Neutral Citation: [2025] UKFTT 206 (TC)

Case Number: TC09429

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal reference: TC/2021/02692

DOTAS – application under sections 306A and 314A Finance Act 2004 whether arrangements notifiable – whether respondent a 'promoter'

Heard on: 12-16 June 2023
Judgment date: 12 February 2025

Before

TRIBUNAL JUDGE GERAINT WILLIAMS
JANE SHILLAKER

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Applicants

and

ASSET HOUSE PICCADILLY 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 Respondents: Rory Mullan KC of counsel, instructed by Griffin Law.

DECISION

INTRODUCTION

1. This is an application ("the Application") by the Applicants, ("HMRC"), seeking an order under section 314A (or in the alternative under section 306A) of part 7 the Finance Act 2004 ("FA 2004") that the arrangements summarised at [6] below are, or are to be treated as, "notifiable arrangements" within the meaning of s306(1) FA 2004. Unless stated otherwise, all legislative references are to FA 2004.

2. In summary, under the relevant provisions:

(1) HMRC may apply to the Tribunal for an order that arrangements are notifiable or are to be treated as notifiable (under s314A(1) and s306A(1) respectively) in each case provided that the application must specify the arrangements in respect of which the order is sought and the promoter of the arrangements (as a promoter is defined in s307) (under s314A(2) and s306A(2) respectively). In their application, HMRC sought an order in respect of the arrangements set out at [6] below and specified the Respondents, ("AHP") to be the promotor.

(2) On an application to the Tribunal made under s314A, the Tribunal may make the requested order only if satisfied that s306(1)(a) to (c) apply to the relevant arrangements (under s314A(3)).

(3) On an application to the Tribunal under s306A, the Tribunal may make the requested order only if satisfied that HMRC "(a) have taken all reasonable steps to establish whether the proposal or arrangements are notifiable, and (b) have reasonable grounds for suspecting that the proposal or arrangements may be notifiable" (under s306A(3)).

PRELIMINARY ISSUE

3. On 2 May 2023, HMRC notified AHP that they intended to rely upon further documents for the purpose of challenging the credibility of AHP's witness, Ms Helen Matthews ("HM"). Following AHP's objection, HMRC made an application on 7 June 2023 for permission to serve further documents late and rely upon an enclosed unagreed Supplementary Bundle. The application was considered at the start of the hearing. The additional documents that HMRC sought to rely upon were documents signed by HM which confirmed that, whilst she was a director of AHP, she was a user of arrangements similar to those which are the subject of the application before the Tribunal. The documents were obtained by HMRC for the purposes of checking HM's tax position, it was submitted that it was not an abuse of process to use that lawfully obtained material to challenge HM's credibility in these proceedings. HMRC further submitted that the Tribunal should exercise its discretion and allow the additional evidence to be served (*Mobile Export 365 Limited and another v HMRC* [2007] EWHC 1737 Ch at [20]) and that the tests for allowing a party to do something after a time limit has passed, as set out in *William Martland v HMRC* [2018] UKUT 178 (TCC) at [40], are met.

4. Mr Mullan's objection to the inclusion of the documents (bar documents 1a and 1b which had been excluded from the hearing bundle by oversight) relied upon the lateness of the application (four days before the hearing) and prejudice to AHP and the concern that HMRC were abusing their statutory powers to obtain documents for use in this hearing rather than making an application for disclosure during the course of these proceedings.

5. We refused the application. In our judgment, the application for permission to serve further documents late was simply made too late with no credible explanation for the lateness of the application. The Tribunal Directions dated 17 November 2021 ("the Directions")

provided that lists of documents relied upon by the parties be served not later than 29 December 2021. The documents that HMRC sought to rely upon were available to HMRC on 29 December 2021 having been provided to HMRC in 2019. HM's witness statement is dated 16 February 2022 and, as required by Direction 2 of the Directions (as amended) was required to be served not later than 26 January 2022. Having considered the tests set out in *Denton v White* [2014] EWCA Civ 906, the delay in making the application is serious delay, HMRC had been in possession of HM's witness statement for over a year before it indicated it wished to rely upon additional documents. During that period it had ample time in which to consider HM's evidence and, if thought appropriate, obtain advice from counsel. We do not accept that any credible reason for the serious delay was advanced by HMRC and in terms of the balancing exercise we concluded that the balance of prejudice is weighted in favour of not allowing the late evidence to be admitted as it was still open to HMRC to cross-examine HM on her evidence. Having refused HMRC's application on the basis of serious delay we did not consider Mr Mullan's alternative "abuse of process" argument.

ARRANGEMENTS

6. HMRC identify the arrangements as a "corporate remuneration trust scheme" which allows directors to extract profits from a company without incurring a charge to income tax. The directors received a reduced salary and, in place of the amount of the reduction, were granted loans via a trust. The arrangements specified by HMRC in respect of which they seek an order under Part 7 are:

(1) company participants in the structure ("participants") enter into a deed of adherence with the WUT No 1 Ltd Remuneration Trust ("WRT"). Party to the deed of adherence" are WUT No 1 Ltd ("WT1") and Bay Trust International Limited (resident in Belize) ("BTIL");

(2) the participants makes contributions on a weekly, monthly, annual or other periodic basis, to WRT. The participants' board minutes record the contributions as part of the economic cost of the company earning its profits for that period and the participants claim a deduction from their profits for corporation tax purposes in the amount that they contributed to the WRT;

(3) a personal management company" ("PMC") is incorporated by the participants for the purposes of participation in the arrangements. The PMC is owned by the director(s) of the participants in the scheme;

(4) UTW Holdings Limited ("UTW"), a Belize registered company, appoints the PMC as nominee of BTIL by entering into a fiduciary services agreement;

(5) the PMC enters into a loan agreement with a director(s) of the PMC.

(6) the participants are charged a fee of 10% of each contribution to the WRT (together with additional fees charged by AHP). It appears that the loans provided by the PMC to the director(s) match the amount of each contribution minus the 10% fees.

APPLICABLE LAW

7. HMRC's case is that AHP began promoting the arrangements in or around February 2011 (the WRT was established by deed of trust executed on 21 February 2011) and continued until 2015/16 tax year. Accordingly the applicable relevant legislation is the legislation in force between February 2011 and April 2016. AHP did not disagree. The relevant statutory provisions in FA 2004 (unless otherwise stated) are as follows:

> "314A. Order to disclose
>
> (1) HMRC may apply to the tribunal for an order that—

(a) a proposal is notifiable, or

(b) arrangements are notifiable.

(2) An application must specify—

(a) the proposal or arrangements in respect of which the order is sought, and

(b) the promoter.

(3) On an application the tribunal may make the order only if satisfied that section 306(1)(a) to (c) applies to the relevant arrangements.

306A. Doubt as to notifiability

(1) HMRC may apply to the tribunal for an order that—

(a) a proposal is to be treated as notifiable, or

(b) arrangements are to be treated as notifiable.

(2) An application must specify—

(a) the proposal or arrangements in respect of which the order is sought, and

(b) the promoter.

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

that HMRC—

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

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

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

(5) Grounds for suspicion under subsection (3)(b) may include—

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

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

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

(6) Where an order is made under this section in respect of a proposal or arrangements, the prescribed period for the purposes of section 308(1) or (3) in so far as it applies by virtue of the order—

(a) shall begin after a date prescribed for the purpose, and

(b) may be of a different length than the prescribed period for the purpose of other applications of section 308(1) or (3).

(7) An order under this section in relation to a proposal or arrangements is without prejudice to the possible application of section 308, other than by virtue of this section, to the proposal or arrangements."

8. For both applications it is necessary to identify the arrangements and the Application can only succeed if HMRC satisfy the Tribunal that AHP is a "promoter" as defined in relation to the identified arrangements. For the application to succeed under s314A, HMRC must also satisfy the Tribunal that the arrangements identified are "notifiable" as defined below.

"306 Meaning of "notifiable arrangements" and "notifiable proposal"

(1) In this Part "notifiable arrangements" means any arrangements which -

(a) fall within any description prescribed by the Treasury by regulations,

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

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

(2) In this Part "notifiable proposal" means a proposal for arrangements which, if entered into, would be notifiable arrangements (whether the proposal relates to a particular person or to any person who may seek to take advantage of it). …

307 Meaning of "promoter"

(1) For the purposes of this Part a person is a promoter -

(a) in relation to a notifiable proposal, if, in the course of a relevant business, the person ("P") -

(i) is to any extent responsible for the design of the proposed arrangements,

(ii) makes a firm approach to another person ("C") in relation to the notifiable proposal with a view to P making the notifiable proposal available for implementation by C or any other person, or

(iii) makes the notifiable proposal available for implementation by other persons, and

(b) in relation to notifiable arrangements, if he is by virtue of paragraph (a)(ii) or (iii) a promoter in relation to a notifiable proposal which is implemented by those arrangements or if, in the course of a relevant business, he is to any extent responsible for –

(i) the design of the arrangements, or

(ii) the organisation or management of the arrangements.

…

(2) In this section "relevant business" means any trade, profession or business which -

(a) involves the provision to other persons of services relating to taxation, or

…

(6) In the application of this Part to a proposal or arrangements which are not notifiable, a reference to a promotor or introducer is a reference to a person who would be a promoter or introducer under subsections (1) to (5) if the proposal or arrangements were notifiable.

308 Duties of promoter

(1) A person who is a promoter in relation to a notifiable proposal must, within the prescribed period after the relevant date, provide the Board with prescribed information relating to the notifiable proposal.

…

(3) 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 …

318 Interpretation of Part 7

(1) In this Part—

"advantage", in relation to any tax, means—

(a) relief or increased relief from, or repayment or increased repayment of, that tax, or the avoidance or reduction of a charge to that tax or an assessment to that tax or the avoidance of a possible assessment to that tax,

(b) the deferral of any payment of tax or the advancement of any repayment of tax, or

(c) the avoidance of any obligation to deduct or account for any tax; …

"corporation tax" includes any amount which, by virtue of any of the provisions mentioned in paragraph 1 of Schedule 18 to the Finance Act 1998 (c. 36) (company tax returns, assessments and related matters) is assessable and chargeable as if it were corporation tax;…

"tax" means—

(a) income tax,

(b) capital gains tax,

(c) corporation tax, …"

318 Interpretation of Part 7

(1) In this Part—

"advantage", in relation to any tax, means—

(a) relief or increased relief from, or repayment or increased repayment of, that tax, or the avoidance or reduction of a charge to that tax or an assessment to that tax or the avoidance of a possible assessment to that tax,

(b) the deferral of any payment of tax or the advancement of any repayment of tax, or

(c) the avoidance of any obligation to deduct or account for any tax"

9. Extracts from the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (S.I. 2006 No.1543) ("TASR")

"5 Prescribed descriptions of arrangements

(1) Any arrangements which fall within any description specified in a provision of these Regulations listed in paragraph (2) are prescribed for the purposes of Part 7 of the Finance Act 2004 (disclosure of tax avoidance schemes) in relation to income tax, corporation tax and capital gains tax.

(2) The provisions are—

(a) regulation 6 (description 1: Confidentiality where promotor involved);

…

(c) regulation 8 (description 3: premium fee);

…

(e) regulation 10 (description 5: standardised tax products);

…

6 Description 1: Confidentiality where promoter involved

(1) Arrangements are prescribed if they satisfy—

(a) Conditions 1 and 2; or

…

(2) The Conditions are as follows.

Condition 1

Any element of the arrangements (including the way in which the arrangements are structured) gives rise to the tax advantage expected to be obtained under the arrangements.

Condition 2

It might reasonably be expected that a promoter would wish the way in which that element of those arrangements secures a tax advantage to be kept confidential from any other promoter at any time in the period beginning with the opening date and ending with the appropriate date.

…

8 Description 3: Premium Fee

(1) Arrangements are prescribed if they are such that it might reasonably be expected that a promoter or a person connected with a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements of these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

…

(2) For the purposes of paragraph (1), and in relation to any arrangements, a "premium fee" is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises, and which is—

(a) to a significant extent attributable to that tax advantage, or

(b) to any extent contingent upon the obtaining of that tax advantage as a matter of law.

…

10 Description 5: standardised tax products

(1) Arrangements are prescribed if the arrangements are a standardised tax product.

…

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

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

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

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

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

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

(3) For the purpose of paragraph (1) arrangements are a tax product if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage.

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

EVIDENCE AND FACTS

Evidence of Ms Fracciolla

10. HMRC relied upon the evidence of Ms Donna Fracciolla ("DF"), a Tax Avoidance Investigator in the Counter Avoidance Directorate, in support of the Application. DF had worked at HMRC for 35 years in various roles. DF's brief witness statement dated 23 September 2021 set out the information relied upon to demonstrate that the arrangements worked as set out at [6] above. The information had been obtained from four users of the arrangements whose tax returns HMRC had enquired into. DF set out the following in her witness statement :

(1) The arrangements were known to HMRC as Corporate Remuneration Trusts ("CRT"), remuneration trusts ("RT") are currently "one of the highest profile types of tax avoidance schemes that HMRC investigate". In May 2011, a "new form RT" scheme was referred to in a document "Instructions to Minerva introducers" in which Baxendale Walker LLP stated "We now have the only working, tax effective arrangement which is outside FA2011".

(2) Various Spotlight articles (HMRC describe some specific tax avoidance schemes in the Spotlights section of its anti-avoidance pages) have referred to disguised remuneration, including schemes involving trusts. It is suspected that the RT arrangements relevant to the current application are, in particular, similar to those arrangements discussed in "Remuneration trust: tax avoidance using loans or fiduciary receipts" (Spotlight 51 published on 10 May 2019). The view expressed in Spotlight 51 was that "the claims made by scheme promoters about the tax savings are not credible or genuine".

(3) Reference was made to the following background. AHP was incorporated on 12 September 1998 (previously named Westwood Trustees Limited until 15 September 2016). WUT1 was incorporated on 7 January 2011. WUT1 on incorporation had the same shareholders as AHP: Collette Chiesa ("CC") and John Chiesa ("JC"). The current directors and shareholders of both companies are currently HM and Lisa Marie Christie ("LC"). WUT1 entered a Trust Deed with a company based in Belize to create the WRT on 21 February 2011.

(4) The arrangements were used in the tax year 2011/12 and continued until at least 2015/16. HMRC are aware that there are many users of the CRT arrangements with significant tax at risk. AHP are one of a number of key players involved in promoting the CRT arrangements.

(5) Tax enquiries were opened into the tax returns of companies identified as users of the CRT arrangements. The responses received to enquiries were substantially the same and appeared to be tailored to the user only in terms of the amounts of payments involved. DF reviewed the enquiry responses for four user companies:

(a) Angels Alternative Assets Limited ("AAA"),

(b) Jantex UK Ltd ("Jantex");

(c) Scrimshaw Wealth Management Limited ("SWM"); and

(d) Strategic Branding Limited ("SBL").

(6) DF stated that there was "a considerable level of correspondence, issued to the users and various contracts, trust deeds have been obtained and completed documents which constitute steps required to implement the [CRT] arrangements." Through the various responses to its enquiries, HMRC obtained copies of the following exhibited documents:

(a) Trust Deed

(b) Deed of Adherence

(c) Finance Agreements and Fiduciary Receipt Agreements

(d) Deed of amendment

(7) DF reviewed the documents listed above and formed the view that:

(a) the arrangements may have been notifiable arrangements as that term is used in the Act;

(b) the Respondent may have been a promoter of the arrangements, as that term is used in the Act; and

(c) further information ought to be obtained from the Respondent to clarify such issues.

(8) DF issued an informal request to AHP asking for a "full explanation" as to why they had not formally notified the arrangements by reference to:

(a) the legislative tests;

(b) to provide documentary evidence to enable her to test their position; or

(c) for them to provide an explanation of their role in relation to the arrangement if they considered they were not a promoter.

(9) DF's witness statement set out the following extracts from correspondence:

"The Respondent replied on 27 March 2018, stating:

> "We can confirm that there are no persons in relation to whom Asset House Piccadilly Ltd has made a marketing contract as defined in FA2004 section 307(4B) in relation to the Remuneration Trust Arrangement. We are of the opinion that Asset House Piccadilly Ltd is not a "promoter" as that term is defined, and that the "arrangements" to which you refer are not notifiable under DOTAS.
>
> We note that under FA2004 section 313C, HMRC must have reasonable suspicion that Asset House Piccadilly Ltd is an "introducer". A reasonable suspicion must be based on some evidence. "Introducer is defined in FA2004 section (1A). One of the key components of being an introducer is that the person must have made a "marketing contract" (sic) with another person in relation to the notifiable proposal. "Marketing contract" (sic) is defined in FA2004 section 307 (4B). Section 307 (4b)(c) states "the information communicated includes an explanation of the advantage in relation to any tax that might be expected to be obtained from the proposed arrangements". This is therefore a necessary requirement of being an "introducer".
>
> "We believe that HMRC is not in possession of any evidence which could reasonably lead to the conclusion that Asset House Piccadilly Ltd has communicated to any person any information which includes an explanation of any advantage in relation to any tax that might be expected to be obtained from the Remuneration Trust arrangements".

On 27 April 2018, I replied to the Respondent reiterating the information required e.g. that they needed to provide reasons why they had not notified the arrangements as a suspected promoter of the scheme and I stated that:

> "Your response of the 27 March 2018 did not address these points and some paragraphs were a copy of your response to the s313C notice dated the 18 September 2017 and referred again to a "marketing contract" rather than a "marketing contact" as referred to in the legislation".

I also offered a meeting to discuss the arrangements.

The Respondent replied on 11 May 2018 [EC/13] stating that:

> "We thank you for the invitation extended in relation to providing further information at a meeting in relation to DOTAS though confirm that we

> would prefer to continue by way of written correspondence for the present time.
>
> We would reiterate the points previously made in relation to matters, though noting the errors that you reference and apologising for the same.
>
> The comments at the close of your letter in relation to suspicions held are noted, though it is asked that you please set our [sic] further detail on the rationale that has result in your coming to such conclusions in order that this case be assessed and interacted with as necessary”.”

Evidence of Helen Matthews

11. AHP relied upon the witness statement of HM dated 16 February 2022. HM stated that she was one of the two directors of AHP and authorised to make the witness statement. HM stated the following:

(1) She had been a director of AHP since 13 February 2012, prior to that appointment she was a PA at AHP. She had previously worked as a legal secretary and as a PA to a director of a property development company. She had no legal qualifications and her role at AHP is on administrative matters and she had gleaned only limited knowledge and understanding of the operation of the structure in question.

(2) She understood HMRC’s case to be that AHP is a “promoter” of a notifiable tax avoidance scheme and that RTs “are designed to circumvent the Disguised Remuneration legislation pursuant to Part 7A of the Income Tax (Earnings and Pensions) Act 2003 (“Part 7A”) consequently enabling users to expect to gain a tax advantage".

(3) She did not accept that past adherence by AHP clients to WRT amounts to tax avoidance. She referred to past adherence by AHP clients as, since 31 January 2019, AHP had ceased operations in this regard. She could not understand the delay in HMRC making the application.

(4) She similarly did not understand the how HMRC could contend that AHP is a “promoter” as she understood that be a "promoter”, AHP would have been or to have been responsible for the design, organisation or management of the arrangements. That is not the case as AHP did not design the arrangements and at no time has had responsibility for organisation or management of them.

(5) She referred to the Tribunal decision in *Strategic Branding Limited v HMRC* [2021] UKFTT 474 (TC) (“*SBL*”) where the Tribunal found that the arrangements (the same arrangements in issue in this appeal) had been designed by “Baxendale Walker LLP (or persons or bodies affiliated with that firm)" and the trust was "designed by Baxendale Walker". She could not understand how HMRC could now argue otherwise nor how the Tribunal could find that the arrangements were designed by AHP.

(6) She had been informed by her fellow director, LC, that AHP was first introduced to the concept of RTs in or about 2007 by Countrywide Estate Planning Limited (now known as Countrywide Tax & Trust Corporation Limited (“Countrywide”). She understood from LC that Countrywide had explained to her predecessor directors that RT’s could, in appropriate circumstances, be effective shelters of corporate wealth from one or more threats to that wealth e.g. claims by creditors, insolvency risks, divorce and taxation. She understood that if a business were to make a gift of its profits into a RT that it had had settled, that money would no longer be available to creditors, liquidators or divorcing spouses and would be trust property. While the trustees might ordinarily agree to let those whose money it once was manage (through a PMC) or even borrow some or all of that money, that money (and any returns generated on the investment of

that money) properly remained trust property. Although the business' owners or directors might have use of business' former money, that money would no longer be theirs. Those individuals would need to trust the trustees not to run off with what, until that money was gifted to the remuneration trust, was once their business' money.

(7) AHP had been provided with a copy of “The Law & Taxation of Remuneration Trusts” which Countrywide explained was written by the developer of RT technology, Paul Baxendale-Walker. AHP began introducing businesses and clients (who AHP thought would benefit from the use an asset protection structure) to Countrywide. In time, AHP was granted permission to effect direct introductions to Baxendale Walker LLP (“BWLLP”). All of the documents mentioned in HMRC’s application were designed by BWLLP, Baxendale Walker Limited, Buckingham Wealth Limited or Minerva Services Limited (collectively “BW”).

(8) When AHP began introducing clients direct to BW, a trust deed was circulated for a RT known as the "umbrella remuneration trust” (“URT”). Up to that point, clients had to settle standalone RTs. BW explained that the URT would allow for a wider array of prospective clients to have access to RT planning at a lower cost. BW circulated a draft trust deed which stated that it was designed by BWLLP. HM observed that it was in fact drafted by Robert Venables QC (“RV”) and she took the view that as “such an eminent and experienced Queen's Counsel as Mr Venables drafted the Trust Deed relating to the trust in question, and has opined as to its effectiveness and legality, who was I to disagree?”

(9) BW provided regular updates in support of the solution that it designed including delivering seminars and circulating presentations that further explained how RTs were lawful and an effective means of corporate wealth protection. At all times, AHP was required to use the standard documents designed by BW. AHP could not have assisted anyone to use the structure without the agreement of BW. Initially, all completed forms were sent to Countrywide to send to BW but when AHP introduced clients direct, the completed forms were sent to BW and, in time, instead to WRT’s trustees. AHP was not permitted to modify the RT structure in any way, it was all controlled by BW.

(10) Businesses that wished to use the asset protection strategy signed AHP’s standard form engagement which made clear that AHP did not provide any advice in relation to the planning under consideration and that its role was merely that of a passive introducer to those who would give that advice- BW. It is for this reason that BW provided a suitable professional liability statement for clients' comfort.

(11) She did not agree with HMRC’s suggestion that the principal or only motivation of clients using the RT was to avoid tax. She could not speak for each client’s motivation but at no time did AHP, when explaining the structure to prospective clients, state that the principal or only benefit was to avoid tax. AHP had gone out of their way to say to clients that if their principal or only goal was to avoid tax, the structure was not right for them. In line with AHP policy, she explained the potential benefits as corporate wealth or asset protection and used the analogy of a business owner that left sizable amounts of cash in an unlocked office desk contrasted with someone who protected their cash or corporate wealth in a safe (the RT).

(12) Her view was that, absent any tax benefits, the benefits of the structure were manifold and worth the fees as the wealth would be held by offshore trustees in a creditor protected environment where it would grow tax free.

(13) She did not accept that the structure was marketed by AHP as a tax avoidance vehicle.

(14) Commenting on HMRC's application:

(a) The Founders of WRT, JC and CC, are not shareholders in AHP;

(b) The Deed of Adherence, standard form written resolutions, standard form finance agreements and memoranda of further advances were designed/drafted by BW not AHP;

(c) Confidentiality was not a requirement when adhering to WRT, it had been referred to in clients' accounts and corporate tax returns. Discretionary beneficiaries would have been made aware of WRT and HMRC had been aware of RTs for over a decade;

(d) A fee as a percentage of the contributions may over the years have been a substantial amount but this does mean that a premium fee (as defined in the legislation) has been charged;

(e) The fee was not deducted from contributions before they are paid to WRT, the entire contribution is paid to WRT and the fee paid from trust property;

(f) It was not accepted that a tax advantage is the motivating factor behind client's use of WRT. It was accepted that the documentation is standardised but it was designed and drafted by BW, BW were the proper respondent to HMRC's application not AHP; and

(g) The steps are entirely prescribed by BW not AHP.

DOCUMENTS

12. It was accepted by HM at paragraph 26.7 of her witness statement that the documentation implementing the Arrangements was standardised. There was no substantive disagreement as to the meaning and/or effect of the documentation and steps taken.

AHP ownership and officers

13. AHP was incorporated on 12 September 1998 under incorporation number SC182931. It was previously called Westwood Trustees Limited between 12 February 1998 and 15 September 2016. Nothing turns on the change of name which followed a rebranding exercise in 2016.

14. The Companies House Annual Return (AR01) for Westwood Trustees Limited for 16 February 2011 confirms:

(1) the registered office is Westwood House, 27 Orchard Street, Motherwell;

(2) The shareholders are listed as JC and CC; and

(3) The company secretary is CC and the director's area CC, JC, Mr Kevin Healy and Mr Hugh Ross.

15. As of February 2011, JC and CC owned all the issued shares in AHP. JC and CC were, until 15 September 2016, the only directors of AHP.

Documents implementing the arrangements

16. WUT1 was incorporated on 7 January 2011 under incorporation number SC391137, its registered address was Westwood House, 27 Orchard Street. WUT1 on incorporation had the same shareholders and directors as AHP: JC and CC. JC and CC were the directors (until 17 August 2011) and shareholders (at the time of the Application) of WUT1. Currently, its

directors are Lisa Christie and HM who are the majority and minority shareholders, respectively.

WRT

17. On 21 February 2011, the WRT was established by trust deed (the "Original Trust Deed) entered into between WUT1 ("the "Founder") and BTIL (the "Trustee"). The name, address and contact details of Baxendale Walker LLP were provided on the title page.

18. The Original Trust Deed is governed by English Law. The Beneficiaries are defined as:

> "… past and present Providers and the wives husbands widows widowers children step-children and remoter issue of past and present Providers and the spouses and former spouses (whether or not remarried) of such children and remoter issue and also means … future Providers and the wives husbands widows widowers children step-children and remoter issue of future Providers and the spouses and former spouses (whether or not remarried) of such children and remoter issue and "Beneficiary" has a corresponding meaning PROVIDED THAT no Excluded Person shall be a Beneficiary …"

19. A "Provider" is defined as:

> "… (i) a person who provides or has provided or may in future provide to the Founder services or custom or products or finance (save for items of a capital nature), and (ii) a person who provides or has provided or may in future provide finance to the Trustees or any manager from time to time of the Trust Fund."

20. Schedule 2 defines Excluded Persons as:

> "1. 1 the Founder;
>
> 1.2 any person connected with the Founder;
>
> 1.3 any Participator in the Founder:
>
> 1.4 any person connected with any such Participator.
>
> 1.5 each and every person who presently or at any future time falls within the definition of "present or former employee" for the purposes of Section 143 and Schedule 24 Finance Act 2003 and section 245 Finance 2004."

21. JC and CC were named the Protectors of the WRT. By clause 9.1, the Protector (or such person as he may in writing appoint):

> "… shall with the consent in writing of the Trustees have the power at any time by deed to alter or add to all or any of the provisions of this Deed in any respect and such power shall be absolute and shall not be a fiduciary power and may be exercised prospectively or retrospectively."

22. Clause 3.4 provides that the Trustees shall procure that the Trust Fund be invested under the supervision and custodianship of such company as is nominated by the Protector.

23. Clause 10 provides the power of the Trustees is limited so that they had no power to pay any "Prohibited Benefits":

> "… (1) any holding or use of the Trust Fund for or in connection with the provision of benefits to or in respect of present or former employees of the Founder; (2) any "pension" for the purposes of the Companies Act 1985; and also means (3) any benefit in respect of qualifying service for the purposes of the Pension Schemes Act 1993; (4) any money or benefit in kind which would otherwise fall within paragraph 1(2) Schedule 24 Finance Act 2003; (5) any benefit within the ambit of Section 43 FA 1989."

24. On 24 February 2011, BTIL, as trustee of WRT, delegated its authority to UTW under a document headed "Appointment of Delegated Manager and Custodian". The document stated:

> "[BTIL] … as the Trustee of that certain Trust known as [WRT], … does hereby delegate unto UTW Holdings Limited, … the execution or exercise of all or any of the Trust's powers and discretions conferred upon it as Trustee as regards the management and custody of the Trust Fund comprised therein.

25. The appointment of UTW could be revoked by the acting Trustees of the WRT at any time.

Personal Management Company

26. A personal management company" ("PMC") is incorporated for the purposes of participation in the arrangements or, in some instances, an existing PMC used. The PMC is owned by the director(s) of the participants in the schemes and is a UK incorporated company. We did not have copies of any of the incorporation documents in the bundle. A spreadsheet prepared by HMRC showed the PMCs of the four users relied upon in the Application all had the same registered address- Summit House, 4-5 Mitchell Street, Edinburgh EH6 7BD. All of the PMC's were incorporated before the participant entered into the Deed of Adherence.

Deed of Adherence

27. A Deed of Adherence to the WRT was entered into by each participant, party to the Deed were the Founder and the Trustees. The Deeds of Adherence were in identical terms. The recitals refer at (1) to the Deed of Adherence being supplemental to the deed of trust dated 21 February 2011, and refer to the Founder (WUT), the Protectors ("JC and CC") and the Trustees ("BTIL").

Adherence to the WRT

28. Participants in the arrangement resolved, by way of what is headed "Written resolution of the Directors" to adhere to the WRT ("which was established under irrevocable trust dated 21st February 2011") and make contributions to that trust. The resolutions were in identical terms (apart from the participant, date and amount) and always stated:

> "After due and careful consideration, it is resolved that contributions by the Company for the accounting period ended … and subsequent years may be made on a weekly, monthly, annual or other periodic basis as may be appropriate for the commercial cashflow circumstances. It was noted that such periodic contributions would reflect part of the economic cost to the Company of earning its profits for that period"

29. Appended to some of the Written Resolutions (GWME, Maxglow and SBL) were a list of questions and explanations/reasons why the directors had resolved to adhere to the WRT. The list of questions and explanations/reasons given were identical for each participant.

Deed of Amendment

30. On 21 June 2012, JC and CC (as Protectors) and BTIL (as Trustees) executed a Deed of Amendment (the "Deed of Amendment") to the Original Trust Deed. The Deed of Amendment purports to have retrospective effect to the date of the Original Trust Deed.

31. Clause 2 of the Deed of Amendment provides that the form of the deed set out at Schedule 2 is to replace the Original Trust Deed "as on and from the date" of the original deed (this then being the "Amended Trust Deed", and the Original Trust Deed and the Amended Trust Deed being referred to as the Trust Deed or Trust Deeds).

30. The Amended Trust Deed includes the following definitions:

(1) Clause 1.1.6 defines "the Beneficiaries" as:

"(a) any individual who during the Trust Period is or has been a Provider (but not including a person who was Provider but has died before the execution of this Deed);

(b) any spouse or civil partner of any person who falls within category (a) above;

(c) any person who was the spouse or civil partner or any person who fell within category (a) above immediately before the death of the latter;

(d) the children and remoter issue of any person, living or dead, who falls, or during his lifetime fell, within category (a) above;

(e) any person who is a spouse or civil partner of any person falling with category (d) [sic] above;

(f) any person who was a spouse or civil partner of any person falling with category (d) [sic] above immediately before the death of the latter (whether or not such person has subsequently entered into marriage or civil partnership with a third party);

and "Beneficiary" has a corresponding meaning PROVIDED THAT no Excluded Person shall be a Beneficiary."

(2) A "Provider" is defined, by clause 1.1.7(a)(i), as:

"an individual who is or has been employed in the Particular Trade and who, while so employed, himself has provided or has been involved, whether as principal, partner, employee, independent contractor or otherwise, in the provision of, in either case in the course of the Particular Trade and during the Trust Period, finance to the Founder or to the Trustees or to any manager of the Trust Fund or any part thereof".

(3) Clause 1.1.7(b) defines "the Particular Trade" as "the trade or profession of lending money".

(4) Schedule 2 defines Excluded Persons as "the Founder", being WUT1.

32. The declaration of trust is expressly subject to clauses 10 (indemnity for founder in respect of UK income tax and national insurance contributions), 11 (to keep the Trust within s86 Inheritance Act 1984), 12 (to prevent any contributions becoming employees' remuneration) and 13 (to prevent any benefits of the trust giving rise to any charges to income tax pursuant to Part 7 ITEPA 2003 as inserted by FA 2011) of the Amended Trust Deed to ensure that certain tax consequences ensued from the operation of the Trust.

Fiduciary Services Agreement

33. The PMC ("the Fiduciary") entered into a Fiduciary Services Agreement with UTW ("the Principal"). The Fiduciary Services Agreement defines the Property as being all and any property real and personal granted by the Principal to the Fiduciary. Clause 2, headed "Declaration of Bare Trust and Fiduciaryship" provides at 2.1:

"During the Period of Appointment the Fiduciary shall have all rights to apply and deal with the Property and the income and capital thereof … as if it were the beneficial owner thereof and all accumulations thereto as if it were the beneficial owner thereof and the Principal shall have no right or power over the Property or other receipts arising or accruing to or received by the Fiduciary".

34. No provision is made in the Fiduciary Services Agreement as to what was to happen with the Property upon the termination of the "Period of Appointment".

Finance Agreement

35. The PMC enters into a loan agreement with one of the directors of the participant, the PMC is "the Lender" and the director of the participant is "the Borrower".

36. The recitals record that the Lender "is acting in its capacity as a nominee of [BTIL]", and that "The Lender has agreed to provide the Borrower with loan finance of … (the "Original Loan"). The loan was for 10 years, at LIBOR plus 2% (with interest rolled-up during the course of the loan).

37. Clause 3 provides that the Lender may make such further advances as it may agree with the Borrower on the same terms and that each such further advance shall be evidenced by a written memorandum between the parties. No security was required to be provided by the Borrower to the Lender. There were several such memoranda (each headed "Memorandum of Further Advances"), and each was signed by a director of the PMC and Borrower in their personal capacity.

Invoices

38. A fee of 10% of the participant's first contribution to the WRT was charged by Baxendale Walker LLP or a related entity. The invoice was addressed to WUT1 for the attention of JC and CC and headed "Re Umbrella Remuneration Trust Arrangements – [participant's name]. The invoice narrative stated: "To our professional charges in respect of work completed on the above matter First contribution to the Trust of £ …10% Minerva Fees … Received in full, with thanks. Baxendale Walker". The invoice was stated to be outside the scope of VAT. AHP charged the same amount to WUT1 with the description stating: "To our professional charges in respect of work completed on the Umbrella Remuneration Trust Arrangements for: [participant] Further contribution to the Trust of £ [amount of contribution] Minerva Fees 10% Received In Full With Thanks". Further fees were charged by AHP to the participant including an "engagement fee" (per engagement letter), "establishment fee" (2% of the first contribution), "administration fees" (providing administrative support to ensure integrity of the structure remains intact) and an "annual renewal fee" (included in establishment fee for year 1 and then payable from year 2 in advance for life of scheme).

Engagement Letters

39. Copies of AHP's engagement letter dated 15 November 2011, 7 August 2012 and 2 June 2015 stated at 1.1 "This letter sets out the basis on which we are to act for you in the restructuring of your financial affairs in a tax efficient manner." At 2.1 under the heading of "Our service to you" it was stated: "We will undertake the following work in connection with you and your financial planning arrangements: Discuss with you together with any third party specialists to whom we refer you of UK tax implications of the proposed transactions and possible ways of reducing any UK tax liabilities arising". The Fees and Commissions were stated to be "2% + VAT of the amount to be contributed or transferred to any structure implemented for initial engagement, subject to a minimum fee of £4,000 +VAT. Thereafter, there will be a monthly fee of £150 + VAT for ongoing advice and support."

40. The engagement letter dated 10 May 2017 under the heading of "Our service to you" stated: "1.1 We will undertake the following work in connection with you and your asset protection: 1.1.1 discuss with you, together with any third party specialists to whom we refer you, the implications of any proposed transactions that are designed to protect your assets against creditor risk; and 1.1.2 liaise with you and such third party specialists with regard to implementing any recommended solutions."

41. Clause 2.2 of the engagement letter stated:

> "Any communications passing between Asset House and you (or your authorised agent) are not to be communicated or copied to any other person without our written agreement and, for the avoidance of doubt, this duty shall continue even after termination of this agreement."

42. The Fees and Commissions were stated to be "initial engagement fee is £5,000 plus VAT charge charged at the current rate. This is due and payable on acceptance of our terms of engagement. You should note that our engagement fee is not refundable if you decide not to implement any solution proposed … we may also be entitled to payment of commissions or other fees by those with whom you may subsequently contract as a direct or indirect result of any introduction that we might make on your behalf."

Marketing materials

43. Exhibited to HM's witness statement were Baxendale Walker LLP documents headed "Robert Venables QC Remuneration Trust opinion pack Instructions to Minerva Introducers" ("Opinion Pack") and a slide presentation titled: "The Minerva Suite of Wealth Planning solutions 2011 series" ("Minerva Suite").

44. The Opinion Pack attached a draft summary opinion of Robert Venables QC ("RV") , a final full-form Opinion of RV and a final template RT deed settled by RV and included the following statements and information:

(1) Under the heading of "The DRAFT Summary Opinion of Venables QC" was stated: "This is your key marketing/sales document. You can show it/provide a copy to anyone you think fit. No accountant or advisor can credibly gainsay what Venables QC states."

(2) Under the headings of "The Final Full-From Opinion Of Venables QC" and "The final Template RT Deed, as settled by Venables QC was stated the identical wording:

> "You can show that it exists to anyone you like.
>
> But, you should be very careful who you let have a copy of this.
>
> • It contains million sof [sic] pounds worth of intellectual property
>
> • The competition would just love to get their hands on this.
>
> • Use your judgment [sic] and discretion: but keep our detailed knowledge safe.

(3) At the bottom of the document in bold and larger font was stated:

> "We now have the only working, tax effective arrangement which is outside FA 2011."

(4) Appended were questions and answers which confirmed that the new form RT applied to corporate founders, FA 2011 does not apply as the Trustees are not allowed to provide benefits to employees, the trust falls within s86 IHTA 1984 because of the class of beneficiaries, it was not a trust for employees but employees/directors/shareholders could benefit by providing finance to the Founder, the RT or the PMC by lending £100 per month.

45. The Minerva Suite slide presentation contained the following relevant statements and information:

(1) The plans worked: they had been successfully used for 21 years, endorsed by leading counsel, fees were insured, the plans were known to and disclosed to HMRC and the plans had never been successfully challenged by HMRC.

(2) A trust structure was available for "every wealth class" with the Remuneration Trust suited to trading profits and the Umbrella RT for smaller traders and companies.

(3) FA 2011 was stated not to apply as the provision of "rewards, recognition or loans" was not in connection an employee's employment.

(4) The unique benefits stated were that companies could use the plans, tax deductions made against profits, no tax on contributions, tax free roll up of trust fund, IHT free, loans allowed, no tax on loans, funds stay in UK and full disclosure to HMRC.

(5) The diagrams explaining how the Remuneration Trust operated were as per the Arrangements relied upon by HMRC. It was stated under "cash banking route" that "£££" were available the same day they were transferred, the cash never leaves the UK and remained under client control.

(6) The PMC structure diagram confirmed that the wealth is held in an onshore PMC where the client is the shareholder and director and signatory on the PMC account, the PMC can invest and trade in anything, is exempt from tax on any profits or gains, can lend to client and the shares pass IHT free under client's will " = TAX FREE WEALTH WITH PERSONAL CONTROL".

(7) The slides titled "Risk Analysis" stated that a participant was better off or in a no worse position by using the structure.

(8) The slide titled "Fees" stated in oversized font that "90% of case value goes to client" with fees of 10% of net asset value.

(9) The slide titled "Questions for US" confirmed that the arrangements had worked for 21 years, the fees were insured in the event that it was found not to work, the trust deed would be amended retrospectively if the law changed, the fees were not high as the client gets 90% of the deal value, the structure could be unwound but "with no more tax benefits" [the text "no more" was emphasised by a different font colour] and the client could hire and fire the trustees.

(10) Details of a company formation agent were provided together with a link to their website to enable participants to take the first step and form a PMC.

(11) The slide titled "Fees Insurance Risk Analysis" stated that BW had obtained professional indemnity insurance cover of £2.5m underwritten at Lloyds of London for negligence claims in respect of fees paid for using the structure.

(12) The slide titled "Your member packs: what you get" confirmed the user would receive an establishment pack specifying all the fees and services together with where and how to make contributions to the trust, details of how to create a member's PMC and Finance Agreement templates.

Letter to the Trustees

46. The bundle contained one example of a letter to the Trustees, BTIL, requesting that the Trustees exercise their discretion and WRT consider advancing a loan to an individual director of SWM.

Bank statements

The bank statements confirm that the contribution to the WRT was paid from the participant's bank account to the bank account of either Baxendale Walker or AHP (Westwood Trustees).

HM'S EVIDENCE.

47. HMRC submitted that HM was not a credible witness. We have carefully considered HM's written and oral evidence (we had the benefit of a transcript). We did not find her evidence convincing and it lacked credibility in respect of certain matters and issues on which

HM was reluctant to accept obvious propositions put to her by Mr Simpson or when taken to documents.

48. HM was questioned on her evidence that AHP did not give taxation advice to clients and that if a client asked about the tax benefit of using the structure it was explained to them that if the tax benefit was the sole purpose of using the structure, it was not the structure for them. When taken to the Maxglow engagement letter that she had signed on behalf of AHP which referred to discussing UK tax implications of the proposed transactions and possible ways of reducing any UK liabilities arising she confirmed that the engagement letter should not have said that, that she wasn't at the meeting as she never actually met clients at the early stage and didn't know what was discussed prior to the engagement letter being produced. She did not accept that AHP was selling the scheme but was tasked with assisting clients in "understanding how the structure worked and the benefits of the structure."

49. When questioned about why she was positive that a tax advantage was not the motivating factor for clients' use of WRT she accepted that she did not know the reasons why clients entered into arrangements. HM was taken to the marketing materials exhibited to her witness statement and asked why they omitted to refer to protecting corporate wealth (which she stated to be the main purpose of the WRT), her answer simply was that she could see that there may be a contradiction. She accepted that of the 14 specified unique features and benefits identified in the marketing materials there was no reference to protecting corporate wealth and eight of the features and benefits were to do with tax.

50. It was put to her that if the main purpose of the structure was to protect wealth why was it not mentioned in marketing materials used in persuading clients to enter or use the scheme. She did not directly answer the question replying, "Not in these documents, no" and that BW would have to be asked why it was not included in the marketing materials as it was their presentation. She accepted the marketing materials were used by AHP.

51. When she was asked about AHP's use of RV's summary opinion documents and whether she accepted that it was a key marketing document she was evasive in her answers. She acknowledged that was provided by BW to AHP for use as part of discussions with clients but that she believed it was issued before she was involved with the use of the structures, that it wasn't sent to her directly and did not recall BW describing the document as the "key marketing/sales document" but acknowledged that was what was stated on the document. When asked why RV's summary opinion did not refer to protecting corporate wealth, she had no plausible explanation and her answer was that she had not seen the instructions to advise sent to RV and repeated that BW would have to be asked as to why that key point was omitted. When it was put to her that the key marketing and sale document only talks about tax consequences of the scheme her answer was "That particular section does, yes".

52. In questioning, she accepted that the scheme did not confer any protection on the participant as once the company had made the contribution to WRT it had no right to get the money back.

53. HM at paragraph 7 of her witness stated that she did not accept that past adherence by AHP clients to the WRT amounted to a tax avoidance scheme but when asked in broad terms about the other parts of the scheme her answer was that she was not able to comment as she was not legally qualified.

54. HM confirmed that AHP did not incorporate the PMCs on behalf of participants but AHP would instruct incorporation agents and provide them with all the details for incorporating the PMC including the registered address. She accepted that BTIL had never refused to sign a deed of adherence and it was usually signed the day after the participant entered into the written resolution to adhere to the WRT.

55. When taken to the examples in the bundle she accepted that, in those examples, the money moved between the PMC and the individuals, the money was not being used for any other purposes.

56. She accepted that JC and CC, the Founders of WRT, were not shareholders of AHP at the date of her witness statement but had been until 18 September 2015.

57. HM stated that there was a written licence agreement between AHP and BW (which was not in evidence) which allowed AHP to inform clients of the structure and receive a share of the 10% Minerva fee in addition to the initial 2% fee. AHP's share of each 10% Minerva contribution varied between 35%-50%.

PARTIES SUBMISSIONS

HMRC

58. Mr Simpson, in summary, submitted as follows:

59. (1) The nature of the Arrangements was such to enable the participants to obtain an advantage in relation to income tax on employment income for directors of the participants by passing money in the form of loans and/or income tax on dividend income for the participant's shareholders and/or charges under s455 CTA 2010 that would have arisen on loans made by the participants.

60. The obtaining of the advantage was the main benefit or one of the main benefits expected to arise from the Arrangements.

61. The Arrangements fell within Regulation 6 (Confidentiality where promoter involved), Regulation 8 (Premium Fee) and Regulation 10 Standardised Tax Product) of the 2006 Regulation.

62. AHP is a "promoter" as it made the identified arrangements, when at the stage of being a proposal, available for implementation by its clients within the meaning of s307(a)(iii).

63. It is appropriate to make an order that the Arrangements are notifiable and AHP specified as the promoter.

64. In the alternative, HMRC have taken all reasonable steps to establish whether the Arrangements are notifiable and have reasonable grounds for suspecting that the identified Arrangements may be notifiable and it is appropriate for the Tribunal to make an order that the Arrangements are to be treated as notifiable, with AHP specified as the promoter as required by section 306A.

AHP

65. Mr Mullan, in summary, submitted as follows:

(1) AHP is not the promoter and it did not make the Arrangements available for implementation. The obvious promoter of the Arrangements is BW who was in a position to make the arrangements available and did in fact make the Arrangements available.

(2) AHP was not a party to any of the documents that HMRC rely upon. It did not design the arrangements and was not in a position to be able to make them available to any person.

(3) AHP's role was limited to introducing parties to the actual promoter and provide documentation, which had been drafted elsewhere, to enable the parties to enter into the Arrangements.

(4) The Arrangements were not notifiable arrangements in any event as they did not give rise to a tax advantage.

(5) None of the prescribed descriptions relied upon by HMRC are met. The general outline of the Arrangements was a matter of public record, there was no evidence that a person would pay a premium fee for the Arrangements and, whilst it is accepted that the documentation is standardised, the Arrangements are not a tax product as they have commercial benefits and the main purpose was not obtain a tax advantage.

SECTION 314A

HMRC's main application is based on s314(A) for an order that an arrangement is notifiable which requires HMRC to specify (a) the arrangements in respect of which the order is sought and (b) the promoter and satisfy the Tribunal that s306(1)(a)-(c) apply to the arrangements. We have first considered what are the arrangements that fall to be considered.

The Arrangements

As stated above, no issue was taken by Mr Mullan that the Arrangements that fell to be considered were those specified at [6] above. We did not understand Mr Mullan to take any issue with the description of the Arrangements. We are satisfied that the Arrangements would satisfy the requirements of "any scheme, transaction or series of transactions" in s318.

Are the Arrangements notifiable?

66. Both parties' submissions proceeded on the basis that the term "notifiable arrangements" for the purposes of s314A will be satisfied if the three conditions specified in s306(1) are met:

(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.

67. As a preliminary point, we note the comments of Whipple J (as she then was) in *R (oao Root2 Tax Ltd) v HMRC* [2018] EWHC 1254 (Admin) ("*Root2 Tax JR*") in respect of s306(1) at [12]:

> "Section 306(1) requires what are, in essence, the same three features to be present (see s.306(1)(b) and (c)). Those features are explained in different words, in a different order and with difference of emphasis; I accept that, but there is much common ground. Specifically, s.306(1)(b) contains (i) the objective approach (i.e. "might be expected to…") and (iii) the obtaining of a tax advantage; s.306(1)(c) contains a test akin to the main purpose test, (ii) above."

68. The relevant descriptions referred to in s306(1)(a) are found in TASR. HMRC relied upon Confidentiality (reg.6), Premium Fee (reg. 8) and Standardised Tax Products (reg.10). We note that s306(1)(a) is satisfied if the arrangements fall within one of the descriptions prescribed by the regulations. We have considered the first condition last as it is the most complex; we have therefore considered s306(1)(b) and (c) first.

306(1)(b)

69. This sub-section asks if the arrangements "enable, or might be expected to enable" any person to obtain a relevant tax advantage. This requirement, as identified in *Root2 Tax JR*, is to be tested objectively. "Advantage" in relation to tax is defined in s318(1) to include the "avoidance or reduction of a charge to tax" or the "deferral of any payment of tax." The tax advantage identified by HMRC is the extraction of profits by directors and shareholders from a participant without incurring an income tax charge/deferral of any payment of tax and the avoidance of charges that would have arisen on the loans under s455 CTA 2010. Mr Mullan relied upon the decision of Whipple J in *Root2 Tax JR*, stated to be binding on this Tribunal,

where she expressly approved the Tribunal's approach to identifying a tax advantage in *HMRC v Root2 Tax Ltd* [2017] UKFTT 696 (TC) ("*Root2 Tax*"). The Tribunal in *Root2 Tax* adopted the approach of Lord Wilberforce in *CIR v Parker* [1966] AC 141 that "there must be a contrast as regards the "receipts" between the actual case where these accrue in a non-taxable way a possible accruer in a taxable way, and unless this contrast exists, the existence of the advantage is not established". That is relevant as it is wrong to contrast on the one hand a loan with, on the other hand payment of cash which are not the legally nor economically the same.

70. We would observe that it is the case that decisions on applications for permission to apply for judicial review are "generally not regarded as authoritative": see *R (Burkett) v Hammersmith and Fulham LBC (No 1)* [2002] UKHL 23 at [41]. Further, Practice Direction (Citation of Authorities) [2001] 1 WLR 1001 generally restricts the citation as case-law authority of "decisions on applications that only decide that the application is arguable". In *R (on the application of Hexpress Healthcare Ltd) v The Care Quality Commission* [2023] EWCA Civ 238, at [4] the Court of Appeal expressly gave permission for its decision to refuse an application for judicial review because the grounds were not arguable to be cited in accordance with the terms of the Practice Direction. That said, subsequent Tribunals have adopted the approach in *Root2 Tax* to identifying a tax advantage.

71. We do not accept Mr Mullan's submission that it is wrong to contrast on the one hand a loan with on the other hand payment of cash as the two are not the same. We note that Mr Mullan made the same submission in *HMRC v AML Tax (UK) Limited and Denmedical UK Limited* [2022] UKFTT 174 (TC) ("*AML and Denmidical*") and, whilst not binding on us, we agree with and adopt the comments in *AML and Denmedical* which had itself in turn adopted the comments of Judge Mosedale in *HMRC v Hyrax Resourcing and others* [2019] UKFTT 175 (TC) ("*Hyrax*"). In *AML and Denmedical*, Judge Popplewell stated:

> 105. In considering whether there is a tax advantage, I am grateful for the comments made by Judge Mosedale in Hyrax (HMRC v Hyrax Resourcing Ltd and others [2019] UKFTT 175 ("Hyrax"). I agree with the following sentiments expressed by Judge Mosedale, and whilst I am not bound by them, I gratefully adopt them for the purpose of this Decision.
>
> > "180. The parties did not agree on the implications of this definition. HMRC's position was that it should be understood to mean what Lord Wilberforce had said 'tax advantage' meant in the case of IRC v Parker [1966] AC 141:
> >
> > > The paragraph, as I understand it, presupposes a situation in which an assessment to tax, or increased tax, either is made or may possibly be made, that the taxpayer is in a position to resist the assessment by saying that the way in which he received what it is sought to tax prevents him from being taxed on it, and that the Crown is in a position to reply that if he had received what it is sought to tax in another way he would have had to bear tax. In other words, there must be a contrast as regards the 'receipts' between the actual case where these accrue in a non-taxable way with a possible accrue in a taxable way, and unless this contrast exists the existence of the advantage is not established…….
> >
> > 186. I think Lord Wilberforce's definition of 'tax advantage' is therefore applicable to the 2004 legislation but it really does not matter to this application whether or not it is applicable, because it is plain on the face of s 318 that 'tax advantage' refers to a contrast between the actual (or expected) tax effect of the arrangements and the tax position that would have existed but for the arrangements.
> >
> > 187. Words must be construed in accordance with Parliament's intent and, unless it appears otherwise, that means they should be construed in accordance with their natural and ordinary meaning. The natural and ordinary meaning of 'tax advantage' in s 318 is that it refers to a contrast in tax liability between one

position and another that would otherwise have existed. That wide construction seems in accordance with Parliament's intent for certain arrangements (as defined) which involved a tax advantage to be notifiable……..

194. And, as I have indicated above at §§189-190, Mr Venables did not accept that the arrangements could result in a tax advantage because it was his case that there was no comparator situation with a greater tax liability. It was the same point he made on tax avoidance, which was that a scheme user was not in the same legal position if they used the scheme compared to the position if they had not used it. If they did not use the scheme, they had their salary as cash in hand which added to their overall wealth; if they used the scheme, they lost the greater part of the salary and received instead cash in hand which (said the respondents) might give them equivalent (actually, increased) liquidity but did not add to their overall wealth because it had to be repaid.

195. I accept Mr Venables' point that the citation from Parker does not expressly deal with the situation where the contrast situation is not legally identical to the actual situation in point. That is not surprising as the situation did not arise in that case where, either way, the taxpayer got cash in hand without any repayment obligation. It did not arise on the facts of Root2Tax Ltd either, as under the scheme in that application, the scheme user received cash in hand in the form of winnings, which there was no obligation to repay. So it does not appear that this point has been considered before.

196. It is a matter of statutory construction. The statute itself does not refer to a contrast situation; it is merely implicit because the statute talks of relief/avoidance/reduction, all of which terms indicate that there would be a contrast situation without the relief/avoidance/reduction. The statute therefore does not define the contrast situation: it does not expressly state whether the contrast situation must be legally or only economically, identical or only similar, to the actual situation which arises.

197. I have said that the statute should be interpreted in line with Parliament's presumed intent which includes assuming Parliament intended (a) that the legislation would be effective in achieving its aim and (b) that where a person would be penalised for non- compliance, it would be clear to them what obligation was being imposed.

198. The aim of the legislation was clearly to combat tax avoidance. It is well understood (see §§164-166) that there may be tax avoidance where a person adopts a scheme which puts them in a similar economic position to the non-scheme position, but with a lower tax liability. To interpret 'tax advantage' as requiring the contrast situation only to be one where the scheme user was in an identical legal position to the one actually used would be to largely deprive the legislation of much of its effect. It is obvious the objective of tax avoidance is to put the avoider into an economically similar position (but with less tax) than he would otherwise be in, and so it seems obvious to me that Parliament intended the contrast situation to include those that were merely economically similar to the actual situation. Parliament intended the legislation to effectively combat tax avoidance.

199. While I accept that the legislation is penal and Parliament must therefore have intended the meaning of 'tax advantage' to be clear, I think that it is clear that Parliament intended to refer to economically similar contrast situations (as well as legally identical ones). A layman, including promoters and users of the scheme, when considering a scheme would consider its economic reality and not its legal form and should understand 'tax advantage' in the same way.

200. In conclusion, I find that the scheme gave, or was expected to give, rise to a tax advantage because it was intended to avoid or reduce the charge to tax on salary which would otherwise have been received by scheme users, had they not adopted the scheme and received equivalent sums in an economically similar, but legally distinct form, of small salary and large loans which were not expected to be repaid (at least not in their lifetime)."

> 106. I have set out a considerable extract from Hyrax since in this appeal, Mr Mullan sought to make the same point as Mr Venables had done in Hyrax; namely that one could not compare the situations where, on the one hand, an individual received a salary, which was his to keep as of right, and receipt of a broadly similar amount by way of a loan which was repayable. This difference in the qualities of the receivable justified the difference in treatment.
>
> 107 It is clear that in this appeal, that the users of the scheme thought that the loans would never, in practice, be repayable. And the evidence shows that on not a single occasion did a lender seek to enforce its rights under the loan/facility agreements and request repayment. I strongly suspect, that had been any possibility of repayment, the directors would not have entered into the arrangements. I do not believe, for example, that Mr Black would have thought that everybody was a winner if there was a realistic possibility that his lender would seek repayment of his loan. I therefore reject Mr Mullan's proposition for the same reasons that Judge Mosedale rejected those of Mr Venables in Hyrax."

72. We accept that on the facts of this appeal there is no indication in any of the scheme documents that the loans would not be repaid and HMRC have not pleaded that the loan agreements are a sham. In our judgment this does not result in there being no tax advantage. We would agree with and adopt the comments of Judge Beare in *HMRC v Premiere Picture Limited* [2021] UKFTT 0058 (TC) that *IRC v Parker* was not limiting the comparison required to be made to one involving a transaction in similar legal form or even one giving rise to similar economic effects. Those comments were adopted and summarised by the Tribunal in *HMRC v AML Tax (UK) Limited* [2022] UKFTT 00114 (TC) ("*AML Tax*"):

> 82. However, we do not agree with Mr Waldegrave's submission that the comparator must leave all participants in the same economic position. We agree with the analysis of Judge Beare in *Premiere Picture Ltd* in which he said [at para 73]:
>
> "I do not read [*IRC v Parker*] as limiting the comparison which is required to be made to one involving a transaction in a similar legal form or even one giving rise to similar economic effects… Instead, as is made clear by the extract from Jonathan Parker LJ's decision in *Sema* … It is perfectly possible for a taxpayer to obtain a tax advantage from entering into a transaction where the taxpayer's tax position as a result of so doing is more favourable than that in which it would have been had the taxpayer done nothing."
>
> 83. The extract from *Sema* referred to by Judge Beare is in the context of where Parker LJ was himself considering the observation of Aldous J about the meaning of the words "tax advantage" in another statutory context, where he said :
>
> "the words "tax advantage" … presuppose that a better position has been achieved. However, I respectfully differ from him when he goes on to answer the question "An advantage over whom or what?" by saying: "advantage over persons of a similar class"… In my judgement, the simple answer to that question is that a better position has been achieved vis a vis the Revenue."

73. We consider that the scheme users' directors/shareholders obtained a tax advantage from entering into the scheme where their tax position as a result of so doing is more favourable than it would have been had they done nothing: they received cash with a legal obligation to repay in 10 years, but without an income tax liability, rather than receiving a slightly larger amount of cash without an obligation to repay, but with an income tax liability and were able to obtain a tax deduction for making contributions. This was a tax advantage. We agree with the Tribunal in *HMRC v Curzon Capital Ltd* [2019] UKFTT ("*Curzon*") that "if the arrangements are presented in such a way as to claim that a tax advantage will (or may) flow from using them, then unless the claim is clearly ridiculous, it can fairly be said that the arrangements "might be expected to enable" the advantage to be obtained." That is the position here.

74. Even if we are wrong that *IRC v Parker* is not limiting the comparison that is required to be made, it was accepted by Mr Mullan that a loan from a company would be comparable to

a loan from a trust created by a company; one would create a charge, the other one would not and there is a tax advantage. We find that the Arrangements fall within s306(1)(b).

S306(1)(c)

75. This sub-section asks whether 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 the tax advantage stated above. Mr Mullan submitted that it was not correct that the only possible purpose of entering into the arrangements was to obtain a tax advantage as having assets legally separate from the assets of a company offers commercial advantages. The evidence of HM is that this asset protection is what was used as a central selling point. Mr Simpson submitted that it was nonsensical that a main benefit or one of the main benefits pursued by the Arrangements was asset protection. The absence of any other discernible benefit is relevant.

76. We can deal with this sub-section briefly. The marketing materials, the Opinion Pack and Minerva Suite slides, focus almost exclusively on the tax advantages that are claimed to arise from entering into the scheme, at paragraph 45 above. At paragraph 45(9) the slide titled "Questions for US" confirmed that the structure could be unwound but emphasised "with no more tax benefits".

77. We did not accept as credible HM's evidence that obtaining a tax advantage was not the only possible purpose of entering into the arrangements and that asset protection is what was used as a central selling point. The evidence that asset protection was used as a central selling and marketing point is contradicted by the RV summary opinion which was stated to be the "key marketing/sales documents" and makes no reference to asset protection. Similarly, the Minerva Suite slides make no mention of asset protection. We do not accept that the participant's assets would be afforded greater protection from preventable risks/litigation by placing profits into the WRT as the participant cannot get back the money unless it borrows it and incurs an obligation to repay it. We can accept that having assets legally separate from the assets of a company offers commercial advantages but implementing the Arrangements places the participant's assets at greater, not less, risk. We cannot see any discernible purpose of the Arrangements other than obtaining a tax advantage, that is the main benefit.

78. We find that the Arrangements under consideration fall within s306(1)(c).

S306(1)(a)

79. We now turn to consider whether the Arrangements fell within any of the descriptions prescribed by TASR such that the Arrangements were notifiable.

Confidentiality description

80. Reg.6 provides that Arrangements are prescribed if they satisfy two conditions. Having already considered whether any element of the arrangements gives rise to the tax advantage, the relevant condition is Reg. 6(2) Condition 2. Condition 2 provides "It might reasonably be expected that a promoter would wish the way in which that element of those arrangements secures a tax advantage to be kept confidential from any other promoter at any time in the period beginning with the opening date and ending with the appropriate date. For these purposes, in the present context of arrangements notifiable under s308(3) the material date is "the date the promoter first became aware of any transaction forming part of the notifiable arrangements". We have proceeded on the basis that the material date is 21 February 2011, the date that HMRC assert in their application is the date that AHP began promoting the Arrangements.

81. Mr Mullan submitted that it was not understood how this condition is met as the nature of the Arrangements were well known and widely discussed. The general outline was a matter

of public record (*Dextra Accessories Ltd and ors v MacDonald (Inspector of Taxes)* [2002] STC (SCD) 413) and were discussed in The Law and Taxation of Remuneration Trusts by Andrew Thornhill QC and Paul Baxendale Walker. Any reference to confidentiality in the documents is nothing more than marketing hype and not relevant to the confidentiality description. Mr Simpson's position was that the condition is met if any promoter (not necessarily AHP) might reasonably be expected to wish to keep the arrangements confidential.

82. The confidentiality hallmark requires that consideration is given to whether it is reasonable to expect that a hypothetical promoter of an arrangement that is the same or substantially similar to the Arrangements would wish the way in which the Arrangements secures a tax advantage be kept confidential from any other promoter. It is an objective test. We agree with Mr Mullan that the general outline of the scheme and how remuneration trusts are said to operate are well known and have been in the public domain for some time but we do not accept that this means that the confidentiality description cannot be met by the hypothetical promoter. Similarly, we do not accept HM's evidence that reference to the WRT in the participant's accounts and tax returns and that the existence of the WRT would have been referred to when informing individuals that they were potential beneficiaries of the WRT does not mean that the documents that implemented and supported the Arrangement were matters that a hypothetical promoter would not want to keep confidential.

83. We consider there is a marked difference between public knowledge of the existence of the WRT and how it broadly operates and making available the documents that implement and underpin the structure enabling the tax advantage. In our judgment, it is clear from the evidence that that BW wanted the "nuts and bolts" of the scheme to be kept confidential. The BW Instructions to Minerva Introducers stated in respect of the RV full- form opinion and the final template RT deed that they could be shown to exist but should be careful who is provided with a copy as it contained "millions of pounds of intellectual property", "The competition would just love to get their hands on this" and "use your judgment and discretion: but keep our detailed knowledge safe". The desire to keep the "nuts and bolts" of the scheme confidential is understandable in light of BW's claim that "We now have the only working, tax effective arrangement which is outside FA 2011." The e-mail dated 19 April 2011 from BW to introducers reiterated this point "FB 2011 has wiped the field clear of competition. With the Venables QC RT Opinion, you will now have the unarguable answer to the 'does it work' / 'nobody can get out of FB 2011' arguments." Similarly, AHP's engagement letters at paragraph 41 above included a confidentiality clause in respect of all communications and this duty of confidentiality was stated to continue even after termination of the agreement.

84. In our judgment, it might reasonably be expected that a promoter of the same or substantially similar arrangements would wish the way in which that element of those arrangements secures a tax advantage to be kept confidential from any other promoter. We are satisfied that the Arrangements fell within Reg. 6 Confidentiality description and are notifiable for the purposes of s306 and for the purposes of s314A(1)(b).

85. S306(1)(a) only requires arrangements to fall within one or more of the relevant descriptions but we have proceeded to consider the remining two descriptions relied upon by HMRC.

Premium fee description

86. Mr Mullan did not accept that the fees charged by AHP were premium fees as defined and were not structured by reference to tax and were payable regardless but, even if that were the case, HMRC must show that the premium fee would be paid by "a person experienced in receiving services of the type being provided". There is no evidence that anyone who paid the

fees was such a person. Mr Simpson submitted that on the facts, there is a direct correlation between the fees charged by AHP and the amount of tax advantage expected.

87. This hallmark requires consideration of a hypothetical promoter of arrangements the same or substantially similar to the Arrangements, and then to ask whether might reasonably be expected that such a promoter would be able to obtain a premium fee from a hypothetical person "experienced in receiving services of the type being provided" for making the arrangements available. "Premium fee" is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises. The hallmark does not require that a premium fee is paid; only that it might reasonably be expected that a promoter of the same or substantially similar arrangements would be able to obtain such a fee from a person experienced in receiving services of the type being provided.

88. We find that it is clear from the evidence that the fees charge by AHP were charged as a fixed percentage (10%) of each contribution made to the WRT by a participant. The 10% fee charged did not bear any correlation to the amount of work involved: the scheme was implemented using standard documents for each participant and a 10% fee charged on each subsequent contributions. It was accepted by HM that a percentage fee was charged on contributions: the "fee is a percentage of the corporate wealth being protected from creditor risks." We do not accept as credible that "corporate wealth was being protected" when there is an immediate dissipation of 10% of the wealth being protected. We find that that the fee was charged by reference to the contributions paid to the WRT which was directly related to the tax advantage expected to be obtained; the larger the contribution made to WRT, the greater the tax advantage. In our judgment, there is no other way of explaining why a participant would be charged a percentage of the contribution. Judge Popplewell in *AML and Denmedical* at [111] noted that in both *Hyrax* at [214]) and *Curzon* at [57] the Tribunal indicated in respect of premium fee hallmark that the fact that in real life the promoter takes a percentage cut from the gross fee paid for the scheme users is good evidence that a hypothetical promoter of substantially similar arrangements will be able to obtain a fee from those arrangements. We find that a promoter of substantially similar arrangements to these Arrangements would be able to charge a premium fee.

89. We reject Mr Mullan's submission that there was no evidence that anyone who had paid a fee was "experienced in receiving services of the type being provided" as we are dealing with the hypothetical person. This is an objective test. The Tribunal in *Curzon* at [59] referred to "[t]he general presentation of the Arrangements, including the level of detail provided and their fulsome endorsement by specialist leading counsel" as indicating that those arrangements were clearly directed to the serious potential scheme user. In *HMRC v EDF Tax Ltd* [2019] UKFTT 598 (TC) ("*EDF Tax*"), Judge Mosedale referred at [122] to "the level of sophistication of the letters and deeds and the references to counsel, more likely than not that a person experienced in receiving the type of services provided, as much as the actual users, would be prepared to pay a premium fee if they decided to enter into the planning." We agree with the comments in *Curzon* and *EDF Tax* and consider that the evidence in this appeal is that the Arrangements are similarly sophisticated and endorsed by specialist leading counsel such that objectively a person experienced in receiving the type of services provided would be prepared to pay a premium fee if they decided to enter into the planning.

90. We are satisfied that the Arrangements fell within Reg. 8 Premium Fee description and are notifiable for the purposes of s306 and for the purposes of s314A(1)(b).

Standardised tax products description

91. It was accepted by AHP that the documentation is standardised and Reg.10(2) is satisfied but it was not accepted that the Arrangements are tax products as they have commercial benefits and the main purpose was not to enable a client to obtain a tax advantage. Mr Simpson submitted that the conditions for being a "tax product" are met where the arrangements are marketed as having a tax advantage and there is no other rationale apart from seeking to obtain that advantage. Whilst there could be some other commercial purpose pursued by the Arrangements, that does not preclude the conclusion that the main purpose is obtaining a tax product.

92. Regulation 10(3) provides that the arrangements are a tax product if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a participant to obtain a tax advantage, as defined in s318.

93. We have already concluded that the Arrangements were such that the main benefit that might be expected to arise from Arrangements was the obtaining of a tax advantage. The test here is almost identical. Taking into account the evidence, an informed observer having studied the arrangements would have to conclude that the main purpose of the arrangements was to enable the scheme user to obtain a tax advantage.

94. The marketing materials, the Opinion Pack and Minerva Suite slides, focused almost exclusively on the tax advantages that are claimed to arise from entering into the scheme (see paragraph 45 above). At paragraph 45(9) above, the slide titled "Questions for US" confirmed that the structure could be unwound but emphasised "with <u>no more</u> tax benefits". It was marketed and sold to potential scheme users on the basis of its tax advantage and it had no rationale apart from the tax advantage. Objectively speaking, that was its only discernible purpose.

95. We did not accept as credible HM's evidence that obtaining a tax advantage was not the only possible purpose of entering into the arrangements and that asset protection is what was used as a central selling and marketing point. The evidence that asset protection was used as a central selling and marketing point is contradicted by the RV summary opinion which was stated to be the "key marketing/sales documents" and makes no reference to asset protection. We do not accept that the participant's assets would be afforded greater protection from preventable risks/litigation by placing profits into the WRT as the participant cannot get back the money unless it borrows it and incurs an obligation to repay it. We can accept that having assets legally separate from the assets of a company offers commercial advantages but implementing these Arrangements places the participant's assets at greater, not less, risk and indeed they are immediately reduced to 90% of their value. We cannot see any discernible purpose of the Arrangements other than obtaining a tax advantage.

96. Regulation 10(4) provides that the arrangements are standardised if a promotor makes the arrangements available for implementation by more than one person. The evidence before the Tribunal was that the arrangements were made available for implementation by more than one participant. HMRC relied upon the documents obtained from the four users.

97. We are satisfied that the Arrangements fell within Reg. 10 Standardised tax products description and are notifiable for the purposes of s306 and for the purposes of s314A(1)(b).

THE PROMOTER

98. We can only make an order under s314A if we are satisfied that AHP was the promoter. Promoter is defined in s307. HMRC's case is that AHP made the Arrangements "available for implementation by other persons" (as that phrase is used in s307(1)(a)(iii)) in the course of a

"relevant business" (as defined in s307(2)). It was accepted by Mr Mullan in his closing submissions that AHP did carry on "relevant business"- "*And in terms of the meaning of relevant business, I think we have to accept that the way in which the tribunals have approached that test, Asset House did carry on a relevant business, a business relating to tax*." We are therefore focused on s307(1)(a)(iii) in relation to the proposal and so also the opening words of s307(1)(b).

99. Mr Mullan argued that the consequence of the DOTAS code applying are penal and this invokes the presumption that the legislation should be construed strictly and s307 should not be construed extensively so as to treat a person who is not in a position to comply with them as being subject to obligations and penalties. The phrase "makes the notifiable proposal available for implementation" requires that a person is able to ensure that a scheme user who wanted to use the arrangements would be able to do so. That is not the case here, only BW was in a position to make the arrangements available for implementation. Mr Simpson argued that there could be more than one promoter and AHP "made" the identified arrangements, when at the stage of being a proposal, "available for implementation by" its clients. If AHP's activities were within that description then it is a promoter in relation to the arrangements once implemented. AHP had made available a proposal for implementation by providing the participants with the documents necessary for a user to enter the arrangements and had been responsible for creation of the PMCs and the WRT.

Construing the legislation strictly

100. Mr Mullan relied upon *Hyrax* in support of his submission that the legislation should be construed strictly to avoid a person, such as AHP, who is not in a position to comply with the obligations of a promoter being subject to those obligations and potential penalties. We do not agree. At [114] in *Hyrax* Judge Mosedale stated:

> "[114] In summary, legislation should be interpreted in line with Parliament's presumed intent. The principle against doubtful penalisation is a part of that doctrine; it is not separate and superior to it. So I must bear in mind, when considering how Parliament intended the legislation the subject of this hearing to be understood, that Parliament would have intended a person's duty to be clear to them from the words enacted. At the same time, I must also bear in mind that Parliament intended the legislation to be effective: and I agree with what was said in [Curzon] (another case on these provisions) by Judge Poole at [33] that 'it is appropriate when construing the legislation to lean against constructions which would undermine the effectiveness of the legislation in achieving that purpose'."

101. In our judgment, construing the legislation in the manner suggested by Mr Mullan would frustrate Parliament's intent and undermine the effectiveness of the legislation in achieving that purpose. The fact that AHP may be unable to comply with the obligations imposed upon a promoter by the legislation should not necessarily disqualify it from being a promoter since it would have voluntarily undertaken whatever activities brought it within that description and should have limited its activities if it wished to remain outside that description with its attendant obligations (per *Curzon* at [79]).

More than one promoter?

102. AHP's case was that BW is the promoter of the Arrangements and had been identified as in Spotlight 51 published on 10 May 2019 and a finding of fact in SBL. As such, HMRC have wrongly identified the promoter in their Application. This submission was not vigorously pursued and we have no hesitation in rejecting it. It is clear from the legislation that there may be more than one promoter in relation to any particular arrangements, see *Curzon* at [77].

AHP not a party to the documents

103. It is clear from the documents implementing the Arrangement that AHP was not a party to the documents and it was WUT1 not AHP that created the WRT. Mr Simpson highlighted that the Protectors of the WRT were JC and CC, directors of AHP during the relevant period, but stopped short of submitting that we should pierce the corporate veil and treat AHP, WUT1 and JC and CC as one and the same. It is clear from the evidence that there is a connection between WUT1, AHP, and JC and CC; HM's evidence was that AHP and WUT1 were sister companies. However, we do not consider that point to be determinative when considering whether AHP had made the identified arrangements available for implementation. Similarly, it is not necessary for a person to be party to the transactions in order to be a promoter of arrangements, *AML Tax* at [175 and [180].

Makes available for implementation

104. Mr Mullan argued that AHP could not make available a proposal for implementation as it did not have the right to agree to the client using the Arrangements. *Smartpay* was wrongly decided and the correct approach for this Tribunal to follow is that adopted in *Curzon* and *Hyrax*. Mr Simpson submitted that a person "makes available" a proposal for implementation when the person provides the documents necessary for the user to enter the arrangements, see *Smartpay* and *Opus Bestpay*. We do not accept that the Tribunal decision in *Smartpay* was wrongly decided. The wording in s307(1)(iii) is clear and states "makes the notifiable proposal available for implementation". There is no requirement in s307(1)(iii) that "makes the notifiable proposal available for implementation" requires that a person is able to ensure that a client who wants to use the arrangements would be able to do so. We agree with the Tribunal in *Smartpay* at [41] where Judge Malek stated "*To my mind "makes available", in this context, means to 'be able to be used' or 'to put at someone's disposal'. There is no requirement, in my mind, to ensure that a scheme user, if s/he wants to, is able to use it.*" Applying this to the facts we find that AHP made the Arrangements available for implementation in the sense that it allowed or enabled more than one person who wanted to use the scheme by providing information about the arrangements and the required documentation to implement the arrangements:

(1) HM accepted that AHP had send the relevant scheme documents to the participants and had helped participants complete them. She further accepted that the suite of documents provided by BW to AHP and that AHP made available to participants, was adequate for purpose of a participant entering into and operating the scheme;

(2) The Deed of Adherence that was sent to the participant was already executed by WT1 and just required the participant to execute;

(3) The written resolution of the directors of the participant resolving to adhere to the WRT was a proforma document provided by AHP to the participants;

(4) HM's evidence was that BTIL had never refused to sign a Deed of Adherence and it would have been a "major event" if it had not. She was not aware of any occasion on which a client who wanted to enter the arrangements was not allowed to enter them;

(5) AHP had not itself set-up the PMCs that were required as an integral part of the Arrangements but had facilitated and/or arranged the formation of the PMCs by obtaining the relevant details from the participant and provided the relevant details to the company formation agent; and

(6) AHP received a monthly administrative fee for dealing with further contributions to the WRT and ensuring that all Company House requirements were complied with by the PMCs.

105. Accordingly, we find that AHP was a promoter for the purpose of s307(1)(a)(iii) in relation to the proposal and the opening words of s307(1)(b).

ALTERNATIVE APPLICATION UNDER S306A

106. Given our conclusions set out above, it is not necessary to consider the alternative application under s306A.

DECISION

107. For the reasons set out above, we make an order under s314A that the Arrangements are notifiable within the meaning of s306(1).

RIGHT OF APPEAL

108. This document contains full findings of fact and reasons for the decision. By virtue of Article 3(i) of the Appeals (Excluded Decisions) Order 2009, no right of appeal arises in respect of this decision.

Release date: 12th FEBRUARY 2025