended for by HMRC).

74. The Tribunal does not need to make an order under s 314A FA 2004 before proceeding to impose a penalty.

75. It is within the Tribunal's discretion to determine an amount of penalty anywhere within the range from zero to the maximum amount.

76. In determining the amount of the penalty, the Tribunal must take account of all relevant considerations (s 98C(2ZB) TMA).

(1) "[The] usual considerations which apply when the imposition of a tax penalty is in question, include[e] such matters as the reasons for non-compliance, the extent to which the position has been remedied, the gravity and duration of the non-compliance, the presence of aggravating or mitigating factors, the availability of other methods for HMRC to recover the tax at risk (most obviously by making an assessment, if necessary on a best of judgment basis), and generally the need to achieve a fair and proportionate outcome, having regard to the interests of the public purse and the general body of taxpayers as well as the circumstances of the non-compliant taxpayer himself" (*Revenue and Customs Commissioners v Tager* [2018] EWCA Civ 1727, [2018] STC 1755 ("***Tager***") at [88], [111], [112]).

(2) When determining a penalty for non-compliance with s 308(3) FA 2004, the Tribunal is required by s 98C(2ZB) TMA to have regard also to "the desirability of its being set at a level which appears appropriate for deterring the person, or other persons, from similar failures to comply on future occasions". This provision states that this is a matter to be considered, but not that this is to be the sole or overriding consideration.

(3) Section 98C(2ZB) TMA states that the Tribunal shall consider "in particular" the amount of fees received by the promoter in connection with the notifiable arrangements. However, it states that this is to be considered "in particular" *as an aspect of the matter referred to in the immediately preceding sub-paragraph*. The words "in particular" do not indicate that the matter referred to in the immediately preceding sub-paragraph is itself to be given greater weight than would otherwise be the case in the overall balancing exercise.

(4) Section 98C(2ZB) TMA does not state that a penalty for a failure to comply with s 308(3) FA 2004 should be set at a level equivalent to the total amount of fees received by the promoter in connection with the notifiable arrangements, subject to the maximum of £600 per day. If the legislation had intended this, it could have said so. Section 98C(2ZB) TMA states merely that the fees received by the promoter in connection with the notifiable arrangements is a particular consideration in determining what level of penalty will deter similar failures to comply in future. It reflects the obvious reality that a relatively small penalty is unlikely to deter future non-compliance if a promoter is receiving very large amounts of fees in connection with the notifiable arrangements. However, this provision does not suggest that promoters will necessarily be undeterred by any penalty that is less than the total amount of the fees that they have received.

(5) There could for instance be cases where a promoter receives very large fees, from which it makes only a very small profit due to very high overheads. In such a case the Tribunal would be entitled to take into account that a penalty at a given level will have a larger deterrent effect than if the whole of the fees represented profit. The fact that s 98C(2ZB) TMA requires the Tribunal to consider the amount of the fees received by the promoter does not mean that it precludes the Tribunal from also taking into account the amount of profit made from those fees.

(6) Section 98C(2ZC) TMA empowers the Tribunal to impose a penalty in excess of the normal maximum, up to an overall maximum of £1 million, in cases where the maximum penalty "appears inappropriately low after taking account of [all relevant] considerations". This provision does not state that the penalty must or should ordinarily be increased beyond the normal maximum by reason alone, for

instance, that the normal maximum penalty would be less than the amount of the fees received by the promoter.

(7) Section 98C(2ZC) TMA still reflects the general consideration that penalties must always remain proportionate (see also *Lindsay v Customs and Excise* [2002] EWCA Civ 267 and *Le Roux Zeeman & Ors v HM Revenue and Customs* [2020] EWHC 794 at [73]-[97]). Section 98C(2ZC) TMA is reserved for the most serious cases, where the normal £600 daily penalties would be inadequate even if imposed at the maximum level. Even in such cases, this provision still does not allow for unlimited penalties. It simply sets a higher maximum. Contrary to what HMRC suggest, it is not possible to draw from this provision a simple proposition that "a penalty in seven figures is not unacceptable to Parliament". On the other hand, it is also not possible to draw from this provision a proposition that all penalties for non-compliance with s 308(3) FA 2004 should be capped at £1 million, even if the normal maximum £600 daily penalties would add up to a total maximum of more than £1 million. If the legislation had intended this, it could have said so.

(8) The penalty under s 98C TMA only penalises the failure to provide HMRC with prescribed information as required by s 308(3) FA 2004. It does not penalise any tax avoidance as such, and does not as such penalise any other non-compliance with tax law, such as a failure to deduct correct amounts of PAYE and National Insurance from payments to employees. The penalty is not intended to be a proxy for the recovery of any unpaid tax (*Tager* at [90], [111], [112]). However, the wider consequences of the failure to comply with s 308(3) FA 2004, if known, may nonetheless be relevant to determining the quantum of the penalty.

(9) The Tribunal's approach must simply be to determine an overall amount of penalty within the penalty range that is fair and proportionate in all the circumstances, taking account of all relevant considerations.

   (a) All else being equal, non-compliance for a given period is not of itself necessarily twice as serious as non-compliance for a period of half as much time. Deterring a person who has been non-compliant for six months from future non-compliance will not necessarily require a penalty of twice the amount required to so deter a person who has been non-compliant for three months. It would therefore be wrong in principle to determine first what would be the appropriate daily penalty in the range between zero and £600, and then simply to multiply that amount by the number of days in the period of default.

   (b) It would certainly be wrong to take as a starting point the maximum penalty, and to impose a penalty at this maximum level unless there is some reason not to do so. The Tribunal cannot accept the HMRC argument that in this case "there is no particular reason why the penalty should be less than the maximum allowed by the statute".

(10) For the reasons above, the Tribunal does not accept without more the HMRC argument that because the Respondent is estimated to have received fees in the region of £3.6 million in connection with the notifiable arrangements, the penalty in this case must be set at or near the maximum possible amount of some £1.3 million.

77. Comparisons with the amounts of penalties in previous cases are not helpful.

(1) Each case turns on its own facts and circumstances. Detailed comparisons of all points of similarity and dissimilarity in the circumstances of different cases would be time consuming and unproductive.

(2) It is noted, for instance, that in *Hyrax* No 2, the statutory maximum penalty was 1,791 days at £600 per day, totalling £1,074,600, and the Tribunal determined a penalty in that maximum amount. However, it cannot be assumed that the circumstances of that case were materially the same.

78. In determining the amount of the penalty, the Tribunal takes into account the following matters.

(1) The penalty range is £0 to £1,318,200.

(2) The non-compliance was not deliberate, but was more than simple carelessness.

(a) The Tribunal does not find that the default was wilful or intentional, in the sense that the Respondent positively knew that disclosure under s 308(3) FA 2004 was required, and deliberately chose not to comply with that obligation. HMRC do not go so far as to allege this.

(b) For an initial period, the non-compliance may have been careless, in the sense that the Respondent should have realised, but did not, that the arrangements might be notifiable under DOTAS. However, even in this initial period, it must be borne in mind that the Respondent was part of a group of companies that had apparently been providing PAYE payroll services since 2004. When the Respondent began to provide services according to the model that it used, resulting in less tax being paid by employees, it should have been aware of the existence and potential relevance of the DOTAS legislation.

(c) However, from 1 November 2017, the Respondent was specifically made aware of the issue of notifiability under DOTAS (paragraph 15 above). From 13 December 2018 the Respondent was aware that HMRC considered the arrangements to be notifiable under DOTAS. From the time that the Respondent was aware that there was a potential DOTAS issue, it should have realised that it needed either to make disclosure under DOTAS, or else take all appropriate steps to satisfy itself that no obligation under DOTAS applied. The steps that it took in that respect cannot be described as all appropriate steps (see paragraph 79 below). If in continuing doubt, the Respondent could have made disclosure on a protective basis, which it ultimately did, but not until 25 April 2022, years after it became aware of the issue. Even if the Respondent did not deliberately and knowingly breach s 308(3) FA 2004, its failure to comply with the obligation in this period was more than simple carelessness.

(3) The duration of the non-compliance is already reflected in the maximum amount of the penalty, which is determined according to the number of days of the period of non-compliance. There is no need to consider this again as a factor in the determination of the penalty.

(4) There is no clear evidence as to the total amounts of "ILO bonus" paid to all employees, or as to the total amounts of income tax and National Insurance contributions that would have been payable on all of those amounts of "ILO bonus" if they had been treated as earnings.

(a) It is common ground that there were 1,593 employees, but they all worked different amounts of time in different weeks, for different rates of pay, and would have been subject to different rates of tax.

(b) It appears to be common ground that the total amounts paid by the end users for the employees' services was some £24 million. From the amounts received from end users, the Respondent took 15% as its own fee, which would have left some £20,400,000 to be paid to employees. If it were assumed, for the sake of argument, that the amounts paid to employees were on average three times the national minimum wage (such that 33.3% of the £20,400,000 figure would have been treated as "salary" and a further 4% (12.07% of the 33.3%) as "rolled-up holiday pay"), some 62.7% of the £20,400,000 would have been treated as "ILO bonus", that is to say, some £12,790,800.

(c) The income tax payable on such a total amount of "ILO bonus", had it been treated as salary, would have been somewhere between around £2.5 million (if all of it had been taxable at the 20% rate) and £5.7 million (if all of it had been taxable at the 45% rate). National Insurance contributions would additionally have been payable.

(d) The Tribunal does not treat these figures as estimates, but merely as the most general indication of the kind of scale of the tax at risk. It is possible that on average employees earned significantly more or less than three times the national minimum wage. The Tribunal proceeds on the basis that there is no clear evidence of the actual amount.

(5) There is no clear evidence as to the availability of other methods for HMRC to recover any tax at risk (for instance by making assessments, if necessary on a best of judgment basis, in the case of the individual employees).

(a) The Tribunal accepts that it may be time consuming, labour intensive, expensive and disproportionate for HMRC to pursue all of the 1,593 employees for any unpaid tax (see *Hyrax* No 2 at [302]). However, no clear evidence has been presented as to whether HMRC have taken or considered any concrete steps in this respect.

(b) Arguments were not presented as to the extent to which HMRC might have avenues for pursuing the Respondent for any amounts of unpaid tax.

(6) It is desirable that the penalty be set at a level which appears appropriate for deterring the Respondent, and other persons, from similar failures to comply on future occasions, having regard in particular to the amount of fees received by the Respondent in connection with the arrangements (s 98C(2ZB) TMA).

(a) HMRC estimate, based on the Respondent's VAT returns, that the fees received by the Respondent in relation to the notifiable arrangements were approximately £3.6 million. Mr Champion expressed the general view in his evidence that the figure would have been less, but gave no specific details. Mr MacGregor accepted that the £3.6 million figure was the amount of the 15% fee taken by the Respondent, but said that employer National Insurance was taken out of this. He said that the adjusted turnover was only about £2.7 million and that the actual profits were £1.5 million to £2 million, but added that he was speaking from memory and could not give an exact figure. There is no documentary evidence of amounts of employer National Insurance

being paid out of the 15% fee, or of how much of the 15% fee represented the Respondent's overheads.

(b) The Tribunal proceeds on the basis that the fees earned after deduction of any employer National Insurance contributions were at least £2.7 million and possibly as much as £3.6 million, and that the profit was probably in the region of £2 million to £3 million. Given the imprecision of the witness evidence, the Tribunal accepts that the turnover and profits may have been at the higher ends of those ranges.

(c) No specific submissions were presented by either party on the question of the level at which a penalty would have to be set in order to have the effect in practice of deterring future non-compliance by the Respondent or another business, apart from HMRC's general submission that the penalty should be at the maximum level.

(d) Having regard to the matters in (a) and (b) above, and in the absence of any more specific evidence or submissions, the Tribunal is satisfied for purposes of these proceedings that a penalty, to have such a deterrent effect, would need in the circumstances of the present case to be at least in the high hundreds of thousands of pounds.

(7) The penalty should achieve a fair and proportionate outcome in all the circumstances.

79. Only limited mitigating weight can be given to the complexity of the DOTAS legislation and the fact that the Respondent obtained specialist third party professional advice.

(1) If in any doubt about the application of DOTAS, the Respondent should have been aware of the need to obtain professional advice before commencing to provide the services. There is no evidence that the Respondent did so (see paragraph 72(2) above).

(2) HMRC first contacted the Respondent on 1 November 2017 questioning whether the arrangements were notifiable under DOTAS (paragraph 15 above). At that point, the Respondent had already been providing the services for some 19 months. From that point, the need for the Respondent to obtain specialist advice in the event of any doubt about the matter should have been even clearer.

(3) The Respondent then sought advice from the consultants referred to in paragraph 72(2) above, who provided an email advice dated 20 December 2017. That advice was short and far from conclusive. It said that under the Respondent's scheme, there was a tax advantage, but that there was "scope to argue" that none of the Hallmarks was present and no DOTAS disclosure was required. It stated that although the matters considered in the advice "would suggest" that the scheme would not be disclosable in respect of the tax advantages arising for the employees, the benefit arising to the Respondent itself needed to be considered. It is also unclear from this short advice whether it took account of all relevant aspects of the Respondent's arrangements, including for instance the fact that the Respondent had no intention of paying bonuses to the generality of the employees. Although the consultants appear to have had an established relationship with the Respondent and may have had a knowledge of the arrangements that went beyond the details specifically mentioned in the advice, the Tribunal cannot conclude that the advice itself took into account matters other than those mentioned in it. The Tribunal is therefore not satisfied that it was reasonable for the Respondent to conclude firmly

from this advice that the Respondent's business did not involve notifiable arrangements.

(4) The Respondent subsequently obtained an opinion from a specialist tax barrister. The Tribunal was informed that the Respondent requested this opinion on 23 January 2019 and received it on 6 March 2019. By this time, the Respondent was no longer providing its services. This opinion addresses the questions whether the making of a loan by an employer to an employee or director gives rise to a liability to income tax, and whether the making of a loan by the employer to an employee or the fact that such a loan remains outstanding constitutes a notifiable arrangement for purposes of the DOTAS regime. The opinion does not address the full details of the Respondent's arrangements, such as the circumstances that loans were ostensibly to be repaid through the subsequent payment of bonuses, but that there was in fact no intention to pay bonuses to the generality of the employees, such that the loans would never be repaid. The instructions given by the Respondent to this barrister to provide this opinion are not in evidence. The Tribunal draws no negative inference from this. However, from the evidence that is before the Tribunal, having regard to the limited questions addressed in the opinion, the Tribunal is not satisfied that it was reasonable for the Respondent to conclude from this opinion that the Respondent's business did not involve notifiable arrangements.

80. Only limited mitigating weight can be given to the Respondent's engagements with HMRC.

(1) The Respondent is required by s 308(3) to provide prescribed information to HMRC whether requested by HMRC to do so or not. The Tribunal rejects the Respondent's suggestion that delay on the part of HMRC in its exchanges with the Respondent makes HMRC partly "culpable" for the delay.

(2) A letter dated 13 December 2018 from HMRC to the Respondent notes that documents requested by HMRC had not been provided, that HMRC had nonetheless obtained the relevant documentation from other sources, and that HMRC were now satisfied that there were notifiable arrangements under s 306 FA 2004. Despite this, the Respondent did not provide the prescribed information under s 308(3) FA 2004 for over a further three years.

(3) The Tribunal is not persuaded that HMRC at any point led the Respondent to believe that the arrangements were not disclosable under s 308(3) FA 2004, or that HMRC had lost interest in pursuing the matter.

(a) At no stage did HMRC ever express a view that the arrangements were not notifiable. From 13 December 2018, HMRC expressly took the view that they were notifiable. In its letter to the Respondent of that date, HMRC expressed the intention to seek an order from the Tribunal. This intention was repeated in a letter from HMRC dated 18 February 2019.

(b) The Respondent responded to the latter letter on 27 March 2019, stating that the directors of the Respondent had "reviewed the legislation in great detail", had obtained independent advice from a barrister who agreed with the directors, and remained of the view that nothing was notifiable under DOTAS. (This letter is referring to the barrister's opinion at paragraph 79(4) above. Mr Champion said at the hearing that the words "reviewed the legislation in great detail" referred to the fact that a barrister's opinion had been obtained.)

(c) The next letter from HMRC was dated 1 April 2021, which again confirmed HMRC's position that the arrangements were notifiable and that HMRC intended to apply to the Tribunal for an order.

(d) The Respondent points to the fact that after its letter of 27 March 2019, it took HMRC over two years, until 1 April 2021, to communicate again. Mr MacGregor said in his evidence that because HMRC had put many tax investigations on hold during the Covid-19 pandemic, "we just felt we always had that comfort that they'd basically gone away".

(e) The Tribunal does not accept that the Respondent was entitled to feel in the circumstances that the matter had "gone away", rather than simply been put on hold for a period due to the pandemic.

(f) Although the Respondent does not expressly rely on the Covid-19 pandemic as a mitigating circumstance, the Tribunal does take into account that, but for the pandemic, events might have moved more quickly, and that this might have resulted in the Respondent's DOTAS disclosure being made sooner than it ultimately was. However, while *some* allowance may be made for this, this does not mean that the Tribunal leaves the days during the pandemic out of the penalty calculations.

81. Little mitigating weight can be given to the fact that the Respondent provided its services in only tax years 2016-17 and 2017-18.

(1) The Tribunal can take into account that although disclosure under DOTAS was not made until 25 April 2022, no further use was made of the Respondent's undisclosed arrangements after 5 April 2018.

(2) It appears that a materially identical scheme was operated by another company in the Income Plus Group after the end of the 2017-18 tax year. If so, the Tribunal can also take into account that that other company will have had its own obligation of disclosure under s 308(3) FA 2004, and will itself face liability to its own penalties if it did not comply with that obligation.

(3) However, although the Tribunal can take (1) and (2) above into account, it can give little mitigating weight to these matters. The Tribunal cannot assume that after 5 April 2018, it no longer made any practical difference whether the scheme was disclosed to HMRC or not. The obligation under s 308(3) FA 2004 continued to apply, notwithstanding that the scheme was no longer in operation.

82. Upon an overall weighing of all relevant considerations, the Tribunal finds that the appropriate amount of the penalty is £900,000.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

Release date: 12th FEBRUARY 2024