FIRST-TIER TRIBUNAL

TAX CHAMBER

TC07025

Appeal number: TC/2017/4389, 17/4408 and 17/4410

INCOME TAX – application for order that certain arrangements are notifiable or to be treated as notifiable – arrangements notifiable – first respondent a promoter – application allowed in respect of first respondent

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

-and-

HYRAX RESOURCING LIMITED
-and-
BOSLEY PARK LIMITED
-and-
PEAK PERFORMANCE HEAD OFFICE SERVICES LIMITED **Respondents**

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 7-8 June and 11-12 September 2018

Mr R Venables, QC and Mr O Marre, Counsel, instructed by RPC, for the Appellant

Mr A Nawbatt QC and Ms G Hicks, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. On 2 June 2017, HMRC made an application under s 314A (and s 306A) of Finance Act 2004 ('FA 2004') that the arrangements that arise when a person becomes employed by Hyrax Resourcing Trust ('HRT') are (or, in the alternative, are to be treated as) notifiable arrangements within the meaning of s 306(1) FA 2004.

2. The application was served on the three respondents on the basis that, in HMRC's view, as stated in the application, they were promoters of the arrangements.

The application

3. The first paragraph of the application was set out at §1 of this decision notice. A summary of the arrangements was set out at §5-8 of the application and was as follows (in brief):

> (a) The arrangements were 'the current iteration' of a contractor loan scheme previously known as K2/Lighthouse and were first implemented in tax year 14/15;
>
> (b) Under the arrangements, a director/contractor is employed by Hyrax Resourcing Limited as trustee of HRT. The services of that director/contractor are then sub-contracted to an end user being the entity wishing to engage the contractor/director. HRT invoices the end user for the services of their employee. HRT pays their employee a national minimum wage ('NMW') and gives him/her interest-free loans. The benefit of repayment of the loan is assigned to an offshore employer-financed retirement benefits scheme. The loans are, in reality, never expected to be repaid.
>
> (c) The employee declares the NMW for PAYE and NIC. The interest free loan is declared as a beneficial loan on the employee's tax return but is excluded from it for PAYE purposes. The tax on the beneficial loan is far lower than if the loan sum was taxed as employment income.

4. A more detailed summary was given in §23, which included reference to documents in an appendix.

5. The application set out that arrangements which it called the K2/Lighthouse arrangements, and which it described in outline, had been notified to HMRC and were allocated a DOTAS. It explained the reasons for HMRC's belief that the Hyrax arrangements (being those described at §3 above) were the successor to them. In brief, those reasons included:

> (a) K2/Lighthouse scheme employees were moved to HRT on 6/4/14; earlier on 31 March 2014, a company at the heart of the K2/Lighthouse scheme had transferred its business to Hyrax Resourcing Ltd (as trustee of Hyrax Resourcing Trust) on 31 March 2014;
>
> (b) The documentation used in both schemes was similar;
>
> (c) Significant overlap between persons responsible for design, management, promotion and implementation of the two schemes; and

(d) Promotional documentation used for the Hyrax scheme suggested that the product had been available for many years in an earlier form.

6. The application set out the two schemes in the form of steps. The K2/Lighthouse arrangements comprised steps a to h; the Hyrax scheme was said to comprise steps a to i. The steps were very similar (although the identity of the companies/trustees varied) save that, as the application made clear, K2/Lighthouse involved an offshore employer (with an onshore company to which its employees were sub-contracted) making loans to the employee while Hyrax arrangements involved an onshore employer making loans, the benefit of which was then transferred to an EFRBS.

7. The application then set out why HMRC believed that the Hyrax arrangements were notifiable arrangements under three prescribed descriptions (premium fee, standardised tax products, and employment income provided through third parties). It set out why HMRC thought a tax advantage was a main benefit; and why it considered the respondents to be promoters.

8. The application contained the documents relied on by HMRC in an appendix.

9. I have to determine whether to allow the application, or the alternative application. To do so I have to consider the facts and the law. I will start with the evidence, and therefore, logically, I will start with the question of what evidence I was able to consider in order to make findings of fact.

THE FACTS

Lawful evidence

Were the documents in evidence?

10. Halfway through the afternoon of the second day of what had been listed as a two day hearing, Mr Venables made a submission that none of the documents referred to by Mr Nawbatt in his submissions and relied on by HMRC to prove their case could be considered by the Tribunal because (he said) they were not in evidence as they had not been proved. He was referring to the fact that HMRC had served 3 folders of documents with the application and relied on them in the hearing, but had not served a witness statement which explained how the documents had come into HMRC's possession. Indeed, the only witness statement served in the proceedings was that of Mr Belli and he did not refer to many of these documents in his witness statement, nor was he taken to them in his oral evidence.

11. Mr Venables then modified his submission to accept that documents referred to by Mr Belli in his witness statement were in evidence before the Tribunal, even though Mr Belli's statement did not explain from where he had obtained them; however, he maintained his submission that the rest of the documents (the greater part of the documents in the bundle) formed no part of the evidence before the Tribunal.

12. Mr Venables referred me to the decision of the FTT in *Quereshi* [2018] UKFTT 115 where the Judge said:

> 8. In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is

> admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it.
> 9. Whatever form the admissible evidence takes, adequate evidence is a necessity; not a luxury.

13. While Mr Nawbatt did not suggest that what the judge said here was incorrect, he considered it wrong for Mr Venables to say that the documents in this appeal were not in evidence; he also considered that HMRC had been ambushed by the submission; he thought HMRC could evidence the source of all the documents on which they relied but had been given no opportunity to do it.

14. Mr Venables' position was that Mr Nawbatt had been given adequate notice of his submission. He pointed out that letters from the respondents' solicitors had included phrases such as ''the burden of proof is on HMRC and it must discharge that burden by lawful evidence properly proved'; and when they had acknowledged receipt of the bundles from HMRC, the respondents had said

> 'we are simply noting the documents that HMRC will be including in the bundle and are not thereby agreeing those documents or their contents'

15. At that point, Mr Nawbatt applied to be allowed to submit a witness statement explaining the provenance of the documents relied upon; it was clear by this point in the day that the hearing was going to have to be adjourned in any event as it would not finish in its allocated time.

16. I ruled in the hearing that there was an obligation on each party to explain their case in advance, even if they did not have the burden of proof. I cited the Upper Tribunal ruling in *Fairford* [2014] UKUT 329 as an example of this. I considered the comments about 'lawful evidence' made by the respondents in advance of the hearing were vague and insufficient to put HMRC on notice that it would be a part of the respondents' case that much of the documentation relied on by HMRC in the application could not be considered by the Tribunal.

17. I considered that HMRC should have the chance to evidence the provenance of the documents and gave them permission to adduce a witness statement to that effect; I could see no procedural prejudice to the respondents because we were having to adjourn in any event; moreover, they would be able to challenge the evidence at the reconvened hearing; and if they genuinely had concerns about the authenticity of the documents, they could have raised this at any time prior to the hearing.

18. Directions were issued; after the hearing adjourned, HMRC served a second witness statement by Mr Belli setting out from where he had obtained each and every document in the hearing bundle. Before the reconvened hearing, the respondents indicated that they had no questions for him. I therefore accepted the evidence in Mr Belli's second witness statement and considered that all the documents in the bundle before me were in evidence.

Were HMRC required to prove the provenance of the documents?

19. In these circumstances, I was not called on to rule whether or not I could have considered the documents to be in evidence if Mr Belli had not served his second witness statement. Mr Venables did not address me on the subject again: he had no need to do so as by the reconvened hearing he had accepted all the documents were in evidence. (He said he did not necessarily accept that any weight should be attached to them, but that of course was a different matter

which I consider below at 23-26). Mr Nawbatt did make the final submission that he considered that all documents in the bundles were in evidence unless the other party queried their authenticity by notice in writing before the hearing; as that had not happened, he considered Mr Belli's second witness statement an unnecessary formality.

20. So I am not required to make a ruling on this, but would draw to the parties' attention, that even if it was the position in the courts that a document must be proved by a witness before it can be admitted into evidence in a trial, the Rules of this Tribunal provide as follows:

> **Rule 15 Evidence and submissions**
> …
> (2) the Tribunal may-
> (a) admit evidence whether or not the evidence would be admissible in a civil trial in the UK….

Therefore, it seems likely that the Tribunal does have the power to admit any documents into evidence and would be very likely to admit documents on the parties' list of documents, or attached to an application the subject of the proceedings, whether or not referred to in a witness statement, in circumstances where there has been no clear advance challenge to their authenticity and/or relevance.

21. I am aware that the FTT had taken the contrary view in a case called *Gardiner* [2014] UKFTT 421 (TC). I do not consider that it was correctly decided on this point and prefer what I said about it in the case of *Atherton* [2016] UKFTT 831 (TC):

> [39] Mr Gordon referred us to the decision in the case of *Gardiner* [2014] UKFTT 421 (TC) where a preliminary issue of whether HMRC had adduced any evidence to support a prima facie case of negligently delivering an incorrect tax return was decided in favour of the appellant, and the appeal succeeded. HMRC's case in *Gardiner* was the scheme documentation was obviously defective and the taxpayer should have known this: the judge threw out the case on the basis that the scheme documentation was not in evidence [20-33]. We found this an odd decision as it appeared to us, reading the decision, that the scheme documentation was on HMRC's list of documents, its authenticity did not appear to be in dispute, and, moreover, comprised documents put forward by the taxpayer to support his tax return. The decision seemed to suggest that if an HMRC officer had been called by HMRC simply to give the evidence that the scheme documentation in the list of documents was the scheme documentation produced by the taxpayer to support his tax return, then the Judge would have accepted that there was evidence for him to consider. As it did not appear that there was any dispute about the authenticity of the scheme documentation, it seemed an unnecessary formality to require oral evidence of its authenticity.
> [40] We do not agree with the decision in *Gardiner* if it requires, in order for a document to be in evidence before the Tribunal, a witness to speak to the authenticity of a document when its authenticity is not in dispute. That seems to us to run counter to the overriding principle (Rule 2(2)(b)) of avoiding unnecessary formality and would be likely to require much unnecessary oral evidence. The decision is not binding on us and we would not be inclined to follow it.

22. In conclusion, all the documents relied on by HMRC were in evidence and could be considered by me. That left open the question of what weight I should attach to them, if any.

The documentary evidence

Letters from third parties

23. Mr Venables, when making his application stated I should not put weight on hearsay evidence. The example he gave of hearsay evidence was the letter from the accounting firm Forbes to which Mr Nawbatt had referred in his submissions and I consider below at §293. I understood his point to be that HMRC could have called a person from Forbes to give evidence and did not explain why they had not; that put the reliability of what was said in the letter in doubt.

24. While I agree with Mr Venables that it may be unsatisfactory, without a good reason, to rely on hearsay evidence where direct evidence would appear available, I did not think I had cause to be concerned with the veracity of the evidence from Forbes. It was a fairly minor piece of evidence in the overall picture; it was information obtained in response to an enquiry from HMRC and there was no reason to suppose it would be inaccurate; most importantly, the respondents were in a position to know if it was inaccurate but did not advance any evidence to counter it. I decided I should put weight on the letter as evidence of the truth of what it said.

Respondents' documents obtained from third parties

25. Mr Venables also said that I should not put weight on any of the documents in the appendix. Earlier in the hearing he had suggested to Mr Belli that documents he had obtained from other persons (such as officers within HMRC) were 'hearsay' and unreliable. I find that the original source of these documents appeared to be the respondents (eg webinars and emails) but the sources from which HMRC had obtained them were third parties such as scheme participants or their accountants (such as Forbes)

26. Therefore, I rejected this submission. The documents such as the webinars and scheme implementation documents were not hearsay evidence as they were not adduced to prove the truth of what was said in the documents; they were produced to prove the fact of their existence. And as evidence of the fact of their existence, it seemed to me that where the documents relied on appeared to emanate from one or other of the respondents or one of the companies which (HMRC alleged) operated an earlier version of the scheme, the officers of the respondents, who had also been officers of the earlier companies, were in a position to state whether or not the documents were genuine. But the respondents called no witnesses at all; they certainly did not give evidence that the documents were not what they appeared to be. Therefore, it seemed to me to be appropriate to take it that the documents were exactly what they appeared to be and were reliable evidence of the fact of their existence.

The documentary evidence in detail

27. The documentary evidence included emails, contracts, application forms, company minutes and so on. The largest by volume was selections of 'slide' printouts. They were described as 'webinars' and I understood that to mean that a participant could log on to a website where they would be able to see each of the slides in succession, and be able to listen to a presenter explaining what they meant.

28. Webinars were mentioned frequently in emails sent by persons on behalf of the respondents, or on behalf of companies involved in the earlier iterations I refer to below; and it was apparent that there were many more of them than I had slides for. David Gill was often mentioned as the person who (with others such as a Karen Mountain) would be the presenter.

29. Mr Venables' position was that I should not take too much from the webinars as the Tribunal did not know what the voiceover actually said. However, it is clear that the presenters included Mr Gill, Mr Lyness and Mr Aitkin, all directors of one of the respondents and some of whom were apparently in the hearing room. None of them chose to give evidence. It seems a reasonable assumption, uncontradicted by the respondents, that the voiceover was consistent with the contents of the slides.

30. Moreover, it seems likely to me that the webinars were an important means used to promote the arrangements, and the earlier iterations, both to existing and potential scheme users and to their accountants. This was apparent from the importance placed on them both in the emails to scheme users and by the requirement that an applicant attend them or another method of promotion (see §54) before being accepted into the scheme.

The witness evidence

Mr Belli's evidence

31. Mr Belli was the HMRC officer who dealt with the investigation into whether the (alleged) arrangements the subject of the application were notifiable under the legislation discussed below. His witness statement was served with the application and was accompanied, as I have said, by three folders of exhibits.

32. The statement set out Mr Belli's understanding of the origin and background to the arrangements, including what HMRC alleged were previous versions of the arrangements, although Mr Belli had not worked on the earlier iterations. He gave information (such as dates of incorporation and directors) on the companies thought to be involved and/or promoters. He gave a lot of evidence about the steps taken by HMRC to establish what the arrangements were, including the correspondence between the parties up to the point just before the making the application.

33. His evidence was clear and consistent and I had no reason to doubt it. I accept it. Mr Venables did not really seem to challenge his factual evidence, but did seek to get him to express opinions on the alleged scheme. The tribunal was not interested in Mr Belli's opinions. In reality, Mr Belli's evidence was not particularly significant: he could explain from where the documents HMRC relied came, but the substance of HMRC's allegations arose from the contents of the documents.

The lack of evidence from the respondents

34. The respondents elected not to serve any evidence nor call any witnesses. Mr Nawbatt's position was that HMRC accepted that it had the burden of proving their case. Nevertheless, it was HMRC's position that the Tribunal was entitled to draw adverse inferences from the respondents' failure to adduce any evidence, despite some of their directors being present in the hearing room, and that such adverse inferences would convert a prima facie case into an overwhelming case.

35. Mr Nawbatt drew my attention to *NRC Holdings v Danilitskiy* [2017] EWHC 1431 (Ch):

> [25] Of more importance, in the present case, is that in *Prest v Petrodel Resources Ltd* Lord Sumption, in the context of discussing whether and if so when an adverse inference may properly be drawn against a party, said at [44] that, for his part, he would adopt, with one modification that is not relevant in this case, the view expressed by Lord Lowry in *R v Inland Revenue Comrs, Ex p TC Coombs & Co* [1991] 2 AC 283, 300 that:

> "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."
>
> and also referred, by way of comparison, to *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, 340. There is a line of Australian authority to similar effect, see, for example, *The Bell Group Ltd (in liquidation) v Westpac Banking Corp (No.9)* [2008] WASC 239 at [1003]-[1022].
>
> …..
>
> [45] In the present case, there are various possible reasons why Mr Danilitskiy may have chosen to purchase the Property in the name of Opal Stem. Some of those reasons might have indicated that Opal Stem was intended to be the beneficial owner of the Property and some that it was not. However, although he plainly has relevant evidence to give on this critical question and could have been expected to provide it on behalf of Opal Stem, there is no evidence from Mr Danilitskiy or indeed anyone else, one way or the other. Nor have I been provided with copies of any board minutes of Opal Stem which assist on this issue, even assuming that such ever existed. In the absence of such evidence, I am not prepared to assume that Mr Danilitskiy intended to transfer the purchase monies to Opal Stem for its benefit nor that he intended Opal Stem to hold the beneficial interest. To the contrary, in my view the appropriate inference which is to be drawn from the decision that he should not give evidence, is that his evidence would not support Opal Stem's case.

36. It seems to me that the principle effect of the respondents' failure to rely on any evidence is that where HMRC can establish a prima facie case on the balance of probabilities then that case is proved. That indeed is the meaning of a prima facie case: it is a case proved to the requisite standard in the absence of rebuttal evidence.

37. Therefore, if HMRC can prove their case, in the absence of evidence from the respondents, whether or not I can draw adverse inferences from the respondents' failure to rely on any evidence seems beside the point.

38. Mr Venables' view was that I should be slow to draw adverse inferences in a penal case; Mr Nawbatt's position was that even in penal proceedings a Tribunal was entitled to draw adverse inferences from a failure to give evidence unless a credible explanation was offered for that failure. No explanation at all had been offered in this case.

39. I agree with Mr Nawbatt that in the absence of any explanation at all for the failure of the directors of the respondents to give evidence it is appropriate to draw the inference that the evidence they could have given would not have assisted their case, even though this case concerns allegations of non-compliance with legislation for which penalties could be imposed. Nevertheless, in large part, I do not see my findings in this case depending on any adverse inferences; it is simply that the respondents have not adduced any evidence which contradicts the prima facie case which HMRC have put forward and which I find proved to the extent I find as explained below.

Findings of fact

Summary of the respondents

40. I find from the evidence in front of me that the directors and shareholders of the three respondents were as follows:

Respondent	Referred to in decision as:	Date of incorporation	Directors	Shareholders
HYRAX RESOURCING LIMITED	Hyrax		Joanne McNamara	Joanne McNamara
BOSLEY PARK LIMITED T/A Peak Performance Solutions	Bosley		Douglas Aitkin	Douglas Aitkin Roy Lyness (and 10 others with small shareholdings)
PEAK PERFORMANCE HEAD OFFICE SERVICES LIMITED	PPHOS	29 January 2014	David Gill Gordon Berry	David Gill

Previous iterations of the scheme

An outline of alleged previous iterations

41. HMRC's case was that the arrangements that comprised the business of Hyrax (which I shall refer to as the 'Hyrax arrangements') were the latest iteration of a tax planning product that had existed in earlier forms since 2004. It was their case, at least as I understood it, that the persons who were shareholders and/or directors of the three respondents had since 2004 set up companies to carry out tax planning schemes to enable their 'clients', owner-directors and consultants, to substitute for the remuneration they would otherwise have received, a small salary and a large interest-free loan, which they would not expect to repay in their lifetime. As the law changed over time, new schemes evolved out of the earlier ones, each designed to circumvent the changed tax laws and allow the loan to be paid and received tax free (apart from a charge to reflect the lack of interest). HMRC's case was that the schemes were in date order as follows:

Assignment Solutions (IoM)	2004-7
Penfold	2007-2009
Hamilton	2009-2011
K2	2011-2014
Hyrax	2014 - onwards

(I note that the K2 arrangements also involved entities referred to as 'Lighthouse' and 'Cirus'; I will refer to them under the umbrella term 'K2').

42. It was HMRC's case, as I understood it, that different companies were incorporated for each scheme; the three respondents were incorporated shortly before the Hyrax scheme commenced in operation. Other companies had been incorporated for each one of the previous iterations. I accept that this was correct.

43. Only the Hyrax arrangements were the subject of this application: all the earlier alleged iterations were notified to HMRC. It was only the Hyrax arrangements which were not notified. Nevertheless, it was HMRC's case that the previous alleged iterations were relevant to proving their case about the notifiability of the Hyrax arrangements. As it makes sense to deal with the evidence chronologically, I will therefore start with the evidence about the previous iterations and then move on to the evidence about Hyrax itself.

Previous iterations: people and companies

44. I find that there were a number of other companies which were involved in and/or promoted the earlier iterations of the scheme. Many of these other companies had as directors and/or shareholders one or more of the persons involved in the three respondents as directors and shareholders.

45. An example of this was David Gill. He was a director and sole shareholder of PPHOS (third respondent). He had been sole shareholder and director of Peak Performance Tax Limited and Peak Performance Professional Contracts Ltd ('3PCL'); he had been a director and shareholder of Peak Performance Contracts Ltd. This latter company was a part of the implementation of the Hamilton scheme; 3PCL was a part of the implementation of the K2 scheme. David Gill's name appeared regularly in the evidence for both K2 and Hyrax: he co-hosted many webinars; he wrote many emails, often quite long, to scheme users and their accountants. He appeared to be the principle 'face' of the schemes through the years.

46. Other examples were as follows. A webinar made it clear Joanne McNamara (sole director and shareholder of the first respondent) had a significant role in the implementation K2; she had in any event been a director of 3PCL which was a part of the K2 structure. Gordon Berry was with David Gill the two directors of Peak Performance Head Office Services Ltd whose role included writing to HMRC in response to their letters over the Hyrax arrangements; Douglas Aitkin and Roy Lyness, with David Gill, were directors and shareholders in Peak Performance Accountants Ltd, whose role was not explained to me but I find from its name was connected with the other companies; in any event, their role in previous iterations was apparent in that, for example, an email from David Gill to scheme users in 2013 referred in a footnote to Mr Lyness and Mr Aitkin as 'tax directors and mentors', it seems, of Peak Performance Tax Ltd (although they were not directors of that company). Douglas Aitkin co-presented webinars on K2 with David Gill.

47. Another repeated name was that of Karen Mountain, who was often a co-presenter on webinars for Hyrax and in an email on behalf of one of the companies concerned was described as the 'tax adviser for K2 and Hyrax'. Ethos Consulting Ltd was described in webinars as providing the administration for the K2 scheme and had a similar role in the arrangements the subject of this application.

Trading name

48. As can be seem from the above example, 'Peak Performance' was a name associated with a number of the iterations. It formed part of the name of companies involved in both Hamilton and K2; it was a part of the trading name of the second respondent, Bosley and a part of the name of the third respondent.

49. Webinars for K2 had a virtually identical logo (words and format) on each slide as those given for Hyrax. In large letters, the top line of the logo was 'peak performance'; the bottom line of the logo was in smaller text and it was only in that line that there was a difference In

relief, the words ‘tax’ appear on the K2 webinars, while the words ‘tax services’ or ‘solutions’ appear on the webinars for Hyrax.

Each scheme a phoenix?

50. While they did not use the terminology ‘phoenix’, it was HMRC’s case that, as legislation was coming into force which was perceived as taking away the tax advantage of the previous iteration, a new iteration was introduced which was intended to avoid the new legislation.

51. I find on the basis of the evidence that this is what happened. Each iteration ceased and the new one commenced at about the time of introduction of relevant legislation that would have been perceived as putting the arrangements into the scope of a tax charge; for example, Hamilton ceased operations just prior to the para 7A disguised remuneration charge legislation comes into force and was replaced with K2. This was not a coincidence; contemporary webinars and emails from the respondents or directors of them show the close relationship with changes to tax legislation. For instance, an email from 2011 from Peak Performance Contracts Ltd said in respect of K2 said:

> ….things [ie K2] have been slightly delayed because, although the Budget was on 23 March, HMRC did not unveil its new draft of the disguised remuneration regulations until 31 March, and we needed to check that nothing had changed to affect the plans….

52. In fact, one of the webinars for K2 talked about ‘life expectancy’ for each scheme, indicating that each scheme had a life expectancy of about 4 years due to HMRC legislating against them. The DOTAS disclosure document (AAG1) for K2 identified the scheme as intended to avoid s 554C(1)(a) ITEPA 2003.

53. Not only did each scheme arise from the ashes of the old scheme, it was clear from this that those behind the schemes represented them to potential users as different points along a single continuum. To some extent at least, the various iterations were put forward as a single but evolving scheme. For example, an email from David Gill as director of Peak Performance Tax Ltd (but actually sent from the email box of Peak Performance Contracts Ltd) advertised forthcoming webinars for ‘all current and former employees of K2, Cirus, Hamilton trust and Penfolds’ . I find from the information in front of me that each scheme was similar but with a crucial evolution to avoid the latest legislation.

Continuity in documentation and method of promotion

54. The application forms, for Hamilton, K2 and Hyrax, which had to be completed and signed by prospective scheme users had striking similarities in both substance and format. For example, each form required the prospect to state that s/he had attended at least 1 of four identical options to ensure they understood the scheme (one of them a webinar about the scheme – see §30).

55. I was only given a small selection of implementation documentation from each of the schemes, although I note in one webinar there was a claim that there were some 25,000 scheme users. From what I had, it was clear that pro formas were used; for instance, a Mr Hunt and a Mr Abrahams signed identical employment contracts and loan agreements, bar the obvious differences for their name and start dates.

56. As I have said, from the evidence in front of me, it appeared the main method of promoting the schemes (at least K2 and Hyrax) was by webinars. There were striking

similarities between the webinars; the same people presented them, whether the scheme was K2 or Hyrax. The logo used on each slide was, as I have already said, virtually the same. The tone of the contents was very similar. Many of the slides appeared very similar too. For instance, there was a diagram showing how K2 'worked'. It was very similar in format and some of the wording to one in a later webinar promoting Hyrax (allowing for different names and slightly different structure); it was also very similar to one in the same webinar which referred to the structure of Hamilton under heading 'How it used to work'. The webinar for K2 had a very similar table to one which was to appear later in a webinar for Hyrax (see §§71-72 below), showing what the authors thought the relative risks and returns of the potential user being employed, self-employed, director of a limited company, using an umbrella structure or using the K2 structure was. K2 showed the highest return (at 82%+) while the risk was assessed as 'low'.

Different iterations along a single continuum

57. I find that those making the arrangements available to the users intended, expected and facilitated the move of scheme users from the old iteration to the new iteration. The evidence showed that users would be transferred from one scheme to the next; for instance a Mr Abrahams moved from Hamilton to K2 to Hyrax.

58. Even though in law, a transfer from one scheme to another meant a change in employer, contemporary emails show it was put to users as a matter of mere administration, done in a manner to cause as little inconvenience as possible. It was a mere matter of signing a few documents. For instance, an email in 2011 to a scheme user as Hamilton was closed down and K2 came on stream said:

> You will have received, at the request of Hamilton, an email this morning asking for resignation letters to go in…..
> In the next couple of days, you will receive an invitation to join a new employer, called K2….that structure will provide similar, but enhanced, benefits to the current employment……

When describing K2, an email from Peak Performance Contracts Ltd to scheme users said (amongst many other things) that:

> 'The structure will be very similar to the past….'

59. As can be seen from above, those recommending the schemes made it clear to their users and prospects that the scheme was an evolution. For instance, in a webinar, K2 was described as having a 'technical pedigree' which dated back to 2004.

Transfer of K2 scheme users to Hyrax

60. I find that, as with previous transfers to new iterations, those responsible for the K2 and Hyrax schemes ensured users of K2 were transferred as seamlessly as possible into Hyrax. I find the emails sent to users reassured them that nothing was really changing other than the legal entity which employed them. For instance, an email dated 6 March 2014 from Ethos Consulting Ltd to an Ian Hargreaves (who I find was a K2 scheme user) was sent in order to comply with the TUPE regulations and explained

> We are proposing to transfer the business to Hyrax Resourcing Limited due to changes in UK law which make it difficult for an overseas employer to place staff with UK businesses

61. On the same day, an email from David Gill 'of Peak Performance Tax' to all scheme users which referred to the above email was from its tone clearly meant to reassure recipients it was business as normal and nothing much but a change of names was occurring:

> '…there are no technical changes to report on the structure. That means that we can just focus on processing the necessary paperwork and supporting you through this process.
> …your employment is simply being transferred to an onshore employer, Hyrax Resourcing Limited….
> …in order to ensure that disruption is kept to a minimum, it will be extremely important to ensure that paperwork is completed as quickly as possible….The key item will be a new loan agreement which will need to be signed and returned …before any loans can be made by Hyrax….

62. Another email a few days later from David Gill (using a 3PCL email address but signing above the name of 'Peak Performance Tax Ltd' to users and/or their accountants said:

> '…the technical analysis and directional risk is completely unchanged – Cirus is replaced by Hyrax and 3PCL ceases to trade….
> ….simplistically the benefits are;
> - By having an onshore employer, Hyrax, the Offshore Employment Intermediaries Legislation is not in point…..
> - Similarly, by having an onshore employer, Hyrax, by definition, there is no prospect of HMRC applying their current preferred technical argument 'transfer of assets abroad'. As you know this appears to be the preferred argument on Penfolds and Hamilton and is also likely to be extended to K2…….

63. The same email said that existing 'contractor' workers who were happy with the new arrangements need do very little. And as well as the emails, it was clear that webinars were being held to explain the changes and reassure participants. This reinforces my finding at §56.

What is the relevance of the previous iterations?

64. As I have said, HMRC's case was that previous iterations were relevant; I understood it to be HMRC's case that it was reasonable to assume that, apart from the legal changes in structure (designed, said HMRC, to avoid tax), the schemes were fundamentally the same in set-up and objectives. HMRC's case, therefore, was the Tribunal was justified in drawing inferences about Hyrax based on what was known about the earlier iterations.

65. Mr Venables pointed out that none of the respondents were incorporated at the date of much of the evidence about K2 and the earlier iterations came into existence. I understood his position to be that, for this reason, the various K2 webinars could not be evidence about Hyrax which did not exist at the time they were published.

66. I agree with HMRC on this. The evidence is quite clear that Hyrax was the latest iteration of a scheme that had been around for many years; users of previous iterations were transferred seamlessly into Hyrax. Hyrax was promoted as being the same as the previous iterations bar being tweaked to avoid being caught by HMRC's latest round of anti-avoidance legislation. In these circumstances, it is legitimate to take the marketing of the earlier scheme, and in particular its immediate predecessor K2, as likely to reflect how the Hyrax arrangements were marketed.

67. I will therefore use the evidence, particularly in respect of K2, when making findings of fact about the Hyrax arrangements, in so far as appropriate to do so.

68. But I do not agree with HMRC that I should infer Hyrax was notifiable because the earlier iterations had been notified. HMRC's position was that all the earlier iterations were notified under the DOTAS legislation the subject of this application and the respondents did not suggest otherwise and so I find that they were. Nevertheless, these earlier iterations were, on HMRC's case, voluntarily notified and there was no judicial decision on whether they were notifiable; even if there had been it would not bind this Tribunal. This Tribunal has to make up its own mind on the relevant evidence before it and it was not relevant that those promoting the earlier iterations had decided to notify them.

Purpose of the Hyrax arrangements

69. I find from the evidence that, as with previous iterations, Hyrax was promoted both to accountants who had clients with personal service companies or who contracted out their services, as well as direct to such persons. The evidence of the promotion was the webinars.

70. The webinars for Hyrax were, in my view, more opaque in wording than those for K2. I find they would refer in vague terms to 'commercial' as well as tax risks, but when it got to the details, they only considered tax risks. For instance, a webinar for accountants described the arrangements as:

> It is an employed solution for individuals providing personal services which minimises commercial risks, tax risks and the responsibility for managing your affairs, whilst allowing you to maximise your commercial return.

71. This suggests that its purposes were fourfold. Moreover, the table used in the same webinar, while very similar to that used for K2, was not quite the same: it's second heading was now 'tax and commercial risk' rather than just 'tax risk'. Nevertheless, the risks discussed in the webinar were clearly solely tax related:

> 'Removal of IR 35 and MSC tax risks from contractor
> It addresses other tax risks such as Status, GAAR, Disguised Remuneration, TOAA, AWR, OEIL, APNs and FNs'

The meaning of these acronyms may or may not have been known to those attending the webinar but, not only could the speaker have explained them, they were all clearly defined as 'tax risks'. Another slide which talked generally about 'risk issues' without identifying them, was followed by a slide which dealt exclusively with tax risks (such as risk of enquiries into returns and the issue of APNs). It also stated 'not all tax providers are the same' and 'all tax strategies will be legislated against', and 'the top tax QC' had been retained. I find, that despite the opacity that was not present in the K2 slides, the Hyrax arrangements were, just as much as the K2 arrangements, there for tax 'risk' and nothing else.

72. It was no doubt also true to say that the Hyrax arrangements were about commercial return in the sense of how much money the scheme user took home. As I have said, Hyrax webinars had a very similar table to that for K2 mentioned at §56 above. For the Hyrax webinars, a new line was introduced to show the authors' perception of 'solutions' offered by their competitors. While they accepted the competitors offered a 70-90% return, they assessed them as 'very high' risk. While the exact figures varied from those used in the K2 table, as before, self-employment and limited company structures were shown to have much lower

return but a much higher risk than the K2/Hyrax structure. Only employment was shown to be less risky, but it was also shown to have a much lower return than Hyrax.

73. The webinars for K2 were less opaque. I find that the webinars about K2 make it quite clear that its purpose was to minimise tax on income on higher paid self-employed contractors and company director/shareholders. The first page of a webinar on K2 presents it as a tax solution and talks of 'tax risks'; it states 'K2 is undertaking a disclosed tax avoidance strategy'; it was clearly sold on the basis of tax saving, comparing the tax costs of other 'structures', such as employment/self-employment/owner-director; it specifically mentions Para 7A in context of something to be avoided.

74. Another webinar for K2 described how 'the solution addresses the main legislative barriers'; it referred to IR 35, MSC, and the disguised remuneration legislation in Part 7A. Mr Gill sent emails to scheme users updating them on tax matters such as the budget, HMRC enquiries into K2, Hamilton and Penfold, and the GAAR.

75. I find that the focus of K2 were all about reducing tax liability for the scheme users. This supports my conclusion that, despite the opacity of some of the webinar slides for Hyrax, Hyrax too was all about increasing the scheme users' financial return by reducing the scheme users' tax liability. As I have said, Hyrax was the continuation of the K2 scheme, just tweaked to avoid further anti-tax avoidance legislation.

76. Another clear impression is that those behind K2 and Hyrax saw similar products as their main business rival; while accepting that similar products offered similar tax savings, those behind K2 and Hyrax criticised them as highly risky, suggesting K2 was to be preferred as it put the tax risk of failure on the employer while other schemes put the tax risk of failure on the scheme user. Again, this reinforces my findings that the arrangements were all about minimisation of tax liabilities.

The loan in the Hyrax arrangements

77. The loans in the Hyrax arrangements must have been as crucial as in the K2 arrangements. It stands to reason that that must be so or the scheme users would have been out of pocket and not entered into the arrangements. But the evidence shows that this is true in any event. Although the webinars for Hyrax were more circumspect than those for K2, nevertheless the importance of the loan is clear from them.

78. In the explanation of how the scheme worked in the webinar, the loan was centre-stage:

- [client] will be ..an employee of a UK entity …Hyrax Resourcing Trust
- Hyrax enters into a contract with either an agency/end user of your services…
- Client will be paid a minimum-wage salary based on hours worked.
- Employer may decide to make discretionary awards by way of loan.
- Loans are repayable on demand, interest-free, assignable and remain so. Loans are beneficial and any benefit in kind should be declared on their tax return.
- The creditor rights on loans may then be assigned by way of employer contribution to an EFRBS.

79. The diagram describing the arrangements (referred to above at §56), while rather opaque, does indicate that the interest was in the loan, as the only commentary on it was placed near the words 'employer loans' and 'EFRBS' and was:

> Money in trust is ring-fenced – can't be claimed by Hyrax or its creditors
> How does the employer motivate and incentivise its key employees?
> What are the terms of the loan?

80. Leaving the webinars, the email referred to at §62 said to the K2 scheme users who were transferring into Hyrax:

> One document you will have to sign is the new loan agreement from Hyrax. The first loan from Hyrax will be on 20th April 2014 but due to the fact that employment is only commencing on 1st April, very few invoices will have been raised far less paid. In practice, the first loan which will be made will be on 20 May 2014.

81. This suggests that all users of K2 were paid a loan every month on same day, and that that would continue to be the case under Hyrax. It again supports the conclusion that the loan was central to the arrangements. And, as I have said, logic dictates that that must have been so.

82. The webinar for K2 was less circumspect than that for Hyrax. A section of a webinar on K2 read as follows:

> FAQ – Do I have to repay the loan to the trust/RBS?:
> - in practice, extremely unlikely
> - nearly 25,000 businessmen and contractors have used this mechanism and on-one has yet had to repay it
> - however, there needs to be the POSSIBILITY of repayment, otherwise it would not be a loan

The slide went on to explain that the trustee was bound by law to act solely in interests of the beneficiary and (implied) a request to repay would never be in interests of contractor (the beneficiary); moreover, as the funds in trust were held for benefit of beneficiary 'you would in effect be repaying yourself'. It went on to explain that the loan would not affect the scheme user's credit score and that a scheme user could still obtain a mortgage through the scheme's brokers: 'our mortgage brokers use contract value as evidence of earnings'.

83. Taking into account what I have said at §66, I consider it more likely than not that the position on loan repayment would have been represented to actual and potential Hyrax scheme users by those promoting it to be exactly the same as for K2. And that representation must be accurate as it would be difficult to see that anyone would enter into the arrangements which involved them taking the larger part of what would otherwise be their monthly salary as a loan if there was any real possibility of being asked to repay it. And that expectation would appear justified because, as the creditor rights were assigned to an EFRBS, and the trustees would act in the interests of the beneficiary (being the scheme user and his/her family), there seemed no reason why the EFRBS would ever ask for the loan to be repaid. And after the scheme user's death, as the value of the EFRBS fund would belong to the scheme user's family (likely to be his heirs), it would make no difference whether the loan was written off or repaid: either way his estate would not be diminished by the repayment obligation.

84. In conclusion, I find that Hyrax was promoted on the basis that the loans, while strictly repayable, were extremely unlikely ever to be required to be repaid. It was clear from logic but also from what was said, including in respect of the scheme's mortgage brokers, that those promoting the arrangements did so on the basis that the loan was in economic terms if not in law equivalent to earnings.

Payment of 'fee'

85. The explanation of the structure given in webinars and emails was that the Hyrax arrangements involved the Hyrax Resourcing Trust being interposed as employer between the scheme user and the end user of his or her services. There was no evidence anyone was actually paid a fee for the arrangements, but it was clear that 'return' to the scheme users (in NMW and loans) would be just over 80% of what the end user paid. Hyrax retained about 18.5%.

86. From invoices issued by Hyrax to the end user of a Mr Tipper (a scheme user), HMRC had created a schedule showing that Mr Tipper received (in salary and loans) 81.5% of what the end user was paying Hyrax each month for his services. Mr Venables' point was that the schedule was not itself evidence and technically he is right; but it was a convenient way of showing information apparent from documents which were in evidence, and he did not suggest the figures were inaccurate. I accept the schedule was correct in showing Mr Tipper's return.

87. The amount retained by Hyrax was not a fee in the normal meaning of the word. Nevertheless, there was some evidence that this retention by Hyrax (basically its profit on what it was paid by the end user less what it paid out to its employees in the form of NMW and loans) would have been referred to as a fee. An email from Peak Performance Contracts Ltd in 2011 in discussing K2 said:

> 'The fees will be very similar to now – so cash returns should be equal to the levels obtained from Hamilton.'

While this was said in respect of K2, I find it was likely similar statements would have been made about the Hyrax arrangements by those promoting them to the scheme users for the reasons given at §66.

Standardised documentation?

Application forms

88. I was shown two Hyrax application forms, one for contractors and one for directors. The forms had similar format but some of the questions were different. I was shown a number of the contractor forms (eg those for Mr Jaye Cook and another for Mr Michel Nangia), the printed parts of each were identical, although obviously the handwritten information inserted by the applicants was quite different.

89. I was also shown a very similar application form for K2. This suggested, and I find, that Hyrax' documents had been prepared by taking over those of the earlier versions of the scheme.

Corporate documentation

90. I find on the basis of the evidence in front of me that the corporate documentation, the application form, the resignation as employee of own company, the board minutes of own company and new directorship agreement for own company were also very similar from one scheme user to another.

Contract of employment

91. Similarly, I find the contracts of employment by scheme users with Hyrax were in standard form, the only differences being name, date and job description. All other terms were identical. While I was only shown about 4 such contracts, it was open to the respondents to show me others if they were in different format: they did not.

Loan agreements

92. I was shown a number of loan agreements were the lender was Hyrax as trustee of HRT. There terms were identical; the only difference was in the name of borrower and the amount.

The roles of the respondents

The role of Hyrax Resourcing Limited

93. It is clear from the application forms that Joanne McNamara on behalf of Hyrax decided whether or not to accept applications to join the Hyrax arrangements by potential scheme users. Having accepted a scheme user, Hyrax was the employer in the employment contract with the scheme user, it was the service provider in the contract with the end user, it made the loans and assigned the repayment rights to the EFRBS. Its role was therefore crucial to the implementation of the arrangements. It implemented them.

The role of the second respondent –Bosley Park Limited

94. It is not entirely easy to discern the role of the second and third respondents; they both used the name 'Peak Performance' but, as I have said, that name was a constant appearing as a part of the name of previous entities. Moreover, the directors and shareholders of all three respondents were directors and shareholders of the companies which had been involved in the previous iterations of the scheme, so it was not necessarily immediately apparent in what role they undertook an activity.

95. What I do find in respect of Bosley is that it traded as Peak Performance Solutions. This was apparent from its headed notepaper. I have commented that that trading name appeared on webinars promoting the Hyrax arrangements (see §49). For example, a webinar dated 30 March 2015 and headed 'Hyrax Risk Mitigation Structure for Prospective Contractors' stated:

> This webinar will be hosted by Douglas Aitkin and Roy Lyness of Peak Performance Solutions. They will be explaining how the Hyrax Risk Mitigation Structure helps to minimise your commercial risks, tax risks and responsibility for managing your affairs, whist allowing you to maximise your commercial returns.

96. The same persons, in their role as representing Peak Performance Solutions (in other words, the second respondent) hosted another webinar on Hyrax two weeks later.

97. I find, based on an email from 3PCL in 2016, Bosley was paid by Hyrax for education, introductions and support in respect of Hyrax' business.

The role of PPHOS – the third respondent

98. There are a large number of emails produced to me which appear to be, and in absence of any evidence to the contrary, I find were emailed to current and potential users of the scheme and their accountants and advisers. These emails were signed by 'David' with an automatic signature underneath for David Gill and the words 'This is an email from [PPHOS]'. David Gill was stated to be, as he was, a director of PPHOS.

99. There were quite a number of these emails and they were often quite long. My conclusions from these emails (in absence of anything that would indicate that I should not take them at face value) are that David Gill, acting for PPHOS:

(a) Sent emails to current and prospective users of the Hyrax arrangements promoting the scheme;

(b) Paid referral fees to persons who recommended a person to adopt the scheme if they went on to do so;

(c) Promoted and hosted webinars which promoted the Hyrax arrangements;

100. It is clear that the relationship between Hyrax and PPHOS was close. An email of 5 September 2014 referred to PPHOS supporting 'former employees' by providing as much information as possible on the new legislation; it went on to thank 'all current Hyrax employees' for their support and fact employee numbers had kept up. It also said: 'now the dust has settled on the new legislation, Hyrax is now able to accept employment applications from prospective new employees.' The email gave the impression that PPHOS was intimately bound up with the arrangements.

THE LAW

The law on disclosure of tax avoidance schemes ('DOTAS')

Jurisdiction of Tribunal

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

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

And

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

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

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

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

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

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

Interpretation of the legislation

105. The place to start seems to be the parties' representations on the rules of interpretation the Tribunal should use to interpret the applicable legislation, before I actually consider the legislation itself.

Was the legislation penal?

106. The respondents' position was that the legislation at issue in this appeal was penal, so that any ambiguity in the legislation must be interpreted in favour of those sought to be penalised. This was on the basis of the principle against doubtful penalisation, as recently reiterated in the case of *ESS Production Ltd (in administration) v Sully* [2005] EWCA Civ 554 at [78] which made it clear that the principle applies as much to civil penalties as criminal sanctions. At [71] Lady Justice Arden said:

> …. It is an important principle of statutory construction that a person should not be penalised except under clear law…..

107. Mr Nawbatt appeared to accept the principle was as represented by Mr Venables; his response was that the legislation was not penal and in any event there was no ambiguity in it.

108. He relied on *Walapu* [2016] EWHC 658 (Admin) for the principle that the legislation was administrative. *Walapu* was a case about an accelerated payment notice, but considered the same legislation as at issue in this appeal, as the question was whether the scheme in that case was DOTAS notifiable. Mr Justice Green said at [152]:

> …… The DOTAS arrangements are a set of administrative measures designed to impose on promoters a duty (subject to serious sanctions if not observed) to provide advance warning to HMRC of tax avoiding schemes. The purpose is so that HMRC can then analyse the arrangements from a substantive legal perspective (through an enquiry) and, if appropriate, issue APNs to the participants. The essence of the scheme is thus to enable HMRC to apply the law to new types of arrangements as they emerge. …..

109. Mr Nawbatt thought I should draw a distinction between provisions imposing an administrative, civil duty to notify, which he said were not penal, and, on the other hand, the provisions imposing a sanction for breaching that civil duty and providing defences (such as reasonable excuse) which he said were penal. I do not agree. Such a line can't be drawn. The whole point about the principle against doubtful penalisation is that it is presumed that Parliament did not intend to penalise a person for doing something where it was not clear that it was illegal to do it. To draw Mr Nawbatt's distinction robs the principle of any meaning as

it would prevent the interpretative principle applying to the legislative description of the action that is penalised.

110. Mr Nawbatt also pointed out that no sanction had as yet been imposed on the respondents and might never be. But I take Mr Venables' point that s 308 obliges a promoter to notify HMRC of 'notifiable arrangements' as soon as they are implemented and s 89C TMA imposes a £600 per day penalty for failure to comply. The arrangements the subject of this application had been implemented in 2014 so the potential penalties were enormous.

111. I find the description of the action/inaction that is penalised is central to the question of whether the person knew what it was they were meant to do or refrain from doing. While it is clear that the respondents have not yet been penalised, and may never be penalised, I do think the legislation the subject of this application is penal in the sense that it imposes an administrative duty on certain persons, who may be penalised if they fail in that duty. Legislation can be both administrative and penal. Indeed, without a sanction for breach, administrative measures are unlikely to be observed.

112. Further, I do not agree with Mr Nawbatt that there is no ambiguity in the legislation; there is often doubt over the precise meaning of legislation, and that is true of this legislation (see discussion below).

113. But that does not mean I agree with Mr Venables that the respondents must have any doubt in interpretation of the legislation the subject of this hearing resolved in their favour. I consider the principle of interpretation against doubtful penalisation to be far more nuanced than that represented by Mr Venables. In particular, it is not an absolute principle; it is something which must be considered when construing legislation, but it may not prevail in the face of other canons of construction. The authority for this is as follows:

> 'the principle of strict construction of penal statutes, … is alive and well even if it may often give way to other canons of construction'
>
> Per Hughes LJ in *R v Dowds* [2012] EWCA Crim 281 at [38]
>
> "[the principle of strict construction of penal legislation] is not an absolute principle. The overarching requirement is that a court should give effect to the intention of the legislator, as objectively determined having regard to all relevant indicators and aids to construction. The principle of strict interpretation of penal legislation is one among many indicators of the meaning to be given to a legislative provision. It is capable of being outweighed by other objective indications of legislative intention, albeit it is itself an indicator of great weight."
>
> Per Sales J in *Bogdonic v S/S for the Home Department* [2014] EWHC 2872 at [48]

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 Capital Ltd* [2019] UKFTT 63 (TC) (another case on these provisons) 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'.

115. Having resolved the issue of how the legislation the subject of this application should be interpreted, I move on to consider it.

Did the application confer jurisdiction on the Tribunal to make either of the orders sought?

Is case criminal under ECHR?

116. Mr Venables next made the point that he considered these proceedings criminal under the European Convention on Human Rights. It is well established that proceedings for tax penalties normally entitle taxpayers to the same rights under the Convention as those accused of criminal offences, as tax penalties are normally seen as 'criminal'.

117. Mr Nawbatt appeared to accept that, if penalties were imposed on the respondents for failing to notify notifiable arrangements, those penalties would be 'criminal' under the ECHR. His point was that no penalties at all had been imposed and so these proceedings could not be criminal.

118. Mr Venables' reply was that these proceedings would (under the principle of abuse of process) nevertheless conclusively determine, so far as the respondents were concerned vis-à-vis HMRC, whether the Hyrax arrangements were notifiable. Therefore, subject to the question of defences such as reasonable excuse, these proceedings would determine liability to any penalties that might in the future be imposed.

119. I agreed with Mr Venables on this for the reasons he gave. The question was therefore the significance of the ECHR to this case. And that was, I understood from Mr Venables, that ECHR art 6.3(a) provided:

> Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;…..

120. It was his position that HMRC had not informed the respondents 'in detail, of the nature and cause of the accusation' against them. However, as the respondents' position on this seemed to entirely mirror their case that the application itself was not a proper application under s 306A(2) because it did not adequately specify the arrangements, I will deal with the ECHR point at the same time as considering whether the application was adequate under the legislation.

Inadequate application?

121. The respondents' position was that HMRC had failed to make a proper application under s 314A or s 306A. Subsection (2) of both those sections was in identical form and provided:

> (2) An application must specify –
> (a) the proposal or arrangements in respect of which the order is sought, and
> (b) the promoter

I agreed with Mr Venables' case that, if the application did not meet the requirements of this sub-section, then the Tribunal would have no jurisdiction to make either of the orders sought. So I move on to consider whether the application did meet the requirements of this subsection.

122. Mr Venables said that HMRC had to fully describe the arrangements and then satisfy the Tribunal that they actually existed. Mr Venables criticised the application in two respects, which he said fatally flawed it. He said it failed to state:

(i) Whether the loans so-called were loans in law;

(ii) Whether the so-called loans were in law remuneration;

He also said it incorrectly described the scheme users as paying a fee.

Alleged failure of specification

123. Mr Venables case was that the application was ambiguous on whether the loans were in law loans, citing §7 & §19 of the application where HMRC referred to the loans not being repaid:

> §7 'HRT invoice the end-user of their employee. They pay their employees a national minimum wage salary and also give them interest-free loans. The benefit of the repayment of the loans is then assigned to an offshore employee-financed retirement benefit scheme. The loans are, in reality never expected to be repaid.'
> §19 'The loans are in reality never repaid'

And then compared those paragraphs to §31 of the application where HMRC accepted that the loans were repayable:

> §31(b) 'members of the scheme give up the unfettered right to receive 100% of the fees…in return for receiving a national minimum wage salary…and a loan which must be repaid at some future time.'

124. Mr Venables' case was that the application was ambiguous in referring to 'loans' as 'salary': the money paid was one or the other but not both, whereas §40 of the application said:

> §40…only to be paid the balance of their salary by way of discretionary loan at the end of each month…

125. His third criticism was that Hyrax' gross profit on sub-contracting its workers could not properly be described as a fee, but the application did so describe it:

> §23(g) before paying the employee/director…Hyrax Resourcing Ltd …deduct a percentage of the employee's income….
> §29 'Second, a fee is paid by the employee/director…this sum, deducted at source, is the cost … incur[ed] for the right to participate in the scheme.

Decision on whether application inadequate

126. The legislation requires HMRC to 'specify' the arrangements. This part of the legislation is not penal: it is not a part of the legislation that places an obligation on the respondents. It should be interpreted by giving the words their natural meaning and in accordance with Parliament's presumed intention.

127. Parliament must have intended HMRC to be obliged to give sufficient specificity in order for the respondents to be able to identify the arrangements being referred to. But Parliament must also be taken to know that the promoters of the arrangements must know all there was to know about their arrangements while, at the same time, HMRC might well know very little. The clear purpose of the legislation was for arrangements to be notified to HMRC so that HMRC could investigate them and could consider their legal effect. Its very purpose

presupposed that HMRC did *not* know everything there was to know about the arrangements and certainly would not know for certain their legal effect. Interpreting the legislation as proposed by Mr Venables would mean giving it a reading that would defeat its objective. It is a meaning Parliament cannot have intended. So I consider, contrary to the respondents' case, HMRC are not required in the application to state the legal effect of the arrangements; they are not required what the tax effect of the arrangements is.

128. I find, on the contrary, that this subsection only requires HMRC to specify the arrangements in sufficient detail for them to be identifiable. HMRC is not required even to state why they think that they are notifiable, although it is obviously helpful to the respondent if the application does so, and HMRC did do so in this case.

129. Mr Venables' position was that any small inaccuracy in the description of the arrangements would mean that HMRC had specified an arrangement that did not exist and that therefore the application must automatically fail. For the reasons given below, I do not think that HMRC did inaccurately describe the arrangements but I also think such accuracy is not required by the legislation: it is enough that the arrangements are identifiable. Errors in the details would not matter as, once HMRC had done enough to identify the arrangements, they would have fulfilled the terms of subsection (2). Errors would only matter if, objectively speaking, the arrangements were not identifiable from the description given.

Application of decision to facts

130. HMRC's case was that Hyrax only existed to implement the arrangements the subject of this hearing. The respondents did not suggest otherwise. I find, therefore, that the application contained considerably more detail than was necessary to specify the arrangements: it more than met the requirement of subsection (2). This is because it specified the arrangements as those implemented by Hyrax.

131. But I go on to deal with Mr Venables' three specific criticisms of the application. In respect of whether the loans were loans, I find the arrangements were promoted on the basis that the loans were not intended to be repaid at least during the lifetime of the scheme user: if this were not the case, it would make a nonsense of the Hyrax webinars. In particular, the figure of 79-82% return would be completely inaccurate; while the Hyrax slides are less explicit than those of the K2 webinars, it was clear it was explained that the EFRBS, which would be the entity with the right to call in the loan, was quite independent of Hyrax and its owners; in any event, K2 webinars had stated 'in practice it is extremely unlikely that a contractor will have to repay the loans' and K2 webinars are part of the evidence as explained at §66: I find they prove how Hyrax would have been marketed.

132. Therefore, dealing with this criticism, in so far as there was ambiguity in the application in its specification of the 'loan', that ambiguity did no more than accurately reflect the ambiguity in the arrangements which included 'loans' which were not expected to be repaid. Such ambiguity in the application therefore *contributed to* the accurate specification of the arrangements within the meaning of subsection (2); or at least, it did not detract from it.

133. The second criticism was that the description of the arrangements included the statement that the loan was part of the salary of the scheme user. The answer to this is really the same as in the previous paragraph: the description of the scheme in the application reflects how it must have been promoted. It must have been promoted on the basis that the loans were not intended to be repaid at least during the lifetime of the scheme user and were therefore like salary: if this were not the case, it would make a nonsense of the Hyrax webinars. In particular,

the figure of 79-82% return would be completely inaccurate. And I find it was so promoted relying on this logic and on the K2 webinars. Ambiguity in the application on whether the loan was salary reflects an ambiguity in the arrangements and therefore contributed to, rather than detracted from, the specification of the arrangements in the application.

134. The third criticism was the description of Hyrax' profit as a fee. Firstly, the citations show that HMRC did understand that the 'fee' was the difference between what Hyrax was paid by the end user, and what Hyrax paid to its employee, the scheme user, as the first quote expressly said so and the second referred to it being deducted 'at source'. The criticism is, therefore, that this 'turn' or profit was called a 'fee' when the respondents do not consider it was in law a fee. But that misnomer, if it is a misnomer, reflects how K2 marketed the arrangements (see §§85-87) and, more likely than not, how Hyrax marketed the arrangements, therefore the misnomer did not detract from the specification of the scheme.

135. It follows from the above that my conclusion is that there was no breach of the ECHR; the application did contain sufficient detail for the respondents to understand the nature and cause of HMRC's case that the arrangements were notifiable. Moreover, the application did specify the arrangements in respect of which the order was sought and the promoter(s). It did so because it clearly identified the Hyrax arrangements.

Were the arrangements notifiable under s 306?

136. Having dealt with these preliminary points, I go on to consider whether HMRC are right that the arrangements were notifiable. S 306 FA 2004 provided as follows:

> **S306 meaning of 'notifiable arrangements' and 'notifiable proposal'**
> (1) In this Part 'notifiable arrangements' means any arrangements which-
>
> > (a) fall within any description prescribed by the Treasury by regulations,
> > (b) enable, or might be expected to enable, any person to obtain an advantage in relation to any tax that is so prescribed in relation to arrangements of that description, and
> > (c) are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage.
>
> (2) In this Part 'notifiable proposal' means a proposal for arrangements which, if entered into, would be notifiable arrangements (whether the proposal relates to a particular person or to any person who may seek to take advantage of it).

137. HMRC's case was that the 'Hyrax arrangements' met the description of notifiable arrangements. The respondents did not accept that the arrangements met any of the conditions, so I will consider each of the three conditions in turn.

138. But before doing so, however, I deal with three prior matters:

(a) Whether the activities of Hyrax amounted to 'arrangements';

(b) Whether Mr Venables was right to say that, in addition to showing that arrangements met those three conditions, HMRC also had to show that the arrangements were tax avoidance;

(c) The meaning of 'tax advantage' as that expression is used throughout the three conditions in s 306.

(a) Meaning of arrangements

139. Mr Venables said that the respondents did not accept that there were any arrangements, let alone notifiable arrangements within the meaning of s 306. Section 318 contained the definitions for Part 7 and defined 'arrangements' as follows:

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

140. From this it can be seen that 'arrangements' had a broad meaning. I am satisfied that the Hyrax arrangements amounted to a scheme and a series of transactions: the evidence on this is clear. Apart from anything else, there were a series of pre-planned transactions: see §78 where this was explained to prospective scheme users. Hyrax was a 'scheme' on any meaning of the words. The arrangements the subject of this application were 'arrangements' within the meaning of s 318 and 306.

141. I note in passing that Whipple J in *Root2Tax* [2018] EWHC said at [14] that the arrangements to be considered included everything up to the final stage, which in that case included the receipt of winnings. In this application, the arrangements included not only the payment of the loans but the passing of the right to repayment to the EFRBS, and the expectation that neither Hyrax nor the EFRBS would ask for the loans to be repaid. These were all part of the arrangements as they must have all been part of the scheme user's expectations. If they were not, no rational person would have entered into the scheme. In any event, it was the basis on which the scheme was promoted (in the colloquial sense) (see §78).

(b) Did tax avoidance have to be proved?

<u>There is no tax avoidance</u>

142. It was a major part of Mr Venables' case that the arrangements were not tax avoidance and that therefore the legislation did not apply. Mr Nawbatt did not accept either submission. I will deal with each in turn.

<u>Must HMRC demonstrate that the arrangements might or did amount to tax avoidance?</u>

143. Mr Venables case was that s 306 did not require the disclosure of anything that was not in fact a tax avoidance scheme. The legislation itself did not refer to a requirement to prove 'tax avoidance' but (as I understood it) it was Mr Venables' case that such a requirement must be implied into the legislation. The reason for implying that requirement into the legislation was said by Mr Venables to be that this was what Parliament intended because it used the words 'tax avoidance' in the title to that Part of the statute and/or it was penal legislation and so should be restrictively construed and/or without such a restriction the legislation was impossibly wide.

144. Mr Venables relied on the references to 'tax avoidance' that did appear. The first was the Part heading. The Finance Act 2004 introduced the legislation the subject of this application in Part 7 headed as follows:

The legislation so introduced is normally known by the acronym 'DOTAS' and the expression 'tax avoidance' is therefore also an integral part of that acronym.

145. The other references to tax avoidance occur:

> (i) In some of the titles to statutory instruments made under Part 7, such as The Tax Avoidance Scheme (Promoters and Prescribed Circumstances) Regulations 2004 no 1865 and the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 no 1543;
>
> (ii) In some of the explanatory notes to the statutory instruments made under Part 7;
>
> (iii) In HMRC publications about the DOTAS legislation.

146. Mr Venables referred me to *R v Montila* [2004] UKHL 50 for authority that headings to sections in Acts can be legitimate aids to their construction:

> [34] The question then is whether headings and sidenotes, though unamendable, can be considered in construing a provision in an Act of Parliament. Account must of course be taken of the fact that these components were included in the bill not for debate but for ease of reference. This indicates that less weight can be attached to them that to parts of the Act that are open to consideration and debate in Parliament. But it is another matter to be required by rule of law to disregard them altogether. One cannot ignore the fact that the headings and sidenotes were included on the face of its Bill through its passage through the legislature. They are there for guidance. They provide the context for an examination of those parts of the Bill that are open for debate. Subject of course to the fact that they are unamendable they ought to be open for consideration as part of the enactment when it reaches the statute book.

147. He referred me to *Pickstone v Freemans PLC* [1988] UKHL 2 where Lord Oliver used the explanatory notes to the regulations at issue in that appeal as a legitimate aid to construction saying in passing:

> '….the explanatory note (which is not, of course, part of the Regulations but is of use in identifying the mischief which the Regulations were attempting to remedy)……'

This was approved in *Coventry and Solihull Waste Disposal v Russell* [1999] UKHL 49 where Lord Hope said:

> In my opinion an explanatory note may be referred to as an aid to construction where the statutory instrument to which it is attached is ambiguous.

Lord Steyn in *R oao Westminster City Council v National Asylum Support Service* [2002] UKHL 38 said

> [5] Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such

> materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. ….
> [6] If exceptionally there is found in Explanatory Notes a clear assurance by the executive to Parliament about the meaning of a clause, or the circumstances in which a power will or will not be used, that assurance may in principle be admitted against the executive in proceedings in which the executive places a contrary contention before a court. This reflects the actual decision in *Pepper v Hart* [1993] AC 593. What is impermissible is to treat the wishes and desires of the Government about the scope of the statutory language as reflecting the will of Parliament. The aims of the Government in respect of the meaning of clauses as revealed in Explanatory Notes cannot be attributed to Parliament. The object is to see what is the intention expressed by the words enacted.

148. Mr Venables did not suggest that materials published by HMRC had ever been approved as useful aids in statutory construction.

149. He also referred me to decided cases where the courts had referred to the DOTAS provisions being there to combat tax avoidance, such as *R oao Rowe v HMRC* [2017]EWCA Civ 2105, in order to show me that DOTAS legislation should be understood as only applying to tax avoidance schemes. In *Rowe,* Lady Justice Arden said:

> [7] …. The Finance Act 2004 introduced provisions (since amended), known as DOTAS, which require the disclosure to HMRC of tax avoidance schemes.

In *R oao Walapu v HMRC* [2016] EWHC 658 (Admin), Mr Justice Green said

> [152] ….The DOTAS arrangements are a set of administrative measures designed to impose on promoters a duty (subject to serious sanctions if not observed) to provide advance warning to HMRC of tax avoiding schemes……

150. In support of his submission that, without a proof of tax avoidance, s 306 would be impossibly wide, he gave me the example of gift aid. He said a higher rate taxpayer claiming a tax refund on a standardised gift aid form would fall within s 306. The claim gave a 'tax advantage' and the tax advantage was expected and intended. The documents were standardised and so the standardised products hallmark was engaged and all three conditions in s 306 would be met, he said, unless HMRC were required to prove tax avoidance.

Decision on whether s 306 requires HMRC to show tax avoidance

151. I was not persuaded by what Mr Venables said. The titles of and explanatory notes to regulations passed after the statute was enacted were not legitimate aids to construction of that statute; in any event they did no more than show that *HMRC* promoted the regulations out of a desire to combat tax avoidance; they did not indicate that *Parliament* intended a restriction to be implied into s 306. The explanatory notes and HMRC's publications did no more than show that *HMRC* saw Part 7 as a tool to be used to combat tax avoidance.

152. The only legitimate aid to construction of s 306 which referred to 'tax avoidance' was the title to Part 7 itself. While I accept that titles can be an aid to construction, Mr Venables was not proposing it as an *aid* to construction, but more as something that would override the actual words used by Parliament in s 306. I did not think that was legitimate.

153. I also thought it would be contrary to Parliament's intent. While 'tax avoidance' is a phrase that most people think they understand, tax avoidance is a difficult concept to define and means different things to different people. While the obvious purpose of the legislation was to require certain persons to notify HMRC of arrangements which might be 'tax avoidance' in the colloquial sense, Parliament had specifically chosen not to use those words. Instead, it had chosen to use the words 'tax advantage' instead, and to explain what it meant by giving a definition to them. It made sense that Parliament had used the word 'tax avoidance' in the title as a phrase that, colloquially, was understood and conveyed the general message that that was what that part of the Finance Act was about, but had then chosen to use a different phrase, with a specific definition, to give effect to its intention. Parliament had effectively defined what it meant by 'tax avoidance' in the title by its use of 'tax advantage' in the actual text of the section. It would run counter to Parliament's intent to then read back into 'tax advantage' a qualification that it must amount to 'tax avoidance' with a definition that was not one sanctioned by Parliament.

154. I have accepted (see §114) that it would also have been Parliament's intent that, as the legislation imposed an obligation with sanctions for non-compliance, the obligation should be clearly expressed. It seemed to me that using a term ('tax advantage'), with a definition of what it meant, was intended to do just that and therefore it was inconsistent with the clarity of the legislation for the term taken from the title of it ('tax avoidance'), with an unsanctioned definition, to be read into it as a limitation on the actual words used by Parliament.

155. And while judges have referred to the DOTAS legislation as being concerned with tax avoidance, they were not doing so in cases where they were asked to state precisely which arrangements were notifiable and which were not. They were merely using the expression colloquially to give a short summary of what the legislation concerned, in much the same was as Parliament had used the word 'tax avoidance' in the title to Part 7. Part 7 was about tax avoidance, colloquially understood. But for the precise terms of the obligation, the legislation had to be read and the legislation used and defined the term 'tax advantage'. HMRC did not have to prove that the arrangements amounted (or might amount) to tax avoidance.

156. Nor did I accept that s 306 was impossibly wide without a requirement to prove tax avoidance. As it stood it would capture schemes which were effective to avoid tax and those which were not; it would capture arrangements which failed because they were shams or had been improperly implemented. It made sense that that the legislation caught them all as one of its objectives was to give HMRC sufficient knowledge about the arrangements in order to effectively litigate, as well as legislate, against them. It would be nonsensical if s 306 only required disclosure of schemes that were effective to avoid tax.

157. What all arrangements caught under s 306 had in common was that (objectively speaking) there had to be expectation of benefit as s 306(1)(c) required 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.' That, it seemed to me, prevented s 306 being impossibly wide. Certainly, it seemed, to me that it would mean gift aid tax relief claims by higher rate payers who had made genuine donations to charity would not be caught. The expected main benefit of such donations did not accrue to the donors but to the charity. (I also accept Mr Nawbatt's point that that the documentation was standardized by HMRC and not by a 'promoter' and so for this reason too gift aid donations were not caught).

158. I was referred to what was said in *Mc Niven v Westmoreland Investments* [2001] UKHL 6 which seems in point here:

> [62] ….But when the statutory provisions do not contain words like "avoidance" or "mitigation", I do not think that it helps to introduce them. The fact that steps taken for the avoidance of tax are acceptable or unacceptable is the conclusion at which one arrives by applying the statutory language to the facts of the case. It is not a test for deciding whether it applies or not….
>
> "…..The question is simply whether upon its true construction, the statute applies to the transaction….."'

I do not agree with Mr Venables that this comment is applicable only to cases where HMRC are asking courts to give a wide definition to a statute: it seems a comment that is generally applicable.

159. There is in any event authority on this point in respect of the DOTAs legislation. In *R oao Carlton v HMRC* [2018] EWHC 130 (Admin) Mrs Justice Whipple said:

> [69] In light of that test, Mr Southern's submissions relating to tax avoidance, and his strenuous assertion that the Claimants were only ever involved in the Partnerships for good commercial reasons, are wide of the mark. The issue which arises under the statute is not whether the arrangements amount to tax avoidance; but whether the test, comprising those two factors, is met. There is, of course, a good reason why the statute makes no reference to tax avoidance: that concept is difficult to define and difficult to prove…..

160. Mr Venables sought to persuade me that the Judge did not mean what she said; he suggested the reference to 'statute' was a mistake for 'regulations' as she was considering a 'hallmark' which was set out in regulations; he also pointed out that earlier in her decision she had made comments to the effect that DOTAS *was* about tax avoidance:

> [6] ….the "DOTAS" legislation which relates to disclosure of tax avoidance schemes…..
>
> [21] DOTAS is a reference to a set of provisions contained in Finance Act 2004 ("FA 2004") establishing a scheme for disclosure to HMRC of arrangements which are or may amount to tax avoidance…..

161. But I think the answer is obvious; at the start of her decision, the Judge used 'tax avoidance' in the colloquial sense, as it was used in the title to Part 7. But when dealing with the DOTAS legislation, she recognised that the courts must apply the words used in the legislation itself. Her comment in [69] is apt to the statute and not just the regulations. My conclusion is that there was no requirement for HMRC to prove that the arrangements did involve tax avoidance, nor even a requirement to prove that they might involve tax avoidance.

<u>Did the arrangements involve tax avoidance?</u>

162. Having disposed of the respondents' case that HMRC were required to prove tax avoidance, I do not need to deal with their case that the arrangements did not involve tax avoidance. But for the sake of completeness, I will do so.

163. Mr Venables referred me to a number of definitions of tax avoidance given by the senior courts. His view was that the definition of tax avoidance was relatively clear. Going back 30

years, in *Challenge Corporation Ltd* PC [1986] UKPC 45, a case about New Zealand's (partial) GAAR, the Privy Council ruled:

> [The GAAR] does not apply to tax mitigation where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability.
>
> [The GAAR] does apply to tax avoidance. Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had.

164. In *Ensign Tankers* [1992] 1 AC 655 Lord Templeman approved *Challenger* and said, consistent with it:

> '….The particular form of tax avoidance scheme with which …this case is concerned, consists of a scheme which seeks to obtain for a taxpayer a reduction in his taxable income without suffering any financial loss or expenditure….

165. In *Willoughby* [1997] UKHL 70, the House of Lords adopted the following definition of avoidance, based on *Ensign Tankers:*

> 'the hallmark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hallmark of tax mitigation on the other hand is that the taxpayer takes advantage of a fiscally attractive option afforded him by the tax legislation and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option.'

166. And most recently in UBS [2016] UKSC 13 said tax avoidance was:

> '….structuring transactions in a form which will have the same or nearly the same economic effect as a taxable transaction, but which it is hoped will fall outside the terms of the taxing statute. It is characteristic of these composite transactions that they will include elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge….'

167. Mr Venables relied on these definitions to show that the Hyrax arrangements did not involve avoidance:

(1) Firstly, he said, the Hyrax arrangements did not result in an outcome that had virtually the same economic effect as the alternative: on the contrary, it was tax mitigation as the taxpayer suffered a genuine reduction in income;

(2) Secondly, alternatively, and in particular reliance on the dicta in *Challenge* (that avoidance was mitigation if the taxing statute permitted the tax reduction), the Hyrax arrangements relied on a specific exemption legislated by Parliament.

- *The same economic effect?*

168. As I understood the respondents' case, it was their position that comparing the position of scheme user with the position s/he would have been in had the scheme not been utilised, there was a real economic difference. Without the scheme, the user received dividends or salary subject to tax; but the money was his, he was free to use it as he chose and it was a part of his wealth. With the scheme, the user received a very much smaller salary. While he also received further cash, and therefore had the same (in fact, increased) 'liquidity' as if s/he had not adopted the scheme, the loan did not add to his wealth as it was received with an obligation to repay it in full.

169. That says, Mr Venables, was a real economic difference. In the words of *Challenge,* there had been a reduction in income; in the words of *Willoughby*, the scheme user had genuinely suffered the economic consequences intended by a reduced income.

170. I do not agree. Economics looks at practical realities and not legal form. The evidence is that there was no intention or expectation of the loan being repaid in the lifetime of the scheme user and it was in any event owed to a trust of which the scheme user and his/her family were beneficiaries, so repayment was unlikely even to diminish his or her estate after death. While there may be a technical, legal difference between a person who receives cash free of an obligation to repay it in comparison to a person who received the same cash but with an obligation to repay it which will almost certainly never be enforced, there is no real *economic* difference between those persons. In practical, economic terms, they both have the cash to do with as they please. It is *economically* a part of their wealth.

171. The scheme was in any event clearly sold on the basis that it enhanced their economic position: see §§69-76. Therefore, it must be presumed that the perceived effect of the scheme in increasing wealth was crucial to the scheme users in their decision to adopt it. It is a reasonable inference that they would not have undertaken the scheme if they thought their economic position would be diminished, rather than enhanced, by it.

172. It is ironic that the respondents supported their case with a reference to *Ensign Tankers* where the use of non-recourse loans to claim expenditure on capital allowances was found to be tax avoidance, as loans which did not need to repaid did not have the economic effect of diminishing the taxpayer's wealth. It provides an apt analogy to support HMRC's, but not the respondents', position.

173. It is perhaps not clear whether *UBS* qualifies the earlier definitions of tax avoidance by requiring a scheme to always include artificial steps inserted for the purpose of the tax avoidance; but whether that is the case or not, it is clear that the Hyrax arrangements would meet the UBS definition because almost all the steps in the Hyrax arrangements were artificial and without any commercial purpose other than to avoid tax.

174. In conclusion, I agree with HMRC that they have proved that, using the definition in the cases relied on by the appellant, the scheme was, and was intended by its users, to be one of tax avoidance.

- *A specific exemption?*

175. The respondents claimed that, in line with an obiter comment in *Challenger,* the arrangements were not tax avoidance as they fell into a permitted tax exemption. As I understood this claim, Mr Venables relied on the fact that a loan made by an EFRBS was subject to tax, while a loan made by an employer was not.

176. Whether or not that obiter comment represents good law, I find that the Hyrax scheme did not rely on a specific provision that provided for a reduction in tax liability; it simply relied on an absence of taxing provision.

177. In any event, it seems likely from what was said in *Willoughby* that that obiter comment is only valid to the extent that the taxpayer 'genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option.' And clearly, as I have said here, the scheme user was intended to have a loan in legal form but with the economic effect of outright ownership of the sums lent. It would not survive this qualification.

- *Conclusion*

178. In conclusion, the Hyrax arrangements were tax avoidance as defined in the case law and had the legislation required (which it did not) HMRC to prove tax avoidance, then HMRC have done so.

(c) Meaning of tax advantage

179. S 318 FA 2004 also included the definition of 'advantage' as follows:

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

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

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.

181. Needless to say, that case was not concerned with the Finance Act 2004. It was concerned with s 43(4)(g) Finance Act 1960 which also used the expression 'tax advantage' which was there defined as:

> 'tax advantage' means a relief or increased relief from, or repayment or increased repayment of, income tax, or the avoidance or reduction of an assessment to income tax or the avoidance of a possible assessment thereto, whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains'

182. Mr Nawbatt's position was that that definition was very similar to that in the Finance Act with which this Tribunal is concerned, and that this Tribunal in the case of *Root2Tax Limited* [2017] UKFTT 696 (TC) at [40], which did concern the exact legislation as in issue in this application, had relied on Lord Wilberforce's definition because it considered the definition of tax advantage to be 'very similar'.

183. Mr Venables' view was that counsel in *Root2tax* had incorrectly conceded this point and in any event it should not be assumed that words used in one statute had the same meaning when used in another statute. Moreover, the definitions of 'tax advantage' in the two pieces of legislation were different, and that difference, he said, was crucial. In particular, the 1960 FA contained, but the 2004 FA omitted, the following words:

> ….whether the avoidance or reduction is effected by receipts accruing in such a way that the recipient does not pay or bear tax on them, or by a deduction in computing profits or gains'

184. What I think Mr Venables meant was that the 1960 Act made clear that there was a tax advantage if a person had cash accruing to him in one form on which more tax would have been payable if it had been accruing to him in another form. In *Parker*, the arrangements had resulted in the taxpayer accruing the cash following redemption of debentures rather than payment of dividends which carried a much higher tax rate and that was a tax advantage.

185. However, I do not accept that those additional words do make any significant difference to the meaning of 'tax advantage' in the two Finance Acts. Both definitions make it clear that they are contrasting two situations: one which has lower tax bill than the other. Both definitions require the 'contrast' situation to be identified. The additional words in the 1960 Act are there simply to make it clear that the contrast exists where the lower tax bill is not the result of receiving something free of tax, but by having increased expenses or deductions. I would say that those additional words are unnecessary as that meaning is implicit in the first part of the definition, but it is irrelevant to this application where there is no question of a deduction in computations.

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.

188. Mr Venables did not really suggest a different construction which was more literal or strict, and it is difficult to see one. The definition is very wide but that is consistent with the construction of the legislation which is to cast the net of 'tax advantage' wide but restrict its application to cases which fulfil the 3 conditions of s 306.

189. The root of Mr Venables' case here was, as I understood it, was not so much a quarrel with the meaning of 'tax advantage' but his case that there was no tax advantage. His point was the one discussed above, which was that the two 'contrast' situations, so to speak, in this application were not identical. In *Parker,* says Mr Venables, the taxpayer ended up with cash in hand in both scenarios. Without the tax scheme, he got cash in hand as dividends; with the tax scheme, he got cash in hand as the redemption price for debentures: the difference was simply that the tax bill without the scheme (if effective) was much larger than with it. With Hyrax, the scheme users would get cash in hand completely 'free' to them if they did not use the scheme, but if they did use the scheme, while they still got the same (in fact, increased) cash in hand, it was not free to them: it came with an obligation to repay it. So, said the respondents, there was no contrast situation: HMRC were not comparing like with like.

190. Having decided the definition of tax advantage, I will deal with Mr Venables' point that (he said) there was no tax advantage below at §§197-203 when considering the conditions for arrangements to be notifiable. I put aside the first condition (which is that the arrangements fall within one or more hallmarks) to last as it is the most complex; and move on to consider conditions (b) and (c), both of which depend on the meaning of 'tax advantage'

The second condition for a notifiable arrangement

191. Condition (b) was whether the Hyrax arrangements were arrangements which:

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

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

193. So far as the last part of the definition in (b) is concerned, which deals with whether the tax was a tax prescribed in relation to arrangements of that description, I did not understand this to be in dispute. In other words, if there was expectation of a tax advantage, and if the arrangements did fall within a hallmark, it was agreed (and I find) the tax referred to was prescribed in relation to that hallmark. So in this section I am only concerned with whether the arrangements 'might be expected to enable any person to obtain a tax advantage'.

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 <u>only</u> to be one where the scheme user was in an <u>identical legal</u> 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).

201. Condition (b) of s 306 was therefore fulfilled.

The third condition for notifiable arrangements

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

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

203. Mr Venables case was that the main benefit of scheme to its users was not tax but 'increased liquidity'. He did not explain what he meant. What I took him to mean was that scheme users had more cash in hand than in the contrast situation. Under the scheme the user would be receive an amount equal to their salary in cash and without any real risk of having to repay it; if the scheme was effective, therefore, the scheme user would be in a similar economic position to a person receiving salary, but in addition the scheme user would benefit from a lower tax bill. In that sense, I could see they would have increased liquidity (as the tax bill would be lower).

204. Therefore, it seemed to me that by this submission, Mr Venables was accepting that the main benefit of the arrangements was the obtaining of that tax advantage.

205. Even without the admission, I would find that the main benefit that might be expected to arise from the arrangements was the obtaining of that advantage. This is obvious from the evidence such as §§69-76: it was clear that the scheme was marketed and sold on the basis of its tax advantage (as described above). In any event, there is no other rational reason for why anyone would implement a convoluted and expensive set of arrangements which left them with a legal (if economically unreal) obligation to repay a sum that they would otherwise have received as salary, save for the expected tax advantage. It seems an obvious and logical inference that the scheme was implemented by scheme users because of the desire to obtain the tax advantage that was at the heart of the marketing of the scheme. Objectively speaking, the main benefit that might be expected to arise from the arrangements would be the tax advantage.

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

Hallmarks - the first condition for a notifiable arrangement

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

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

Description 3: Premium Fee

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

8 Description 3: Premium Fee

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

But arrangements are not prescribed by this regulation if –
(a) no person is a promoter in relation to them; and
(b) the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.

(2) For the purposes of paragraph (1), and in relation to any arrangements, a 'premium fee' is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises, and which is –
(a) to a significant extent attributable to that tax advantage, or
(b) to any extent contingent upon the obtaining of that tax advantage as a matter of law.

210. Mr Nawbatt stated that HMRC did not rely on Regulation 8(2)(b) (contingent fees provision). The Tribunal is therefore only concerned with (a) of Regulation 8(2).

Objective test for fee

211. The hallmark does not require that a premium fee is paid; only that it might be reasonably expected that a promoter of substantially similar arrangements would be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

212. The respondents' point was that no fee was paid in these arrangements. Even if the first respondent should be seen as providing a service, it was not remunerated by payment of fees. It merely took a cut of the contract price when sub-contracting the scheme user's services to the end user. It was inserted as an agent or main contractor in between the scheme user and the end user (being the business using the scheme user's services) and took its cut by paying the scheme user less than it received from the end user. (I recognise that payment by Hyrax was in the form of salary *and* transfer of loan repayment rights).

213. Even if the respondents are correct to say that such a cut or commission is not a 'fee', as I have said, the question is not whether a fee was paid but whether one was reasonably expected to be able to be charged by a promoter of substantially similar arrangements.

214. It seems to me to be obvious that Hyrax was able to take a cut from the gross fee paid for the scheme user's services; its ability to take a percentage of the gross payment is evidence that, instead of a cut, it would have been able to take a fee. Whether paid the same amount as a % of the gross earnings or as a fee, the cut or fee are economically the same to a middleman, as Hyrax was; the fact it was actually able to earn an amount economically the same as a fee is good evidence that it might be reasonably be expected that a promoter of substantially similar arrangements would be able to obtain a fee from the arrangements.

215. I note in passing that HMRC relied on the evidence that those involved in promoting K2 and Hamilton regarded the 'employer's' cut as a fee as it was referred to such: see §87. While I agree, for the reasons given at §66, that this is good evidence that the promoters regarded

Hyrax' percentage of the gross earnings as a fee, the test is objective. And, as I have said, the objective test is met. So I move on to consider whether the fee that would be expected would be a premium fee.

Meaning of premium fee

216. HMRC must prove that it might be reasonably expected that a promoter of substantially similar arrangements would be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

217. A premium fee is a fee chargeable by virtue of any element of the arrangements from which the tax advantage is expected to be obtained arises and which is to a significant extent attributable to that tax advantage.

218. Mr Venables described the cut of about 18% that Hyrax took as a 'modest commercial profit for acting as an employment agency'. However, I find that the proper inference from the evidence is that Hyrax did not perform any significant services as an employment agency; in particular, it merely inserted itself as main contractor into a contract/employment situation which had been negotiated by others. It did not identify the job opportunities for the scheme user and was therefore not remunerated for doing so.

219. On the contrary, it is clear from the evidence that what Hyrax's cut remunerated it for was the arrangements it put in place, being the arrangements the subject of this hearing. It did not do anything else. The hypothetical premium fee, being equivalent to Hyrax' cut, would therefore, like the cut, be chargeable by virtue of the Hyrax arrangements. They are arrangements from which a tax advantage is expected to be obtained.

220. The only remaining question is therefore whether the hypothetical premium fee would to a significant extent be attributable to that advantage. This question should be answered by looking at whether Hyrax' actual cut is to a significant extent attributable to the expected tax advantage.

221. Hyrax' cut was a % of the gross contract value of the contract for the scheme user's services. The greater the contract value, the greater the expected tax saving (as tax is a % of earnings), and therefore Hyrax' cut increased in line with the expected tax saving. It was clearly charged as a % of the contract value (and therefore the expected tax saving) and did not reflect the amount of work involved: the evidence indicated that the work carried out by Hyrax would be roughly equivalent for all scheme users. But the charges would depend on the contract value.

222. It seems fair to say that the charge was to a significant extent attributable to the expected tax advantage as there is no other way of explaining why it would be charged as a % of the contract value; Hyrax was in effect splitting the expected tax saving with its scheme user. In conclusion, I find that a promoter of substantially similar arrangements would be able to obtain a premium fee.

An experienced person?

223. Would that premium fee be paid by a person experienced in receiving the type of services being provided? As before this is an objective test. In *Curzon Capital Ltd,* at [59] the Judge referred to 'the 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. I agree with him over the relevance of this evidence and find that it exists in this application too. Moreover, I note in practice that there is actual evidence that persons experienced in this kind of scheme (as they had implemented earlier iterations) also chose to implement Hyrax, accepting that Hyrax would make around a 18.5% profit. That actual evidence supports the conclusion that objectively a person experienced in this kind of scheme would have been prepared to pay a premium fee.

Does the exception apply?

224. Mr Venables considered that the exception to the Hallmark was applicable. That exception was where

> (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.

HMRC accepted that (b) applied. The scheme users, who expected to obtain the tax advantage, were individuals. HMRC did not accept that (a) applied. Their case was that even if they were unable to prove that any of the respondents were promoters, nevertheless it was obvious that there was a promoter of the arrangements, even if it was not identified, and this exemption was therefore inapplicable.

225. Rather than decide whether HMRC was right about this, I go on to consider later in this decision whether any of the respondents were promoters. My conclusion below is that the first respondent was a promoter. Therefore, this exception could not apply.

Conclusion on premium fee hallmark

226. For the above reasons, I am satisfied that the Hyrax arrangements fell within one of the descriptions (hallmarks) prescribed by Regulations and that therefore they were notifiable arrangements within s 306(1).

227. Strictly, I do not need to consider whether the arrangements fell within any other Hallmarks, but for the sake of completeness, as it was argued, I do so.

Description 5: Standardised tax products

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

> **10 Description 5: standardised tax products**
> (1) Arrangements are prescribed if the arrangements are a standardised tax product.
> But arrangements are excepted from being prescribed under this regulation if they are specified in regulation 11.
> (2) For the purposes of paragraph (1) arrangements are a product if –
> (a) the arrangements have standardised, or substantially standardised, documentation –
> (i) the purpose of which is to enable the implementation, by the client, of the arrangements; and
> (ii) the form of which is determined by the promoter, and not tailored, to any material extent, to reflect the circumstances of the client;

(b) a client must enter into a specific transaction or series of transactions; and
(c) that transaction or that series of transactions are standardised, or substantially standardised in form.
(3) for the purpose of paragraph (1) arrangements are a tax product if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage.
(4) For the purpose of paragraph (1) arrangements are standardised if a promoter makes the arrangements available for implementation by more than one other person.
11 Arrangements excepted from Description 5
(1) the arrangements specified in this regulation are -
(a) [not relevant]
(b) those which are of the same, or substantially the same, description as arrangements which were first made available for implementation before 1 August 2006

229. The exemption in paragraph 11(1)(a) (brining in the provisions of paragraph 11(2)) were not relevant as the respondents stated that they did not rely on them. Therefore, I do not set them out here.

230. Mr Nawbatt pointed out that K2's AAG1 (the DOTAS notification) identified the K2 scheme as involving the standardised tax products hallmark. If he was implying that it would necessarily follow that the Hyrax arrangements also fell within this hallmark, I do not accept that for the reasons given above at §68. I consider whether the Hyrax arrangements meet this hallmark based on the legislation and the evidence in this application.

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

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

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

(2) For the purposes of paragraph (1) arrangements are a product if –
(a) the arrangements have standardised, or substantially standardised, documentation –
(i) the purpose of which is to enable the implementation, by the client, of the arrangements; and
(ii) the form of which is determined by the promoter, and not tailored, to any material extent, to reflect the circumstances of the client;
(b) a client must enter into a specific transaction or series of transactions; and
(c) that transaction or that series of transactions are standardised, or substantially standardised in form.

- *Standardised documentation?*

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

- (I)Substantially standardised documentation

234. I find that the evidence (§§88-92) shows that there was a series of documents which were utilised by the scheme users to implement the scheme; between each document in the series the only differences between one user and another user was normally the scheme user's name and the amount of the contract value. I consider that the arrangements did have standardised or substantially standardised documentation.

- (II)Purpose of standardised documentation

235. The purpose of the standardised documentation was clearly to enable the scheme to be implemented by the scheme user. If the scheme user did not enter into the various documents discussed at §§88-92 he could not implement the scheme. But the question was whether the standardised documents was to enable the scheme to be implemented by 'the client'?

236. So the real issue was whether the scheme user was a 'client'. The regulations contained no definition of 'client'. I also note that the regulations were amended with effect from February 2016 to change the word 'client' to 'person' but no reason for this change was given in the explanatory notes.

237. So the question is whether a scheme user was a 'client' within the meaning of these regulations. It is rather an odd provision in that sense because it uses the word 'client' without saying whose client the person has to be. However, Regulation 10(4) refers to a promoter making the arrangements available, so I consider it must have been intended that the 'client' referred to must be the client of the promoter.

238. Mr Venables's position was that there was no promoter and no client. To be a client, he said, the scheme user must pay the promoter for its services. No services were provided and no payment was made. Mr Nawbatt's view was that the word 'client' did not imply that there was payment for services; and it was his position that services were provided even if no direct payment was made for them.

239. The dictionary is of little help. 'Client' has a number of meanings, the one probably closest to the meaning intended here is:

> A person using the services of a professional person or organization; a customer of a person or organization offering services.
>
> Oxford English Dictionary

240. My view is that, certainly where professional-type services are provided, it is not a necessary implication that clients pay for the services they receive. Pro bono clients of law firms are still clients, albeit ones who do not pay.

241. But did the scheme users receive any services from Hyrax, the first respondent? I am only concerned with Hyrax as, for reasons given below, Hyrax was the only respondents I have found to be a promoter. Mr Venables' view was that Hyrax merely entered into an employment contract with the scheme user; doing so, he quite rightly said, could not be the provision of services to the scheme user such as to make the scheme user its client. On the contrary, the contract made the scheme user its employee. Employees are not clients of their employers by virtue of their employment contract.

242. However, it was clear that what Hyrax actually did was make the Hyrax arrangements available to the scheme user. Hyrax not only entered into the employment contract with the

scheme user, it also entered into the contract with the person seeking the scheme user's services. It also assigned (for no charge) its repayment rights under the loans. It was essential to the scheme that Hyrax did so. It did so because it was intended from the outset that it would do so because it was making the scheme available to users. It was doing much more than merely employing the scheme user. It was providing a service of making a tax avoidance scheme available.

243. Whether or not that should be seen as a professional service, I think scheme user is properly within the meaning of 'client' in this context because services were rendered by Hyrax, and Hyrax was rewarded by its client for those services by being put into a position where it could slice off the top 18% of the fee being paid by the end user for the services of the scheme user.

244. I note in passing that Mr Nawbatt relied to some extent on descriptions in webinars of the scheme users as 'clients' but I accept that the use of this term to refer to potential scheme users was more likely intended to refer to them as clients of their accountants who were attending the webinar with a view to recommending the scheme to their clients, rather than as clients of any of the respondents. And so I do not rely on the use of the word 'client' in the webinars for my conclusion that the scheme users were clients of the first respondent.

245. In conclusion, I find the arrangements had a substantially standardised the purpose of which was to enable the implementation of the arrangements by clients of Hyrax (the scheme users).

- <u>(III) form determined by promoter?</u>

246. Who determined the form of the documents? There was very little evidence on this. However, it seems a reasonable inference that the person who drafted the documents did so on behalf of and on the instructions of Hyrax; this is because Hyrax was the counter-party to most of them and was the entity at the heart of the scheme, and the documents were in standard form so were clearly not dictated by the scheme users. As I find they were drafted on behalf of Hyrax, it is a reasonable inference, and therefore, I find, that Hyrax determined the form of them.

247. I note that if this were not the case, the directors of the respondents were in a position to know who determined the form of the documents, yet they chose to bring no evidence to counter HMRC's submission that the form of the documents was determined by Hyrax. It is proper to conclude in these circumstances that Hyrax was, as it appeared to be, the entity which determined the form of the documents.

- <u>(IV) not tailored, to any material extent, to reflect the circumstances of the client?</u>

248. Having considered the evidence at §§88-92, I find that the documents were not tailored to any material extent to reflect circumstances of the client. Obviously, the documents did reflect the scheme user's individuality in that they used his or her name and reflected the actual end user of his or her services. But the documents appeared to have no other material differences between them. They were 'off the shelf' and not tailored to a material extent to reflect the *circumstances* of the client.

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

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

- (I) Is there a client?

250. If there was a requirement to enter into a transaction, it was a requirement on the scheme user. Was the scheme user a client? I have addressed this point at §§238-245 above and concluded that the scheme users were clients of the first respondent.

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

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

252. What Parliament meant by the use of 'must', because it is the only reading which makes sense, is that it needs to be shown that the implementation of the scheme was only possible by the scheme user entering into a specific transaction or series of transactions. And the answer to that question is clear. It is obvious that the only way that the scheme user could implement the Hyrax arrangements was to enter into the standard form employment contract and loan agreement with Hyrax. There was no other way in which to participate in the arrangements other than to become a party to these contracts.

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

253. The answer to this is clearly yes. There were standardised contracts which the scheme user was required to become a party to in order to implement the scheme.

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

254. Having considered the evidence at §§88-92, I find that the transactions were in substantially standardised form. Obviously, the documents did reflect the scheme user's individual circumstances in that they used his or her name and reflected the actual end user of his or her services. But the transactions appeared to have no other material differences between them. They were 'off the shelf' and not tailored.

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

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

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

257. I have already concluded that the arrangements were such that the main benefit that might be expected to arise from the Hyrax arrangements was the obtaining of a tax advantage (see §§191-206). The test in (3) is almost identical. Taking into account the evidence, an informed observer having studied the arrangements would have to conclude that the main purpose of the arrangements was to enable the scheme user to obtain a tax advantage. It was

sold to potential scheme users on the basis of its tax advantage and it had no rationale apart from the tax advantage. Objectively speaking, that was its only discernible purpose.

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

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

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

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

261. This condition is clearly met on the evidence. Elsewhere in this decision I find that Hyrax was a promoter, and that it made the arrangements available for implementation by the scheme users. It clearly made them available for implementation by more than one person as more than one person implemented them.

262. In conclusion, I find that the Hyrax arrangements were a standardised tax product.

Reg 11 - Exclusion from Description 5

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

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

264. The respondents relied on regulation 11(1)(b). During their hearing, they withdrew their reliance on this. They did not suggest any other exception applied.

265. For the sake of completeness, I note that it would be for the respondents to prove that the Hyrax arrangements were substantially the same as those first made available for implementation before 1 August 2006. Mr Venables stated early in the hearing that he intended to rely on evidence which would be elicited from Mr Belli for their case that the Hyrax arrangements were substantially the same as the 2004 iteration. In the event, no relevant evidence on this was elicited from Mr Belli. Nor was I shown anything in the documentary evidence (all of which was produced by HMRC) to substantiate the respondents' case.

266. So there was no evidence on which I could conclude that this exception applied. I note that while it was certainly HMRC's case that Hyrax was the latest iteration of a scheme that had been around in earlier forms since 2004, I was given no evidence about the form of the 2006 iteration. HMRC certainly did not concede it was 'substantially the same'. On the contrary, it was their case that each iteration was significantly different as each iteration was re-designed to avoid the latest round of anti-avoidance legislation.

267. Had the respondents maintained their case on this, I would have dismissed it as I am unable to conclude, from the paucity of information in front of me, that the Hyrax arrangements were substantially the same as any other scheme in place in 2006. In fact, what evidence I had suggested that Hyrax was significantly different to all earlier iterations as the tax legislation had evolved considerably since 2006.

Conclusion

268. I find that HMRC have proved that this hallmark five applied to the Hyrax arrangements.

Description 8: employment income provided through third parties

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

> **18. Description 8: Employment income provided through third parties**
> (1) Arrangements are prescribed if –
> (a) Conditions 1 and 2 are met and Condition 3 is not met; or
> (b) ……[not relied upon]
> (2) Condition 1 is met if the arrangements involve at least one of the following –
> (a) …[not relied on]
> (b) any person taking a relevant step under s 554C or 554D; or
> (c) ….[not relied on]
> (3) Condition 2 is met if the main benefit, or one of the main benefits, of the arrangements is that an amount that would otherwise count as employment income under s 554Z2(1) is reduced or eliminated.
> (4) Condition 3 is met if, by reason of at least one of sections 554E to 554X or regulations made under section 554Y, Chapter 2 of Part 7A does not apply.

270. All parties were agreed that Condition 1 was met and Condition 3 was not met. That meant that the only point of contention between them was whether or not Condition 2 was met. In other words, the issue between the parties on whether or not Description 8 applied was whether:

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

271. S554Z2(1) is the charging provision for Part 7A of ITEPA. Where there is a 'relevant step', the value of the 'relevant step' counts as employment income.

272. S554A provides that Part 7A applies where there is an arrangement in respect of an employee where it is reasonable to suppose that that arrangement is a means of providing rewards or loans in connection with the employment and a relevant step is taken by a third party (which includes the employer in capacity of trustee) in pursuance of the arrangement. A relevant step includes payments and transfers of assets to a third party.

273. HMRC's case is that the benefit of the Hyrax arrangements was to reduce a charge under s 554Z2(1) which would have arisen because, without the arrangements, Hyrax (as trustee) would have paid the amount to be loaned to the scheme user to the EFRBS which would then have lent the amount paid to the scheme user. HMRC's view was that the history of the various predecessor versions of the scheme show that each new iteration was specifically aimed to avoid new anti-avoidance legislation and Hyrax was developed specifically to avoid Part 7A ITEPA and the charge under s 554Z2(1).

274. Mr Venables' point was that, even accepting the arrangements were tax avoidance and Hyrax was the successor to K2, if the Hyrax arrangements had not been available, it did not follow that scheme user would have used a scheme similar to the K2 scheme. On the contrary, once Part 7A ITEPA was in force, no rational person would enter into a scheme that was bound to fail. The only sensible options for potential scheme users in the face of Part 7A were (1) to do nothing and just receive income direct from the end user and pay tax on it or (2) find another

scheme which was expected not to be caught by Part 7A. But it was clear that schemes like K2 were no longer effective and would no longer be implemented. So, said Mr Venables, by using the Hyrax arrangements, the scheme user was not actually reducing or eliminating an amount that would otherwise count as employment income under Part 7A.

275. My conclusion is that HMRC only need show that *one of the main benefits* of the arrangement was the reduction/elimination of an amount that would otherwise count as employment income under Part 7A ITEPA. While I accept the point that the main benefit of the arrangements was the reduction/elimination of an amount that would otherwise have been employment income per se, nevertheless it inevitably follows that *one of the* main benefits was reduction/elimination of amount that would otherwise have counted as employment income under s 445Z2(1). That has to be so or the whole purpose of the arrangement would be frustrated. It was essential to the Hyrax arrangements that Part 7A ITEPA was by-passed.

276. It follows that I find that HMRC have proved that this Hallmark applied. As I said at §226, I have found that that the Hyrax arrangements were notifiable arrangements within s 306(1). That does not conclude the application in HMRC's favour.

Were the respondents promoters?

Can I allow HMRC's application if I do not find any of the respondents were a promoter?

277. This is because an application for an order by the Tribunal under s 314A FA 2004 that arrangements are notifiable must specify the arrangements *and* the promoter. The application the subject of this hearing specified the three respondents as promoters. The respondents did not accept that they were promoters; Mr Nawbatt's position was that even if the Tribunal agrese with the respondents on this, the arrangements were nevertheless notifiable.

278. What I think Mr Nawbatt was driving at was that a finding by this tribunal that the arrangements were notifiable would enable HMRC to issue APNs to scheme users even if the Tribunal found that none of the respondents were promoters. His point was that the arrangements must have had a promoter even if it was not the respondents.

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

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

281. HMRC's case was that all three respondents were in fact promoters and I move on to consider this. But as long as HMRC can satisfy me that at least one of the respondents was a promoter, then it follows that HMRC's application will succeed.

The legislation

> **S 307 Meaning of 'promoter'**
> (1) For the purposes of this Part a person is a promoter -

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

282. So s 307(1)(a) contained the definition of 'promoter' in relation to notifiable *proposals* and s 307(1)(b) contained the definition of 'promoter' in relation to notifiable *arrangements*. HMRC therefore relied on s 307(1)(b) as it was their case that there were notifiable *arrangements* rather than notifiable proposals. Nevertheless, the definition in s 307(1)(a) was relevant as s 307(1)(b) referred back to it. In summary, a person was a promoter in relation to notifiable arrangements if (in any case) in the course of a relevant business:

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

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

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

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

283. I will consider in turn whether each respondent was a promoter.

Hyrax

Acting in course of relevant business?

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

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

285. HMRC's view was that Hyrax' business was the provision to scheme users of their services in relation to taxation as they made the Hyrax arrangements available. Mr Venables point was similar to his point on the meaning of 'client'. He said that Hyrax had no clients and so provided no services. All it did, he said, was become the employer in an employment contract.

286. I have already dealt with this at §§238-245 above. Hyrax did become the employer in an employment contract but it did much more; by agreeing to be a party to the contract of employment with the scheme user, with the contract for services with the end user, and the loan to the scheme user, Hyrax was providing a service to the scheme user for which the scheme user was prepared to reward Hyrax by allowing Hyrax to use its position as middleman in the arrangements to slice off about 18% of the contract value. The services Hyrax provided to the scheme user were undoubtedly related to taxation as (I have found) the purpose of the arrangements was a tax advantage (and tax avoidance).

Did Hyrax undertake promotion as defined?

287. The next question is whether any of the conditions set out were fulfilled. HMRC's case was that Hyrax to a great extent managed and organised the arrangements (see S 307(1)(b)(ii)) and/or made the arrangements available for implementation by other persons (s 307(1)(a)(iii)) because:

(i) Agreed to accept applications

(ii) Signed contracts of employment

(iii) Made the loans

(iv) Assigned creditors rights in loans

288. The arrangements were notifiable. Before implementation they were therefore a notifiable proposal; Hyrax made the notifiable proposal available for implementation by the scheme users because it agreed to be the counter-party to all the necessary contracts. I find that Hyrax was therefore a promoter of notifiable arrangements because it was a promoter of a notifiable proposal.

289. Did Hyrax also manage and organise the arrangements? Strictly I do not need to consider this as the conclusion in the previous paragraph is that Hyrax was a promoter. I do so for the sake of completeness. The evidence was that Joanne McNamara in her capacity as director of Hyrax decided whether or not to accept scheme users into the arrangments. As Hyrax was the counter-party to the necessary contracts, it seems inevitable that Hyrax had to make this decision. An accountancy firm, Forbes Ltd, which provided HMRC with a letter about the scheme on 10 September 2016, stated that it had obtained the information on the Hyrax arrangements from Joanne McNamara, R Jenkins, E Rees all of Hyrax (and David Gill of PPHOS). All of this is consistent with the likely scenario that Hyrax, as the counter-party to all the relevant contracts was also the organiser and manager of the arrangements. No evidence was led by the respondents to counter this natural inference.

290. So for a second reason I find Hyrax was a promoter.

Bosley Park Limited (the second respondent)

Acting in course of relevant business?

291. To be a promoter, Bosley had to be acting in the course of a business which involved the provision to other persons of services relating to taxation.

292. HMRC's view was that Bosley's business was the promotion of the Hyrax arrangements and so it was acting in the course of a relevant business. Mr Venables's position is that there

was no evidence that Bosley was paid by scheme users; on the contrary, the evidence was that Bosley was paid by Hyrax.

293. I accept that the evidence shows that Bosley's services were rendered to Hyrax; but I do not agree that that means that they were not services relating to taxation. On the contrary, they were clearly services relating to taxation because they were all about promoting and advertising to potential scheme users and their accountants the Hyrax arrangements, which were a notifiable arrangement. It did not matter for the purpose of the definition of 'relevant business' that the recipient of the services was Hyrax, while the tax benefit was that of the scheme users'.

Did Bosley undertake promotion as defined?

294. However, to be a 'promoter', Bosley also had to fall within s 307(1) b). There was no evidence that Bosley was responsible for the design of the Hyrax arrangements (s 307(1)(b)(i)), nor for their organisation and management (s 307(1)(b)(ii)). Bosley could therefore only fall within s 307(1)(b) if it was a promoter in relation to a notifiable proposal implemented by the Hyrax arrangements by virtue of s 307(1)(a)(ii) or (iii).

295. S 307(1)(a)(iii) would require Bosley to have made the Hyrax arrangements available for implementation by other persons. That phrase does not appear to be defined. It seems to me that it means that Bosley must have been able to ensure that a scheme user who wanted to use the arrangements would be able to do so. But there is no evidence that this was the case. The evidence is that Bosley promoted the arrangements in the colloquial sense by advertising them; there is nothing to show that Bosley had any influence over Hyrax's decision to enter into the arrangements with any particular scheme user. So I do not consider s 307(1)(a)(iii) applies.

296. S 307(1)(a)(ii) would require Bosley to have made a 'firm approach' to another person with a view to *Bosley* making the notifiable proposal available for implementation. While Bosley might well have made a firm approach (within the meaning of s 307(4A)) to various potential scheme users, it was with a view to *Hyrax* making the notifiable proposal available for implementation. The evidence is that Hyrax and not Bosley made the scheme available for implementation.

297. In conclusion, I do not consider that Bosley was a promoter within the meaning of s 307.

PPHOS (the third respondent)

Acting in course of relevant business?

298. The first question is whether PPHOS was acting in the course of a business that involved the provision of services in relation to taxation to other persons.

299. There was no evidence that scheme users or their accountants paid remuneration to PPHOS; Mr Venables' position was that PPHOS was paid by Hyrax but it seems to me that this was not in evidence. In any event, I have already said that the word 'services' does not necessarily imply that there was payment for the services and so the lack of evidence of payment is irrelevant.

300. Mr Venables' position was that PPHOS rendered no services to scheme users (as they were not paid by them) and although PPHOS did render services to Hyrax (perhaps as introducer) those were not services in relation to taxation, as they did not impact on the tax position of Hyrax.

301. As with Bosley, while I agree that the evidence shows that PPHOS' services were rendered to Hyrax, I do not agree that that means that they were not services relating to taxation. On the contrary, they were clearly services relating to taxation because they were all about promoting and advertising to potential scheme users and their accountants the Hyrax arrangement, which was a notifiable arrangement. It did not matter for the purpose of the definition of 'relevant business' that the recipient of the services was Hyrax, while the tax benefit was that of the scheme users.

Did Hyrax undertake promotion as defined?

302. However, as with Bosley, HMRC had to show PPHOS fell with s 307(1)(b) and they have not. There is no evidence that PPHOS was responsible for the design of the Hyrax arrangements (s 307(1)(b)(i)), nor for their organisation and management (s 307(1)(b)(ii)). PPHOS could therefore only fall within s 307(1)(b) if it was a promoter in relation to a notifiable proposal implemented by the Hyrax arrangements by virtue of s 307(1)(a)(ii) or (iii).

303. S 307(1)(a)(iii) would require PPHOS to have made the Hyrax arrangements available for implementation by other persons. That phrase does not appear to be defined. It seems to me that it means that PPHOS must have been able to ensure that a scheme user who wanted to use the arrangements would be able to do so. But there is no evidence that this was the case. The evidence is that PPHOS promoted the arrangements in the colloquial sense by advertising them; there is nothing to show that PPHOS had any influence over Hyrax's decision to enter into the arrangements with any particular scheme user. HMRC's case relied on the statement referred to at §100 above by PPHOS that Hyrax was now ready to accept new applicants, but that does not show that PPHOS could actually influence Hyrax' decision whether to do so. So I do not consider s 307(1)(a)(iii) applies.

304. S 307(1)(a)(ii) would require Bosley to make a 'firm approach' to another person with a view to *PPHOS* making the notifiable proposal available for implementation. While PPHOS might well have made a firm approach (within the meaning of s 307(4A)) to various potential scheme users, it was with a view to *Hyrax* making the notifiable proposal available for implementation. The evidence is that Hyrax and not PPHOS made the scheme available for implementation.

305. In conclusion, I do not consider that HMRC have proved that PPHOS was a promoter within the meaning of the legislation.

Conclusion

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

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

308. I agree with the comments of Judge Poole in *Curzon Capital Ltd* at [45]: while the word 'may' gives the Tribunal discretion, it is clearly the intention of Parliament that where the necessary prerequisites to the making of an order are proved, the Tribunal should exercise its discretion to make the order unless there is a compelling reason not to. I am aware of no such

reason, compelling or otherwise, in this case. On the contrary, as the Hyrax arrangements were notifiable, I consider it right to exercise my discretion in favour of making the order sought, so that all the consequences intended by Parliament (such as the making of APNs) can follow.

309. The application is therefore allowed, but on the basis that the application correctly specified the first respondent as the promoter. It is not allowed in respect of the second or third respondent.

Doubt as to notifiability

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

The legislation

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

> (3) On an application the tribunal may make the order only if satisfied that HMRC –
>
> (a) have taken all reasonable steps to establish whether the proposal or arrangements are notifiable, and
>
> (b) have reasonable grounds for suspecting that the proposal or arrangements may be notifiable.
>
> (4) Reasonable steps under subsection (3)(a) may (but need not) include taking action under s 313A or 313B.
>
> (5) Grounds for suspicion under section 3(b) may include –
>
> (a) the fact that the relevant arrangements fall within a description prescribed under s 306(1)(a);
>
> (b) an attempt by the promoter to avoid or delay providing information or documents about the proposal or arrangements under or by virtue of section 313A or 313B;
>
> (c) the promoter's failure to comply with a requirement under or by virtue of section 313A or 313B in relation to another proposal or other arrangements.
>
> …..

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

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

> (5) Grounds for suspicion under section 3(b) may include –
>
> (a) the fact that the relevant arrangements fall within a description prescribed under s 306(1)(a);
>
> (b) an attempt by the promoter to avoid or delay providing information or documents about the proposal or arrangements under or by virtue of section 313A or 313B;
>
> (c) the promoter's failure to comply with a requirement under or by virtue of section 313A or 313B in relation to another proposal or other arrangements.

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

315. I would also have to be satisfied that HMRC took reasonable steps to establish whether the arrangements were notifiable. S 306A went on to provide examples of 'reasonable steps' as follows:

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

316. Mr Venables' position was that HMRC failed to take all reasonable steps based on an exchange of correspondence between HMRC and the respondents. I will only consider the correspondence with Hyrax, which appeared identical to the correspondence with the other two respondents. What I find is that HMRC opened a dialogue with the first respondent in April 2016. By its reply in May 2016, the first respondent did not accept that there were notifiable arrangements nor that it was a promoter. HMRC did not respond to that letter until October 2016. The reply said HMRC intended to apply to the Tribunal for an order under s 314A and over several pages set out the author's view that the conditions of s 314A were met.

317. Hyrax replied on 7 December 2016. It was a very long letter; it denied all HMRC's allegations; it said HMRC had not given sufficient details; it asked various questions about HMRC's allegations. On 2 February 2017, HMRC replied to state that they were considering the letter and would 'provide a full response in due course'. On 2 June 2017, HMRC wrote a short letter to say they had considered the letter, formed the view that HMRC's letter of October 2016 was correct, and would shortly apply to the Tribunal for an order. And they did so.

318. Mr Venables' position based on the above was that HMRC failed to take all reasonable steps as it had failed to respond to the first respondent's questions in its letter of December 2016. My view of the correspondence is rather different; the respondents' letters did not contain much if any factual information but did engage in close detail with the legislation and gave the respondent's view on why (they said) s 314A did not apply. The correspondence established that the respondents had a different interpretation of the law to HMRC; all s 307 required HMRC do was take reasonable steps to find out about the *facts* of the position. It did not require HMRC to involve itself in endless tooiigs and froings over the meaning of the legislation.

319. In my view, HMRC obtained sufficient information about the facts to establish that the arrangements were notifiable; it is therefore true to say that they took all reasonable steps. The correspondence was terminated by HMRC but all it made clear was that the parties had fundamental difference of interpretation of the law. Continuing the dialogue would have served no purpose other than to delay resolution; ending the dialogue did not mean HMRC had failed to take all reasonable steps.

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

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

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 05 MARCH 2019