[2019] UKFTT 0063 (TC)

TC06949

Application number: TC/2017/05528

DOTAS – Application for order that certain arrangements are notifiable (or alternatively that they are to be treated as notifiable) – sections 306A & 314A Finance Act 2004 – whether arrangements "notifiable arrangements" – yes – whether respondent "promoter" – no – application refused

FIRST-TIER TRIBUNAL

TAX CHAMBER

BETWEEN

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

-and-

CURZON CAPITAL LIMITED **Respondent**

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in public at Taylor House, Rosebery Avenue, London on 10-12 July, 13 September and 18 October 2018

Mark Fell, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Applicants

Alison Graham-Wells, counsel, for the Respondent

DECISION

Introduction

1. This decision relates to an application made HMRC (unusually, in this case, the Applicants rather than the Respondents) for an order pursuant to section 314A Finance Act 2004 ("FA04") that certain specified arrangements are "notifiable" arrangements within the meaning of section 306 FA04 (part of the so-called "DOTAS" regime) or, in the alternative, an order pursuant to section 306A FA04 that the same arrangements are to be treated as so notifiable.

2. In the interests of brevity and clarity, I will refer throughout this decision to the Applicants as "HMRC" and to the Respondent as "CCL". References to sections are to sections in FA04 unless otherwise stated.

The facts

3. I received witness statements and heard oral testimony from Officer David Wood of HMRC, Christopher Derricott, Chief Executive of CCL and a draft witness statement of William Graham, former director of CCL, who unfortunately died in consequence of a riding accident on 31 January 2018 before he was able to finalise and sign his witness statement. The draft produced to me had been prepared by Mr Graham and emailed by him to CCL's counsel for review on 29 January 2018. I also received a bundle of documents.

4. I find the following facts.

5. CCL was set up by Dr Derricott and Mr Graham in 1999. At all material times it was authorised and regulated by the Financial Conduct Authority (or the predecessor regulator). Its regulatory status was "small corporate finance adviser". It has never provided tax advisory services in the normal sense of that phrase. Dr Derricott had worked in financial services since 1979 and Mr Graham since 1987.

6. CCL has acted as a sponsor and operator of a number of unregulated collective investment schemes. It has also provided investment advice to various funds. More recently, it has provided financial administration services of various types. In particular, it has provided administration services to a pension fund which invested in car loans.

7. In early 2011, Mr Graham was approached by one Neil Masters ("NM") and an associate of his called Simon Wilson ("SW") to enquire whether CCL would be interested in providing some administration services for a set of arrangements, to be called "Capital Contracts", which had been designed to reduce the taxable income of those who chose to participate in them. NM and SW operated through a number of entities, and it was not clear whether the approach was made by them in their personal capacity or on behalf of one or more of those entities. References to "NM" in this decision should be read as encompassing all of them unless the context requires otherwise. CCL had provided administration services since 2010 to a set of arrangements called "Teak Syndicates", also operated by NM (who Dr Derricott believed had designed the "Capital Contracts" arrangements). I infer that the approach in relation to Capital Contracts arose as a result of that previous connection.

8. The Capital Contracts arrangements ("the Arrangements") were described to Mr Graham as being known to HMRC as a "contractor scheme" or "contractor loan scheme". The prospective role of CCL was described to him as entailing:

(1) liaising with new participants, upon notification from ISH Marketing LLP ("the LLP")[1], in order to process and complete the sign-up paperwork, that is to say the documentation which would actually implement the Arrangements in relation to the participants;

(2) preparing and forwarding invoices on behalf of the trustees of International Services Trading Trust ("the Trading Trust")[2] to the companies for which the participants were performing services;

(3) operating bank accounts on behalf of various entities involved in the Arrangements; and

(4) distributing information to the participants in order for them to complete their annual tax returns.

9. In return for these services, CCL was to receive an administration fee of between 1% and 2% of the amount invoiced to the companies receiving the contractors' services. Mr Graham's draft witness statement described this as "quite normal for this kind of work, based as it is on a fund administration fee model". I accept that statement as accurate. In fact, it appears the fee actually paid varied between 1.5% and 3%.

10. Mr Graham's draft witness statement states (and I accept) that he undertook some basic due diligence and requested a copy of any Counsel's opinion in order to reassure himself that the Arrangements were legal and would have the intended effect on a participant's tax position. He was provided with a note of a conference with a well-known QC dated 17 May 2011 which provided him with the necessary comfort, and included the phrase: "Overall the structure is a very neat and cleverly worked variant on what I have seen previously, in my opinion it would, if operated as set out in this note, provide the anticipated results". Mr Graham also undertook some separate "market research" to satisfy himself that the proposed Arrangements were a commonly used form of tax planning and nothing out of the ordinary. He was also informed that CCL would not be expected to market the Arrangements to participants and that all of the services provided by CCL would be "contingent on receiving instruction from" NM, Mr Wilson and the trustees of the relevant trusts. As confirmed by Dr Derricott, I take this to mean (and I accept) that CCL's contractual role was simply to carry out the various administration tasks delegated to it in accordance with detailed instructions it would receive.

11. In order to understand the scope of CCL's role, it is necessary to summarise the overall Arrangements and the tasks which CCL performed within them. Much of the detail was somewhat vague in the evidence before me, but the key parts of the structure were as follows:

(1) An employee and his/her employer both had to be willing to participate in the Arrangements.

(2) The employee would become a member of the LLP by means of a standard form deed of adherence. The designated members of the LLP were a company registered in the British Virgin Isles ("BVI") and a Monaco-based entity, though the BVI company

[1] This was the LLP at the heart of the Arrangements – see [11] below. There was some suggestion that from a point in 2014, the UK LLP in the structure was replaced by a similarly named LLP based in Guernsey. Whether or not this was the case, it is immaterial to this decision.

[2] This was a Guernsey based trading trust, also central to the Arrangements – see [11] below.

appears to have been administered in Guernsey – officers of Bourse Directors Limited of Guernsey signed instructions on its behalf to CCL.

(3) The employee would cease to be paid as such, instead a payment would be made by the (former) employer to the Trading Trust, upon receipt of an invoice from it, pursuant to a standard form of authority signed by the worker which directed that the payment should be made to "Capital Contracts", specifying a bank account held in the name of CCL. The invoice itself was headed "Capital Contracts". It was stated to be an "invoice by Administrator, on behalf of International Services Trading Trust". At the foot, it stated "Administered by Curzon Capital Limited", and it requested payment of the invoice amount to the bank account in the name of CCL previously specified in the standard form of authority. No VAT was paid by the former employer, on the basis that the VAT reverse charge provisions applied. The trustees of the Trading Trust are not totally clear, but were two entities identified in the trust deed as both being called "International Services Holdings Limited", one a BVI company and the other unidentified; the trust deed was executed on behalf of both of them by officers of Bourse Directors Limited, also of Guernsey.

(4) The Trading Trust would transfer approximately 82% of the money received from the former employer to a Guernsey-based benefit trust called "International Services Benefit Trust" ("the Benefit Trust"). The trustees of this trust appear to have been (i) the same BVI company as acted as trustee of the Trading Trust and (ii) Bourse Trust Company Limited of Guernsey. As explained in a letter from the Trading Trust to CCL dated 11 January 2012, that trust had "an agreement with International Services Benefit Trust who provides our beneficiaries with facilities on the basis that we provide cash security to them equal to the value of the facility provided." In fact, it appears that the money was simply on-lent by the Benefit Trust to the participants pursuant to a standard form unsecured[3] loan agreement, under which any amount loaned had to be repaid within ten years (subject to potential renewal at the discretion of the lending Benefit Trust) and carried interest at 1% per annum (though there was some indication in the documents before me that this interest was actually paid on behalf of the borrower by the LLP[4]).

(5) The remainder of the money would then be paid broadly as follows. Approximately 8-10% would be paid to NM, approximately 3-6% would be paid to the adviser who had introduced the participant to the Arrangements, CCL would receive approximately 1.5%-3% for its services (slightly smaller amounts were also mentioned, but the difference is immaterial for present purposes), approximately 1% would be retained by "the trustees"[5], and approximately 0.5% to 1% would be retained in a "fighting fund" to defend the Arrangements if attacked by HMRC.

[3] The loan agreement did however provide that the trustees of the Benefit Trust "may at any time and at their sole discretion require the Borrower to provide such security for the Loan as the Trustees in their absolute discretion think fit." There was no evidence before me that any such security had ever been required or given.
[4] See [16] below.
[5] It may well have been the case that this amount, or some part of it, was paid to the LLP; filed accounts of the LLP for the period 2011 to date all exclude profit and loss accounts, other than the accounts for the calendar year 2015, which show turnover of £395,906, operating profit of £24,348 and net profit of nil for that year; they also show figures for the year 2014 of £2,079,266 turnover, £116,702 operating profit and net profit of nil; there was also a copy in my bundle of a direction to CCL from the Trading Trust to pay £6,000 to the LLP "as payment for its services" (its principal activity in the 2015 accounts being given as "provision of administrative and marketing

12. The tasks performed by CCL, all of them on the basis of specific instructions received from the LLP, the Trading Trust or the Benefit Trust included:

(1) Processing and completing the "sign up paperwork". This entailed:

(a) obtaining a standard form deed of adherence from the participant to become a member of the LLP and (until September 2014, when its authority was revoked) executing the deed of adherence as attorney for at least one of the designated members of the LLP;

(b) obtaining a standard form of authority signed by a participant, addressed to his/her employer, requiring future payments to be made to "Capital Contracts" via CCL's bank account, and issuing it to the employer[6];

(c) obtaining a standard form loan agreement signed by each participant and (until September 2014, when its authority was revoked) signing the loan agreement as attorney for the Benefit Trust.

(2) Preparing and forwarding invoices on behalf of the Trading Trust to the companies for which the participants were performing services.

(3) Operating bank accounts on behalf of the Trading Trust, the LLP and the Benefit Trust, monitoring receipts and making payments into and out of such accounts in accordance with instructions received. Over the period from August 2011 to February 2016, a ledger of the Trading Trust included in the documents before me showed aggregate sums of over £113 million credited by CCL.

(4) Distributing to the participants information supplied by the LLP as to their respective profit shares in the LLP, for inclusion in their tax returns.

13. CCL started to perform these services in June 2011. There was mention in the documents before me of an agreement dated 24 June 2011 covering CCL's services, but no copy of that agreement was included, nor were copies of the powers of attorney under which CCL acted.

14. Included in the bundle of documents before me was a copy of a set of 15 slides relating to the Arrangements which had been provided to HMRC by a taxpayer in the course of an enquiry into his/her self-assessment return for a year in which he/she had taken part in the Arrangements. These slides were prepared on a CCL template and included "Curzon Capital" and "Capital Contracts" on nearly every page as part of the layout. The title page read "Capital Contracts / A Salary Enhancement Strategy". The next page was headed "Background", and included the following text:

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services"). I do not consider this detail to be material, though illustrative of the uncertainty surrounding some of the detail of the Arrangements.

[6] Included in the documents before me was a letter dated 25 June 2012, purportedly from CCL to one of the companies whose employees participated in the Arrangements. This letter enclosed the employees' signed authorisations to make the relevant payments "to Capital Contracts". Mr Graham in his draft witness statement asserted that he had not sanctioned or approved this letter, and implied that a pdf version of his signature may have been improperly added by someone else. I do not consider this to be significant, as I am satisfied that the letter emanated from CCL in any event, however Mr Graham's purported signature came to be added to it. The fact that it included advice about the operation of the VAT reverse charge provisions does not affect this view, as I am satisfied that advice must have been provided for inclusion in the letter by NM or SW or one of their entities.

"■ Restructuring the method by which individuals are remunerated to mitigate tax

■ Retention of 82% of gross earnings

■ Employer also benefits through saving 13.8% on National Insurance contributions and attracts Corporation Tax relief on the full invoice value

■ Strategy effective for employees earning over £45,000 per annum

■ Strategy also has potential to generate 27% saving on Inheritance Tax"

15. The next page included a table headed "Current Remuneration Options" which purported to provide a comparison (in terms of "Risk" and "Gross Earnings Retained") of "Employment", "Self-employment", "Limited company", "Umbrella" and "Capital Contracts". The last of these, which resulted in 82% of "Gross Earnings Retained", was described as offering the "Best balance of risk and reward", and compared apparently favourably to the "Gross Earnings Retained" in employment of "52%-65%".

16. There followed two pages outlining the "Strategy Mechanics", which explained that the participant became a "Member of an LLP/Trust structure", through which his/her services were offered back to the previous employer, with the participant receiving "82% of the gross earnings through the Administrator on a monthly basis". It was explained that this was by way of loan, and the following page, headed "Loan Status", included the following text:

"■ The monthly payment received by the participant is a "soft" loan from a trust of which he/she is a beneficiary

■ The loan is unsecured and is not connected with any employment that the participant may have

■ The interest rate on the loan is 1%, but this cost is covered through the 18% monthly administration fee retained by the LLP

■ The loan can be written off at some point in the future with no adverse tax consequences

■ If the loan is left in place, on death this can provide IHT advantages for protecting the value of the participant's estate"

17. Other pages included a brief reference to the fact that CCL, authorised and regulated by the Financial Services Authority, administered "all aspects of the strategy", including the payment of "the monthly remuneration transfers to participants". A summary of the "Application Procedure" was given. Some "FAQs" were set out and answered, including: "Is there any risk I will have to repay the loan?", to which the answer was: "The loan is received as a benefit & can be written off at any time. Although for IHT purposes the participant may wish to leave the loan in place". The extract from counsel's opinion quoted at [10] above was set out (with counsel's name and the date on which he settled the relevant note, 17 May 2011). On the final page, contact details were given, namely "Charlie Goldsmith" and "Patrick McMeekin", both with email addresses at CCL, whose address, telephone and fax number were also given.

18. Mr Goldsmith had, at the relevant time, been the head of sales at CCL and Mr McMeekin had been his assistant. Mr McMeekin left CCL on 30 September 2012 and Mr Goldsmith left in 2016.

19. In his draft witness statement, Mr Graham had said this about the preparation and issue of this document:

> "In order that all members of staff (there were five of us at the time) were fully briefed on the new initiative for the company I asked NM to prepare an "aide memoire" for us so that if any of us were on holiday or away from the office another colleague would have a basic idea what our role and responsibilities were regarding Capital Contracts. NM obliged by providing me with a set of diagrams and a written explanation of how the arrangements worked, together with a summary of Counsel's Opinion. In order to make this user-friendly for my colleagues I inserted the information into a series of slides (using a Curzon-branded template only because I was familiar with how to use it) and circulated it internally. It was never intended to be used as a marketing document. To the best of my knowledge and belief Curzon never introduced a single third party to the arrangements and did not once receive an introductory commission for doing so.
>
> HMRC have obtained a copy of Curzon's slides from a third party. I understand that the reason the slides came to be in a third party's hands is because an accountant, whom NM had contacted about the arrangements, wished to explain them to a client and asked the promoters (NM and SW) for an "aide memoire" to assist him in this task. NM asked me to forward the slides to the accountant in order to save himself the trouble of having to produce something of his own. Had I known that HMRC would subsequently seize on this as evidence that Curzon "marketed" the arrangements then I would not have asked one of my colleagues to send out the document to the accountant in question."

20. Dr Derricott however confirmed that, having spoken to Patrick McMeekin and Charles Goldsmith, a slightly different picture emerged. He had established that Mr McMeekin had sent out this document to "a number of independent financial advisers" before he had left CCL on 30 September 2012. In doing so, I find that he was acting on the instructions of either Mr Graham or Mr Goldsmith (Dr Derricott referred to Mr McMeekin as Mr Goldsmith's "second in command, basically his gofer for want of a better description"). Dr Derricott had also established from his conversation with Mr Goldsmith that the latter had also spoken about the Arrangements to a number of his IFA contacts before Mr McMeekin's departure, but apparently without sending out the slide pack to any of them.

21. Dr Derricott said (and I accept) that he was not himself aware of the slide pack being sent out to IFAs.

22. When the content of the slide pack is considered, it is not in my view plausible to regard it as having been prepared for the "internal briefing" purposes referred to in Mr Graham's draft witness statement. It does not provide any detail about the specific tasks to be carried out by CCL, its general tone and thrust is very much as a marketing document to explain the outline of the Arrangements and their intended benefits to potential participants and their advisers. I find that it was issued as such by CCL to a significant number of IFAs in the hope that they would introduce their clients to participate in the Arrangements, resulting in further administration fees arising for CCL.

23. An example of how the Arrangements had operated for a particular user was given in the bundle of documents before me. That user ("X") had received a formal offer letter dated 24 April 2012 from ISH offering "a partnership" in ISH (as a result of which he would become an ordinary member of ISH); he had sent a letter of acceptance, also dated 24 April 2012, enclosing a copy of the standard form Deed of Adherence signed by him, and recording that he would become a member of ISH upon completion of the Deed of Adherence. He also signed a standard form loan agreement, which provided for a loan facility of £840,000 on the standard terms referred to above. His Deed of Adherence was dated 1 May 2012 (though no copy of the Deed executed by the designated members was included in the documents before me). By a series of invoices issued by CCL as "Administrator, on behalf of International Services Trading Trust" to X's company on various dates between 21 May 2012 and 20 March 2013, sums totalling £246,200 were invoiced in respect of X's services from "April 2012" (which, it will be noted, predated the execution of the Deed of Adherence) to March 2013. Loans totalling £201,884 (exactly 82% of the invoice amounts) were advanced to X. By email dated 22 November 2013, CCL informed X that he should include taxable profits of £3,187.73 on his 2012-13 self assessment return in respect of his share of the profits of ISH, but that "no reference to the advances you have received or indeed to Capital Contracts in general need or should be included on your tax return."

24. I accept that no introductory commission was ever received (or sought) by CCL as a result of any such introductions. As Dr Derricott made clear in evidence, the administration fee income from the Arrangements was very important in its own right to CCL. Its accounts for the year ended 31 December 2012 disclose turnover up to £2,426,021 from the previous year's figure of £645,295 and Dr Derricott was quite frank that "the lion's share" of the increase was due to the fees earned for administration of the Arrangements. The ledger referred to at [12(3)] above discloses that a little over £45 million was passed through the Arrangements during the calendar year 2012, which would (at a notional fee rate of 2%) have given rise to some £900,000 of fees during the year, so the administration fee income was clearly a very important part of CCL's business at that time, even without introductory commission in addition. Dr Derricott estimated that between 50% and 75% of CCL's turnover for 2012 was attributable to Capital Contracts, and more than 50% for 2013 and 2014 as well.

25. I am satisfied that neither CCL nor any of its officers or employees was involved in the design of the Arrangements or had a detailed technical understanding of precisely how they were intended to achieve the results claimed for them.

26. There was some dispute before me as to whether CCL actually "traded as" Capital Contracts. I do not consider that it did. Its activities were quite clearly held out as being those of administrator of a set of arrangements carrying the promotional title "Capital Contracts". Although HMRC described CCL (inaccurately, in my view) in their application as having traded under the name "Capital Contracts", I do not consider this vitiates the application in any way; the essence of the Arrangements as described by HMRC in their application remains broadly accurate, and certainly sufficiently so to comply with the requirement to "specify the arrangements in respect of which the order is sought", as set out in section 314A(2)(a).

The legislation

27. Relevant extracts from the various statutory provisions are set out in an Appendix to this decision.

28. HMRC contend that the Arrangements the subject of this application fall within either or both of the "Premium Fee" and "Standardised Tax Product" descriptions specified in

Regulations 8 and 10 respectively of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 ("the 2006 Regulations") as in force from 1 January 2011 to date or (in the case of Regulation 10) to 22 February 2016. The parties are agreed that the version of the 2006 Regulations to be applied is that in force during that period, rather than the version currently in force, chiefly because any obligation to notify arises by reference to a time during that period.

The arguments

For HMRC

29. Mr Fell submitted, in broad terms, as follows:

(1) The nature of the Arrangements was such that they enabled, or might be expected to enable, the participants to obtain an advantage in relation to income tax (by means of the intended circumvention of the disguised remuneration legislation contained in Part 7A of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA")).

(2) The obtaining of that advantage was the main benefit (or one of the main benefits) that might be expected to arise from the Arrangements.

(3) The Arrangements fell within both Regulation 8 ("Description 3: Premium Fee") and Regulation 10 ("Description 5: Standardised Tax Product") of the 2006 Regulations.

(4) The activities of CCL were such as to make it a "promoter" of the Arrangements within the meaning of section 307.

(5) It is therefore appropriate for the Tribunal to make an order that the Arrangements are notifiable, with CCL being specified as the promoter as required by section 314A.

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

For CCL

30. Ms Graham-Wells submitted, in broad terms, as follows:

(1) CCL could not properly be regarded as a (or the) "promoter" for the purposes of sections 306A, 307 or 314A or the 2006 Regulations; its role was merely administrative, it had not played any part in the design of the Arrangements, it had not made any "firm approach", it did not itself make the Arrangements available for implementation, nor was it to any extent responsible for their organisation or management; finally, none of its activity in relation to the Arrangements was in the course of a "relevant business", as its business did not involve the provision of services relating to taxation, nor was it (or any group company) a bank or securities house.

(2) In any event, Regulations 4 and (until 16 April 2015) 5 of the Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004 ("the 2004 Regulations") applied so as to exclude CCL from being a promoter.

(3) The 1-3% fee received by CCL was not a "premium fee", it was an industry-standard administration fee; furthermore, as CCL was not in her submission a (or the) promoter and HMRC had not identified any other person or entity as such, the "Premium Fee" description in the 2006 Regulations was not satisfied (any intended tax advantage accruing to individuals or small or medium-sized enterprises).

(4) CCL had not determined the form of any of the documents used in the Arrangements, and HMRC had failed to identify any other person who had done so; accordingly the Arrangements did not satisfy the "Standardised Tax Product" description in the 2006 Regulations.

Discussion

Introduction

31. As HMRC's main application is based on section 314A, that is the appropriate starting point. There are three aspects of that section which require comment. In the order in which they appear in the legislation they are as follows:

(1) First, it must be established that the proposal or arrangements in question are "notifiable" (section 314A(1)).

(2) Second, HMRC's application is required to specify two things, namely:

(a) the proposal or arrangements in respect of which they seek an order (section 314A(2)(a)), and

(b) the promoter (section 314A(2)(b)).

(3) Third, only if it is satisfied that section 306(1)(a) to (c) applies to the arrangements in question, "may" the Tribunal make the order applied for by HMRC (section 314A(3)).

32. Any consideration of the first aspect must necessarily follow the formation of a view as to precisely what are the "proposal or arrangements" under consideration. Therefore, it is appropriate to consider part (a) of the second aspect before the first aspect.

Previous case law

33. There has been no consideration in the decided cases of the significant issues in this application. The parties only referred me to one First-tier Tribunal decision, *HMRC v Root2Tax Limited & Root3Tax Limited (in liquidation)* [2017] UKFTT 0696 (TCC)[7], and in doing so made passing reference to certain comments made by Green J in *Dr Walapu and others v HMRC* [2016] EWHC 658 (Admin), a judicial review case on accelerated payment notices ("APNs"). In that case, Green J was considering an argument about the invalidity of the APNs in question, based on the argument that the underlying arrangements were not notifiable under Part 7 FA04 and therefore no valid APN could be issued. In doing so, he observed that the DOTAS regime in Part 7 FA04 had been promulgated "to enable HMRC to learn about and challenge" avoidance schemes or suspected avoidance schemes. Accordingly, it is appropriate when construing the legislation to lean against constructions which would

[7] For completeness, I should say that reference was also made to the application to the High Court for permission for judicial review of this decision (reported at [2018] EWHC 1254 (Admin), but this added nothing of material relevance to the present case.

undermine the effectiveness of the legislation in achieving that purpose. Beyond this, I found nothing in *Walapu* of assistance to me in the present case.

34. A copy of the Special Commissioner's decision in *HMRC v Mercury Tax Group Limited* [2009] SpC 737, [2009] STC (SCD) 307 was also included in the authorities bundle, though neither party referred me to it; the law has been substantially amended since that case was decided and I did not find anything in it to assist me in the present case.

35. *Root2Tax* was concerned with the question of whether certain arrangements were notifiable under the DOTAS regime. The key areas of dispute were whether the arrangements in particular answered the description of "standardised tax product" (applying the same version of that description in the 2006 Regulations as applies in this case), and whether the arrangements in question enabled, or might be expected to enable, any person to "obtain an advantage in relation to any tax…". A separate issue (concerning whether the arrangements in that case showed another of the "hallmarks" in the 2006 Regulations) need not concern me in this case.

36. As recorded in *Root2Tax* at [35], the first of the disputed issues did not detain the Tribunal for long:

> "Although, in his skeleton argument, Mr Way *[counsel for the Respondent]* disputed HMRC's claim that the Alchemy scheme is a standardised tax product he did not pursue the argument orally with any vigour. It will be apparent from what I have already said that I agree with Ms Nathan *[counsel for HMRC]* on this point. Even a cursory perusal of the documents shows a recurring pattern with little variation, apart from dates, names, amounts and similar details, from one iteration to another. It is also apparent that the documentation required minimal tailoring to each user."

37. As recorded at [30] of the Tribunal's decision, it had been accepted by the respondents that if the scheme under consideration in that case amounted to notifiable arrangements, then they "must be regarded as promoters of it within the statutory meaning."

38. Accordingly the heart of the Tribunal's decision (at [33]) addressed the "real battleground between the parties", which resolved into "three fundamental but interlinked issues":

> "The core of the respondents' argument is that the DOTAS provisions are not engaged at all, because the arrangements did not give rise to a tax advantage: the user could not have undertaken the transactions I have described in any other way, and the tax to which they give rise has been declared and paid. That argument depends for its success on an answer favourable to the respondents to the question which represents the second issue: what is the tax advantage, if any, which falls within the scope of the legislation, as applied these transactions? That question cannot be answered without addressing the third issue: which of the various transactions fall within the scope of the 'arrangements' to which the statutory provisions apply?"

39. Clearly the present case is concerned with significantly different matters, and accordingly I did not find any real assistance in *Root2Tax*.

What are the "arrangements" under consideration?

40. In these proceedings, HMRC have applied for an order that "arrangements" (rather than "a proposal") is notifiable. They specified in their application the "arrangements" in respect of which the order is sought, as being "the arrangements that arise when a person becomes a partner of ISH Marketing LLP ("ISH")[8]". They set out their understanding of those arrangements as follows:

> "(1) An individual ("scheme user") becomes a partner in ISH by way of a Deed of Adherence…
>
> (2) Through its trading trust, ISH provides the scheme user's services to its previous employer (or private company).
>
> (3) The scheme user authorises for all timesheet and expenses payments for its services to be paid to the Respondent ("trading as 'Capital Contracts'). At or about the same time, a loan agreement is then entered into with the arrangements' benefit trust, based in Guernsey, which allows the scheme user to draw down from a line of credit. The loan terms are generally for ten years, with 1% interest. The term of the loan is extendable at the discretion of the trust….
>
> (4) The Respondent receives the gross amount of the scheme user's remuneration on behalf of the trading trust. Typically 82% of that amount is then provided to the arrangements' benefit trust, with typically 18% being retained.
>
> (5) The scheme user then receives typically 82% of its gross 'salary' by way of a loan from the benefit trust. Before paying the scheme user as outlined above approximately 18% of the income is retained."

41. Whilst the legislation is drafted on the basis that "arrangements" may implement a "proposal" (as will be seen below, in some contexts it is assumed that any given set of arrangements may well be preceded by a proposal), and to that extent there is a link between the two concepts, it is also clear that they are entirely distinct, with separate disclosure regimes applying to them. It is important to keep the distinction in mind when considering the legislation.

42. It is clear to me (and Ms Graham-Wells did not argue to the contrary) that the Arrangements summarised above (and explored more fully in the course of the hearing) clearly fall within the definition of "arrangements" in section 318, which states that "'arrangements' includes any scheme, transaction or series of transactions."

43. Having established the "arrangements" with which we are concerned, the next step is to consider the first aspect at [31] above, namely whether those arrangements "are notifiable".

Are the Arrangements notifiable?

Preliminary points

44. Whilst the statute does not specifically say so, both parties put their arguments on the basis that arrangements are "notifiable" for the purposes of section 314A if they fall within the

[8] Technically, a person becomes a "member" of an LLP, rather than a "partner" of it, though in common parlance members of LLPs are often described loosely (though inaccurately) as partners. CCL rightly took no issue on this, the true intention being clear.

definition of "notifiable arrangements" in section 306. This would appear logical, but does not explain the significance of section 314A(3), which provides that "[o]n an application the tribunal may make the order only if satisfied that section 306(1)(a) to (c) applies to the relevant arrangements"; section 306(1) specifically states that "notifiable arrangements" are arrangements within those three sub-sections, therefore the additional purpose of section 314A(3) is unclear – if arrangements must fall within sub-sections 306(1)(a) to (c) before they are "notifiable", section 314A(3) appears to be redundant in requiring the Tribunal to be satisfied that those provisions apply to the arrangements before it may make an order. I have not been able to identify any particular intention behind this apparent duplication in the legislation and neither party sought to make anything of it, accordingly I disregard it as a piece of redundant drafting.

45. The slightly more significant point arising from section 314A(3) however is that it is phrased in permissive rather than mandatory terms. In saying that the Tribunal "may" rather than "shall" make an order, it implies that a Tribunal may choose not to make such an order, even if entitled to do so. Mr Fell argued that it would be inconsistent with the policy of the legislation for a Tribunal to decline to make an order if all the requisite conditions were satisfied, and the word "may" should be read more as the positive conferring of a power (to make the order) in the stated circumstances rather than the creation of a discretion. As the task of the Tribunal under section 314A is to decide whether to make an order rather than to determine whether a particular state of affairs (factual or legal) exists, it seems to me that there must inevitably be an implied discretion for the Tribunal, but if the requirements of section 314A are satisfied, it is a discretion which should be exercised in favour of making the order unless there is some compelling reason not to do so. I approach the matter on this basis. Parallel observations apply to section 306A.

46. The next point of interpretation arising on section 314A derives from the fact that it uses the present tense – the order being applied for is that the Arrangements "are" notifiable. In a situation where (as here) the rules to determine what arrangements are notifiable have changed over the relevant period, this gives rise to the question of whether the Tribunal should, in testing for notifiability, apply the legislation as it applies on the date of the hearing, the date of HMRC's application or (as both parties submitted) an earlier date, namely the date on which the Arrangements, if notifiable, would first have potentially given rise to duties under section 308 to provide prescribed information to HMRC.

47. Mr Fell provided some detailed written submissions on this (and a related) point before the final day of the hearing, and Ms Graham-Wells indicated she was in broad agreement with them. As they were not in dispute, I do not consider it worthwhile to summarise them in this already long decision, I simply record that I generally accept the arguments put forward and agree that it is clearly correct to apply the test of "notifiability" as it stood at the time when the duty to notify the Arrangements specified in the application would have first arisen, if they were notifiable. I am not directly concerned with a "proposal" rather than "arrangements" in this application, but the same reasoning would in my view apply in such a case.

48. I am here concerned with whether the Arrangements fell within sub-sections (a) to (c) of section 306(1). The main dispute between the parties revolved around sub-section (a) and the related provisions, and there was no serious argument around sub-sections (b) and (c), therefore I can dispose of them briefly first.

Sub-section 306(1)(b)

49. As to sub-section (b), the question is whether the Arrangements "enable, or might be expected to enable, any person to obtain an advantage…" in relation to (in this case) income tax. For this purpose, "advantage" is defined broadly in section 318(1), to include "the avoidance or reduction of a charge" to tax. It is quite clear from the briefest examination of the Arrangements in this case that their intention was to avoid the incidence of income tax (especially higher rate income tax) on earnings from employment. Without a detailed analysis of the Arrangements (including, if necessary, a final determination of their effect by litigation) it cannot be said that they "enable" such avoidance. The more relevant question is whether they "might be expected to enable" it. Clearly that was the stated expectation of NM (endorsed by CCL), as expressed in the slide referred to at [15] above, but is that sufficient? To put the point more broadly, whose expectation is to be considered in this context? It seems to me that this question must be considered in the light of the policy behind the provisions in general, and that policy would be stultified if a detailed examination had to be carried out into the robustness of any scheme in order to form a view as to whether, from the point of view of some notional observer with particular attributes, it "might be expected to enable" a tax advantage to be obtained; the better view in a case such as the present is, I think, 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.

50. That is the case here, and I find therefore that the Arrangements under consideration fall within sub-section 306(1)(b).

Sub-section 306(1)(c)

51. As to sub-section (c), the question is 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 referred to above.

52. Mr Fell referred to a particular use of the Arrangements reflected in the bundle before me, in which the participant had received payments totalling £201,844 out of invoices totalling £246,000. The retention of 18% was "substantially less" than the amount of income tax that would have been payable on an income of £246,000, and the profit share of £3,187 he was advised to report made no material difference. In outline, a taxpayer would be accepting an 18% deduction in place of a tax liability of 40% or more. There were no corresponding non-tax benefits against which that saving should be weighed (following the approach of Whipple J in *R (on the application of Carlton, Hartley and others) v HMRC* [2018] EWHC 130 (Admin) at [72] *et seq*, and accordingly it was self-evidently the case that the tax saving was the main benefit that might be expected to arise from the Arrangements.

53. I agree with Mr Fell's submission and find that the Arrangements fall within sub-section 306(1)(c).

54. Accordingly, the question of whether the Arrangements were notifiable depends upon whether they fell within sub-section 306(1)(a), which in turn depends on whether they fell within any of the "descriptions prescribed by regulations". Two such descriptions are argued to be relevant, and I deal with each in turn.

Premium fee description

55. Ms Graham-Wells' submissions on this point revolved mainly around the argument that CCL had not itself obtained a premium fee in connection with the use of the Arrangements.

56. This misses the point. Regulation 8 posits a hypothetical situation involving a notional promoter of arrangements the same as (or substantially similar to) the Arrangements, and a notional "person experienced in receiving services of the type being provided" (which must refer to the services of making the Arrangements available for implementation). The question then to be asked is whether it might reasonably be expected that that notional promoter (or a person connected with him) would (but for the requirements of the 2006 Regulations) be able to obtain a premium fee from that notional person for making the arrangements available. Thus the fact that CCL itself did not obtain a premium fee is not relevant.

57. For these purposes, the definition of "premium fee" is important. Given that there is no suggestion that the Arrangements involved a contingent fee, Regulation 8(2) of the 2006 Regulations provides that 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… to a significant extent attributable to that tax advantage." In the present case, the structuring of the Arrangements included a deduction of 18% of the gross payment made to the Trading Trust, out of which various costs and commissions were met, leaving a balance of around 8%-10% as the fee which went to NM. It is clear that whether one considers the full 18% or only the 8%-10% that was paid on in this way, it can properly be regarded as a fee which was charged by virtue of the 18% deduction taken by the Trading Trust (an element of the Arrangements or their structuring); and that the deduction would only be possible as a result of the supposed avoidance of income tax at a much higher rate on the amount actually paid to the Trading Trust, meaning that it must be regarded as attributable "to a significant extent" (if not wholly) to the tax advantage constituted by such avoidance.

58. Of course, the question to be answered is not whether there was a premium fee actually paid in respect of the Arrangements, it is whether "it might reasonably be expected that a promoter… would be able to obtain a premium fee…"; however, the fact that a large number of individuals did in fact pay what I consider to be premium fees for the use of the Arrangements is clearly a strong indicator that a notional promoter of these (or substantially similar) arrangements "might reasonably be expected… [to] be able to obtain a premium fee" from a notional "person experienced in receiving services of the type being provided". Of course, there was no evidence before me as to whether the participants in the Arrangements were in fact "experienced in receiving services of the type being provided", so this cannot be regarded as definitive.

59. Standing back and looking at the facts in the round, however, even disregarding that "strong indicator", I am satisfied that this requirement is satisfied in relation to the Arrangements. The general presentation of the Arrangements, including the level of detail provided and their fulsome endorsement by specialist leading counsel, is clearly directed to the serious potential scheme user and, as such, it would be reasonable to expect that a premium fee would be obtainable from a person experienced in receiving services of the type being provided.

60. Regulation 8(1) of the 2006 Regulations contains one other qualification that deserves mention. It excludes from the "premium fee" description any arrangements if "no person is a promoter in relation to them; and…the tax advantage which may be obtained under the

arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise". The main tax advantage hoped for under the present Arrangements was certainly an income tax saving for an individual or individuals; the exception would therefore apply if "no person is a promoter in relation to them". Whatever the view about whether CCL was a promoter, I am satisfied that NM was: the evidence before me clearly showed that whatever such person(s) or entity/ies was or were actually involved, it was (or they were) acting in the course of a business "involving the provision to other persons of services relating to taxation" and that as such it or they had been largely (if not exclusively) responsible for the design of the Arrangements. Thus it or they clearly satisfied the definition of "promoter" in relation to these Arrangements under section 307(1)((b). Mr Graham clearly saw NM as such (see [19] above) and from the description given in his witness statement as to their activities generally (as well as the way in which the Arrangements actually operated) I am satisfied that he was correct to do so.

61. It follows that I consider the Arrangements to answer to the "Premium Fee" description contained in Regulation 8 of the 2006 Regulations. As such, since section 306(1)(a) only requires arrangements to fall within any one or more of the relevant descriptions, I consider the Arrangements to be notifiable for the purposes of section 306 (and therefore also for the purposes of section 314A(1)(b)).

Standardised tax product description

62. It is however also appropriate to consider whether the "standardised tax product" description contained in Regulation 10 of the 2006 Regulations also applies.

63. There are four elements involved. First, one must decide whether the Arrangements are a "product" (as defined in Regulation 10(2)); if so, one must decide whether the product is a "tax product" (see Regulation 10(3)); if so, one must decide whether that tax product is a "standardised tax product" by applying Regulation 10(4); and finally one must decide whether the exception in Regulation 11 applies.

64. In the present case, if the Arrangements are found to be a "product", then I am in no doubt that it would be both a "tax product" and a "standardised tax product". Neither party argued to the contrary. It would, in my view, 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" (see Regulation 10(3)) and a promoter (whether it be CCL or another person) has clearly made the Arrangements available for implementation by more than one other person (see Regulation 10(4)).

65. The antecedent question is whether the Arrangements are a "product", and Ms Graham-Wells picked up on one particular point in seeking to argue that they were not, at least in relation to CCL.

66. Regulation 10(2) provides, in relevant part, as follows:

> "(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 series of transactions are standardised, or substantially standardised in form."

67. It is quite clear that the Arrangements have "standardised, or substantially standardised, documentation… the purpose of which is to enable the implementation, by the client, of the arrangements". It was also not disputed that the client "must enter into a specific transaction or series of transactions", and that the transaction or series of transactions were "standardised, or substantially standardised in form." I agree. However, Ms Graham-Wells pointed out that (as I accept) the "form" of that documentation was determined not by CCL but by NM; accordingly in the context of an application seeking an order that CCL was the promoter of notifiable arrangements, she argued it was clearly not the case that the form of the documentation was "determined by the promoter, and not tailored, to any material extent, to reflect the circumstances of the client" (see Regulation 10(2)(a)(ii)).

68. This argument essentially relied on the proposition that the use of the phrase "the promoter" in this context must necessarily refer to a single promoter and, on HMRC's case, that could only be CCL (identified as "the promoter" in their application to the Tribunal). This was to be contrasted with the formulation "a promoter" used in Regulation 10(4), which clearly contemplated the possibility of a different promoter from that specifically under consideration at the time (it being common ground that any given set of arrangements could have more than one "promoter").

69. I consider this to be putting too much weight on the words "the promoter" in Regulation 10(2)(a)(ii). The general thrust of Regulation 10 is to identify what might be called a "pre-packaged" scheme; clearly any scheme in which the form of the documentation was determined by the user would not meet that description. The legislation clearly contemplates that any given set of arrangements can have more than one promoter, and it would be odd indeed (and contrary to the underlying policy of the legislation) if that fact precluded Regulation 10 from applying because of the reference to "the promoter" in Regulation 10(2)(a)(ii). If it is the case (as I am satisfied it is here) that some person has been responsible, in the course of a relevant business, for the design of the arrangements then that person is clearly a promoter of the arrangements and if that person has determined the form of the documents (as I am satisfied is the case here) then Regulation 10(2)(a)(ii) is satisfied.

70. Ms Graham-Wells argued that Regulation 11(1)(b) of the 2006 Regulations took these Arrangements outside the scope of the "standardised tax product" description. This regulation provides that "arrangements which are of the same, or substantially the same, description as arrangements which were first made available before 1st August 2006" are "specified" and therefore qualify the description in Regulation 10. Her argument was that the Arrangements were just another example of the "contractor loan schemes" that had been common for many years, and certainly before 1st August 2006.

71. I consider this argument to be entirely undermined by leading counsel's view of the Arrangements as "a very neat and cleverly worked variant" of previous schemes – see [10] above. Even without this evidence, I would have regarded the burden as lying on CCL to establish that the exception in Regulation 11 applied to the Arrangements, and Ms Graham-Wells adduced no evidence to support her assertion.

72. I therefore consider Regulation 11 of the 2006 Regulations does not apply so as to take the Arrangements outside the scope of the "standardised tax product" description in Regulation 10.

73. It follows that I consider the Arrangements in this case also answer to the "standardised tax products" description in Regulation 10 of the 2006 Regulations.

Conclusion on notifiability

74. It follows that I consider the Arrangements to be "notifiable arrangements" pursuant to section 306, both on the basis of the "premium fee" description and on the basis of the "standardised tax product" description.

Was the respondent a promoter?

Preliminary points

75. Section 314A on its face only requires the Tribunal to decide whether the arrangements in question are notifiable. Given my findings above, it could be argued that is the end of the matter and I ought to make the order sought by HMRC. But I do not consider that would be a correct interpretation of the legislation.

76. Section 314A quite specifically requires HMRC to identify "the promoter" in any application under section 314A (and the same requirement applies under section 306A). The consequence of the making of an order is that CCL would be responsible for the various reporting obligations of a promoter, and indeed section 314A is headed "Order to disclose", which can only be a reference to those obligations. It therefore seems to me that it is implicit in section 314A and 306A that the Tribunal must be satisfied that HMRC have identified in their application a person who answers to the description of "promoter", who ought to be sufficiently involved in the arrangements to be in a position to make the requisite disclosures, which include:

> "(d) information explaining each element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained under the arrangements arises; and
> (e) the statutory provisions… on which that tax advantage is based."

(Tax Avoidance Schemes (Information) Regulations 2004, Regulation 3(2)).

77. I conclude therefore that an order should only be made under section 306A or 314A if HMRC have correctly specified a person in their application as "the promoter". In saying this, I recognise that the legislation specifically contemplates that there may be more than one promoter in relation to any particular set of arrangements, therefore if HMRC are able to establish that the person specified in their application answers to the statutory description of a "promoter", then an order may be made notwithstanding the fact that another person or persons may also answer to it (whether more or less obviously than the person specified in the application).

78. The question still arises, though, as to whether CCL on the facts of this case falls within the statutory description of a "promoter" in relation to the Arrangements under consideration.

79. The fact that CCL may be unable to comply with the disclosure requirements imposed on 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 accordingly should have limited its activities appropriately if it wished to remain outside that description. I do consider it appropriate however, when interpreting the description itself, to bear in mind the underlying purpose of the legislation and the matters which the legislation appears to assume could generally be expected to lie within the knowledge of a person acting as a "promoter".

Section 307

80. It is now appropriate to turn to the core question of whether CCL falls within the statutory definition of "promoter" in section 307.

81. The relevant parts of section 307 provide as follows:

> "(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.
>
> (1A) For the purposes of this Part a person is an introducer in relation to a notifiable proposal if the person makes a marketing contact with another person in relation to the notifiable proposal.
>
> (2) In this section, "relevant business" means any trade, profession or business which –
>
> (a) involves the provision to other persons of services relating to taxation, or
>
> (b) is carried on by a bank, as defined by section 1120 of the Corporation Tax Act 2010, or by a securities house, as defined by section 1009(3) of that Act.
>
> …
>
> (4A) For the purposes of this Part, a person makes a firm approach to another person in relation to a notifiable proposal if the person makes a marketing contact with the other person in relation to the notifiable proposal at a time when the proposed arrangements have been substantially designed.
>
> (4B) For the purposes of this Part, a person makes a marketing contact with another person in relation to a notifiable proposal if –
>
> (a) the person communicates information about the notifiable proposal to the other person,
>
> (b) the communication is made with a view to that other person, or any other person, entering into transactions forming part of the proposed arrangements, and

(c) the information communicated includes an explanation of the advantages in relation to any tax that might be expected to be obtained from the proposed arrangements.

…

(5) A person is not to be treated as a promoter or introducer for the purposes of this Part by reason of anything done in prescribed circumstances."

82. Until its revocation from 17 April 2015, Regulation 5 of the 2004 Regulations provided an exemption pursuant to section 307(5) above as follows:

> "**5 Persons not to be treated as promoters under section 307(1)(b)(ii)**
> A person is not to be treated as a promoter under sections 307(1)(b)(ii) where he is not connected with another person who is a promoter under section 307(1)(a) or (b)(i) in relation to –
> (a) the arrangements; or
> (b) arrangements which are substantially similar to the arrangements."

83. So there are essentially three routes to becoming a promoter in relation to "arrangements" (the relevant issue in these proceedings), all contained in section 307(1)(b), which could be summarised as follows:

(1) By making, in the course of a "relevant business", a "firm approach" to another person in relation to the notifiable proposal which is implemented by the arrangements, with a view to making the notifiable proposal available for implementation by the person so approached, or by any other person.

(2) By making, in the course of a "relevant business", the notifiable proposal which is implemented by the arrangements available for implementation by other persons.

(3) By being responsible to any extent, in the course of a "relevant business", for the design, organisation or management of the arrangements.

84. Mr Fell argued that CCL's activities brought it within the first two of the three headings referred to at [83] above. He confirmed HMRC were not arguing CCL fell within the third heading – accepting that it was not responsible to any extent for the organisation or management of the Arrangements. Finally, he submitted that there was insufficient evidence before the Tribunal to demonstrate that CCL fell within the exemption in Regulation 5 until 17 April 2015.

Did CCL act "in the course of a relevant business"?

85. HMRC must establish that CCL was acting in the course of a "relevant business" before they can show it to have been a promoter under any of the headings referred to at [83] above.

86. It was not suggested that CCL was a bank or securities house, so section 307(2)(b) is not relevant.

87. The question therefore is whether CCL was acting in the course of a "trade, profession or business…which involves the provision to other persons of services related to taxation."

88. Mr Fell submitted that CCL was acting in the course of a "relevant business" because the services which it provided necessarily involved it, in the course of its business, in providing "services relating to taxation", essentially since the whole rationale for those services was the avoidance of tax. He submitted that this view was reinforced by the content of CCL's letter dated 25 June 2012 referred to in the footnote to paragraph [12(1)(b)] above, in which it stated that "Capital Contracts is administered by Curzon Capital Limited which specialises in efficient and effective administration of tax solutions to the contractor industry."

89. Ms Graham-Wells submitted that CCL was providing simple administration services, in the course of its normal business of doing so; the fact that the Arrangements it was administering happened to be tax avoidance arrangements did not change this fact.

90. Section 307(2) requires an assessment of the nature of the overall trade, profession or business through which the relevant services were provided (and whether that trade, profession or business involves the provision of services relating to taxation), rather than the nature of the specific activities which took place. However, we are not here concerned with some small activity in the context of a far larger general administration business. As can readily be seen from [24] above, the administration of the Arrangements provided a very substantial part of CCL's income for the period for which evidence was available. As a result, I consider the nature of CCL's trade or business for the period from at least 2012 to 2015 is coloured by the services it provided in relation to the Arrangements, to the point where it could fairly be said that its core trade or business involved the provision of those services. Thus the issue boils down to the question of whether the services which CCL provided in connection with the Arrangements were "services relating to taxation".

91. In the context of the overall scheme of Part 7 of FA04, I consider that they were. I accept that CCL had no expertise in the area of taxation and its services were, and were characterised (both with regard to NM and with regard to participants in the Arrangements) as administration services, though it also carried out some marketing activities as summarised above. However, the phrase "services relating to taxation" is in my view sufficiently broad in meaning to cover the activity of administering a tax avoidance scheme, even when doing so without any clear knowledge of the detailed way in which it is intended to work.

92. It follows that I consider CCL to have been acting in the course of a relevant business when carrying out its various activities connected with the Arrangements.

Did CCL make a "firm approach" in relation to the antecedent notifiable proposal?

93. Mr Fell argued that CCL's contacts with IFAs referred to at [19] to [22] above, along with the services it provided in connection with the execution of the deeds of adherence and loan agreements clearly amounted to a "firm approach": it was clear that by the time of CCL's contacts, the Arrangements were already in use (and therefore obviously "substantially designed") and the contacts in question clearly satisfied all the requirements to be "marketing contacts".

94. Ms Graham-Wells submitted that whilst CCL may have made marketing contacts and thereby brought itself within the definition of "introducer" in section 307(1A), that was insufficient to constitute it as a "promoter". The underlying policy of Part 7 (reinforced by HMRC's published guidance on the point) made this clear.

95. It is clear to me that the contacts made by CCL with IFAs summarised at [20] above satisfied all the requirements to be "marketing contacts" within section 307(4B), and Ms

Graham-Wells did not argue otherwise. It is equally clear that the Arrangements were "substantially designed" at the time when that contact was made (indeed, they had already been implemented in relation to a number of participants) and accordingly each of those contacts also amounted to a "firm approach" within section 307(4A).

96. The only other question to be addressed under this heading is whether any such "firm approach" was made "with a view to [CCL] making the notifiable proposal available for implementation by" the IFAs which had been contacted or by their various clients.

97. The guidance issued by HMRC on this point is as follows:

> "**3.6.3 The third test – does P intend to make the scheme available himself for implementation by clients?**
>
> The test is that a person makes a marketing contact with a view to making the scheme available **himself** (that is, he is making a marketing contact with a view to obtaining clients who will buy the scheme from him).
>
> A person who is simply an introducer will not meet this test and will not be a promoter because an introducer solicits clients for another person (the promoter) not himself."

98. This highlights the significance which HMRC place upon it being "P" himself (in this case CCL) who would actually provide the scheme, if implemented following the firm approach. I consider their guidance to be correct in this regard. In the present case, if any firm approach made by CCL had matured into the implementation of the Arrangements by any client of the relevant IFAs, it is quite clear that the scheme would have been made available for implementation by NM (from whom the scheme would have been "bought"), and not by CCL. Accordingly, I consider that CCL was not a promoter of the Arrangements by reference to section 307(1)(b), applying section 307(1)(a)(ii).

Did CCL make the antecedent notifiable proposal available for implementation?

99. Mr Fell argued that the same marketing contacts clearly amounted to "making the proposal available for implementation by other persons".

100. Here, I consider a parallel analysis applies to the "firm approach" provisions. HMRC, in paragraph 3.5 of their guidance, say this:

> "A person who acts solely as an intermediary between a scheme provider and potential scheme user (that is, they seek clients for the provider, not themselves) is not a promoter."

101. It should be remembered that (as reflected in HMRC's own guidance) the "firm approach" provisions considered above were added in 2011 to take account of concerns at HMRC that they were not getting sufficiently early notification about schemes; the wording is clearly aimed at obtaining information upon the making of a "firm approach" as a potentially earlier trigger point before the "making available for implementation" which already featured in the legislation. I see no rational basis therefore why the phrase "making the notifiable proposal available for implementation by C or any other person" in section 307(1)(a)(ii) should be read as referring to a wider concept of "making available" than is connoted in the phrase "P makes the notifiable proposal available for implementation by other persons" in section 307(1)(a)(iii).

102. In short, therefore, I consider that section 307(1)(a)(iii) would, like section 307(1)(a)(ii), only apply to a proposal being made available by CCL itself for implementation with it. That is not the case here, and accordingly I consider CCL was not a promoter by reference to section 307(1)(b), applying section 307(1)(a)(iii).

Does the Regulation 5 exemption apply in any event?

103. If it applies, Regulation 5 of the 2004 Regulations (set out at [82] above) would in any event prevent CCL from being treated as a promoter up to 16 April 2015.

104. In view of my findings set out above, it is not necessary to decide whether Regulation 5 applies in this case. The evidence before me was not specifically directed to the point and Mr Fell submitted therefore that there was no basis upon which I could decide that Regulation 5 applied. Whilst the general tenor of the evidence for CCL proceeded on the tacit assumption that CCL was not connected with NM (indeed, they were entirely at arms' length), that is not sufficient for me to draw an inference that no connection existed. On the evidence before me, therefore, I am unable to conclude that Regulation 5 would have applied to exempt CCL from being a promoter of the Arrangements up to 16 April 2015.

105. In passing, I should mention that Regulation 4 of the 2004 Regulations is not relevant here, as that regulation only provides an exemption from being treated as a promoter under sections 307(1)(a)(i) or (ii) (in relation to a "proposal") and not under section 307(1)(b) (in relation to "arrangements", with which this application is concerned).

Application under section 306A

106. HMRC's alternative application was for an order under section 306A, headed "Doubt as to notifiability". As the heading implies, it provides a mechanism through which HMRC may resolve such doubts by obtaining an order of the Tribunal to the effect that a proposal or arrangements are to be "treated as notifiable".

107. For the purposes of this application, I have already decided that the Arrangements are notifiable (see [74] above). There is therefore no need for any order that they should be "treated as notifiable". Furthermore, I have decided that CCL is not a "promoter" of the Arrangements, and accordingly (see [77] above) it would in any event not be appropriate for an order to be made.

Summary and conclusion

108. I consider that the Arrangements do satisfy all the statutory criteria to amount to "notifiable arrangements" – see [74] above.

109. I consider that CCL was acting in the course of a relevant business in carrying out its various activities in relation to the Arrangements – see [92] above.

110. I do not consider CCL's activities were within section 307(1)(a)(ii) or (iii); accordingly it was not a promoter of the Arrangements within section 307(1)(b) – see [98] and [102] above.

111. An order, whether under section 314A or section 306A should only be made if HMRC have correctly identified a promoter as "the promoter" in their application – see [77] above.

112. As HMRC have incorrectly identified CCL as such, it follows that the application must be REFUSED, both in relation to section 314A and in relation to section 306A.

Appeal rights

113. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 28 JANUARY 2019

APPENDIX

Extracts from Finance Act 2004

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).

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.

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.

(1A) For the purposes of this Part a person is an introducer in relation to a notifiable proposal if the person makes a marketing contact with another person in relation to the notifiable proposal.

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

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

(b) is carried on by a bank, as defined by section 1120 of the Corporation Tax Act 2010, or by a securities house, as defined by section 1009(3) of that Act.

…

(4A) For the purposes of this Part a person makes a firm approach to another person in relation to a notifiable proposal if the person makes a marketing contact with the other person in relation to the notifiable proposal at a time when the proposed arrangements have been substantially designed.

(4B) For the purposes of this Part a person makes a marketing contact with another person in relation to a notifiable proposal if—

(a) the person communicates information about the notifiable proposal to the other person,

(b) the communication is made with a view to that other person, or any other person, entering into transactions forming part of the proposed arrangements, and

(c) 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.

(4C) For the purposes of subsection (4A) proposed arrangements have been substantially designed at any time if by that time the nature of the transactions to form part of them has been sufficiently developed for it to be reasonable to believe that a person who wished to obtain the advantage mentioned in subsection (4B)(c) might enter into—

(a) transactions of the nature developed, or

(b) transactions not substantially different from transactions of that nature.

(5) A person is not to be treated as a promoter or introducer for the purposes of this Part by reason of anything done in prescribed circumstances.

(6) In the application of this Part to a proposal or arrangements which are not notifiable, a reference to a promoter 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.

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.

Extracts from the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006

5 Prescribed descriptions of arrangements[9]

(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 –

…

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

…

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

…

5 Prescribed descriptions of arrangements[10]

(1) The following arrangements are prescribed for the purposes of Part 7 of the FA 2004 (disclosure of tax avoidance schemes)—

(a) in relation to income tax, corporation tax and capital gains tax, any arrangements which fall within any description specified in a provision of these Regulations listed in paragraph (2);

…

(2) The provisions are—

…

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

…

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

…

[9] As in force from 1 January 2011 to 3 November 2013
[10] As in force from 4 November 2013 to date

8 Description 3: Premium Fee[11]

(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.

But arrangements are not prescribed by this regulation if—

(a) no person is a promoter in relation to them; and

(b) the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.

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

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

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

…

10 Description 5: standardised tax products[12]

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

But arrangements are excepted from being prescribed under this regulation if they are specified in regulation 11.

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

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

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

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

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

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

[11] As in force from 1 January 2011 to date
[12] As in force from 1 August 2006 to 22 February 2016

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

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

…

11 Arrangements excepted from Description 5[13]

(1) The arrangements specified in this regulation are—

(a) ….

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

Extract from the Tax Avoidance Schemes (Promoters and Prescribed Circumstances) Regulations 2004

5. Persons not to be treated as promoters under section 307(1)(b)(ii)[14]

A person is not to be treated as a promoter under section 307(1)(b)(ii) where he is not connected with another person who is a promoter under section 307(1)(a) or (b)(i) in relation to–

(a) the arrangements; or

(b) arrangements which are substantially the same as those arrangements

[13] As in force from 1 January 2011 to 22 February 2016
[14] As in force from 1 August 2004 to 16 April 2015.