[2022] UKFTT 00114 (TC)

TC 08445/V

Disclosure of tax avoidance schemes — FA 2004 ss 314A and 306A — two applications for an EBT structure and a separate annuity arrangement — Whether arrangements notifiable – Whether respondent a 'promoter'- Whether grandfathering applies – Main benefit and tax advantage tests – Application of premium fee and standardised tax product hallmarks - Tax Avoidance Schemes (Prescribed Descriptions of Arrangements)Regulations 2006, SI 2006/1543, regs 8, 10 and 11.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/00513 and TC/2019/02000 (V)

BETWEEN

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

-and-

AML TAX (UK) LIMITED **Respondent**

TRIBUNAL: JUDGE TRACEY BOWLER
SHAMEEM AKHTAR

The hearing took place on 8-10 November 2021. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video platform. A face to face hearing was not held because of the circumstances of the pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Ms Rebecca Murray, counsel, for the Applicant instructed by the General Counsel and Solicitor to HM Revenue and Customs.

Mr Edward Waldegrave, counsel, for the Respondent.

DECISION

INTRODUCTION

1. This decision relates to two applications made by HMRC in each case for an order pursuant to s314A Finance Act 2004 ('FA04') that the specified arrangements are 'notifiable' arrangements within the meaning of s306 FA04 (part of the 'DOTAS' regime) or, in the alternative, an order pursuant to s306A FA04 that the same arrangements are to be treated as notifiable.

2. We refer throughout this decision to the Applicants as "HMRC" and to the Respondent as "AML". References to sections are to sections in FA04 unless otherwise stated.

3. The arrangements which are the subject of HMRC's applications can be briefly summarised as follows. One of the arrangements ("the Annuity Arrangements") was used by close companies which would each enter into one or more option agreements with one or more participators in the company under which the company either paid a lump sum amount, or credited the participator's loan account, for the right to exercise an option. On exercise of the option the individual was required to enter into an annuity agreement under which the individual was required to pay an annuity to the company for life. However, an "early encashment" mechanism enabled the company to cancel its rights under the annuity agreement for a nominal fee at any time up to the date on which the first annual payment was due.

4. The other set of arrangements ("the Pre-Funded EBT Arrangements") involved an employee benefit trust ("EBT") being set up and funded by an AML related company in the Isle of Man. An employer company purchased the right to appoint beneficiaries to the EBT and the purchase price of that right was left outstanding. One or more employees of the company agreed to assume the company's obligation to pay the outstanding purchase price. In return, an amount previously lent to the individual by the company would be credited.

5. In the case of the Annuity Arrangements, AML accepts that it was a "promoter", but AML denies that it was a "promoter" in the case of the Pre-Funded EBT Arrangement. AML maintains that the other legislative requirements for either of the arrangements to be notifiable or treated as notifiable are not met; and, in the case of the Pre-Funded EBT Arrangements, the arrangements were grandfathered.

6. The application in relation to the Annuity Arrangements was made on 17 January 2019 and in relation to the Pre-Funded EBT Arrangements on 28 February 2019.

THE APPLICATIONS

The Annuity Arrangements

7. In their application HMRC summarised the Annuity Arrangements by reference to what HMRC describe as the key standard documents as follows:

(1) a loan agreement between a company and an individual director/shareholder of the company in relation to a pre-existing loan ("the Loan") owed by the individual to the company;

(2) an option agreement between the same parties whereby the company releases the individual from his obligation to repay the Loan in consideration of the grant by the individual to the company of an option to enter into the annuity agreement ("the Option"). In order to exercise the Option the company must pay an amount which is small in comparison to the amount of the Loan (for example, £1000 paid in the context of a Loan of £65,000);

(3) an annuity agreement between the same parties, effective if the company exercises the Option. If so, then the individual is obliged to make annuity payments to the company as from a specified future date for the remainder of his life. This right is subject to cancellation at the company's request for "early encashment" for a nominal fee at any time up to the date on which the first annual payment is due.

8. HMRC say that in return for the Option, the company releases the individual from the obligation to repay the Loan with the result that the company is no longer liable to pay corporation tax in respect of the Loan (or, if it has already paid the tax, it becomes entitled to repayment of the tax). There is no evidence that any company has paid the further consideration and exercised its Option, but in any event the right to receive annuity payments is subject to cancellation as a result of the "early encashment" provisions.

9. AML received a fee for its services, which it described as advice in the form of a planning recommendation in connection with tax treatment of private annuities, calculated as 8% of the Loan.

10. Accordingly, HMRC say that the Annuity Arrangements enabled a company and its director to clear the director's loan account which would otherwise be left outstanding and giving rise to a charge to corporation tax under section 455 of the Corporation Tax Act 2010 ("CTA").

The Pre-Funded EBT Arrangements

11. In their application HMRC summarised the Pre-Funded EBT Arrangements as follows:

(1) a user company identifies an amount or amounts to be credited to a director's loan account and implements the following steps:

(a) an employee benefits trust ("EBT") is created. A related AML company resident in, and run from, the Isle of Man called AML Limited ("AML IoM") enters into a deed of settlement as settlor with Knox House Trustees Ltd as trustee;

(b) AML IoM, as settlor, transfers a sum to the trustee;

(c) that sum, less a nominal amount paid to the trustee of less than 1%, is lent back to AML IoM ("the Loan") under a loan agreement ("the Loan Agreement") the terms of which include that the Loan is unsecured, interest-free and repayable on demand. AML IoM cannot assign its rights under the Loan without the consent of the trustee;

(d) the Board of Directors of the user company meet to resolve bonuses and the purchase of an interest in the EBT as a way of meeting the expectations of, and rewarding, employees;

(e) an agreement is entered into between AML IoM and the user company to enable the employer company to provide a means of rewarding and motivating its employees. Under that agreement the user company is liable to pay a sum to AML IoM in return for the right to require AML to appoint beneficiaries to the trust. The amount due to AML IoM under this agreement is left outstanding as an interest-bearing debt;

(f) under a tripartite agreement between AM IoM, the user company and the employee:

(i) the employee agrees to assume liability for a proportion of AML IoM's loan to the user company and AML IoM releases the user company from its liability to repay that proportion of the liability;

(ii) the director's loan account is credited with the amount of the liability assumed by the employee;

(iii) in consideration of the employee's assumption of the liability, the user company agrees to accept such assumption in full and final repayment of the loan to the employee.

(g) AML received a fee, generally in the range of 10 – 15% of the amount credited to the director's loan account, plus a set-up fee of £5000 – £10,000.

(2) HMRC proceed to identify the standard documents used for implementation of the Pre-Funded EBT Arrangements; and

(3) HMRC say that the user companies were seeking to avoid deduction under PAYE of income tax and National Insurance Contributions on employee remuneration, generally in relation to a loan made to a director of the user company prior to the Pre-Funded Arrangements being implemented. The loan is eliminated instead of being written off and giving rise to taxable income for the individual. User companies claim a deduction for co-operation tax purposes.

12. Importantly, we note that in their application HMRC define AML as AML UK and AML IoM as AML. This has particular relevance in the context of the parties' dispute about identification of the arrangements, as we explain later in this decision.

THE RELEVANT STATUTORY PROVISIONS

13. The DOTAS legislation has been amended on various occasions. The relevant legislation for the applications is that in force prior to the changes made in February 2016. We set out the relevant provisions in full in the Appendix.

14. In addition, we set out the relevant statutory provisions governing the tax treatment of loans to participators in close companies and the payment of remuneration to employees which HMRC say that the arrangements were designed to avoid.

THE BURDEN OF PROOF

15. It was recognised by the parties that the burden of proof rests with HMRC, save in relation to establishing that grandfathering was available to the EBT arrangements, in relation to which the burden lies with AML. In each case the ordinary civil standard of the balance of probabilities is applied.

16. AML accepts that it is a promoter of the Annuity Arrangements.

THE EVIDENCE

17. We have been provided with two pdf bundles running to 98 and 1079 pages as identified in the indices. In addition we heard evidence from Mr Lancaster (director of AML) and Mr Lloyd (HMRC's officer).

18. Ms Murray submitted that a prima facie case for each set of arrangements has been established on the balance of probabilities that AML is the promoter and that the arrangements are, or are to be treated as, notifiable. AML has failed to provide evidence to counter this position and in those circumstances HMRCs case has been established to the requisite standard, applying the principles stated in *HMRC v Hyrax Resourcing Ltd & Ors* [2019] UKFTT 0175 (TC).

19. The burden of proof rests with HMRC (save in respect of one matter concerning grandfathering). We respectfully consider that Judge Mosedale was describing principles of general application regarding the burden of proof in saying in *Hyrax* (at paragraph 36) that:

> "It seems to me that principal effect of the respondent's 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."

20. As Judge Mosedale noted this is not a matter of adverse inferences. Instead, it is application of the usual burden of proof process: where HMRC have produced evidence which discharges that burden, it is then for AML to rebut that with its evidence. Therefore where AML does not do so we make findings relying upon HMRC's evidence.

21. The evidence provided by AML to rebut HMRC's evidence where the burden of proof is on HMRC, and to prove its case in the context of the grandfathering, is in the form of a Witness Statement and oral evidence from Mr Lancaster, the sole director of AML. In some contexts the evidence relied upon by AML to rebut the evidence relied upon by HMRC was simply the oral evidence of Mr Lancaster. However, we have reduced the weight given to Mr Lancaster's evidence on various matters for the following reasons:

(1) his evidence regarding the roles played by AML and AML IoM in relation to the Pre-Funded EBT Arrangements was inconsistent with the documentary evidence which, as we explain in the findings of fact, provide numerous examples to show that Mr Lancaster's evidence was, at the very least, seeking to minimise the role of AM in ways which could not be supported by other evidence:

(a) for example, he claimed that a description of services provided by AML in fact meant services provided by AML IoM despite there being no reference to AML IoM in the description. Mr Lancaster described the staff as being effectively "postboxes", merely passing on questions and details to AML IoM, but that is also inconsistent with the documentary evidence. It is entirely clear from the documents that UK-based staff had knowledge and expertise which they used to deal with clients' queries in writing and by telephone, identified the relevant amounts at particular stages of transactions, and ensured that both sets of arrangements were entered into step-by-step, chasing up details and completion of the relevant documents;

(b) his evidence that personnel such as Andrew Simpson were no more than salesmen with no actual tax knowledge was inconsistent with the information provided on AML's own website. We found his suggestion that the description of Mr Simpson's experience on the website as "no more than a marketing tool" was an attempt to deal with the inconsistency in the evidence he faced in cross-examination. We assume he was not saying that the description which was used on AML's website was a misrepresentation. In fact, the evidence from emails shows that Mr Simpson would advise potential clients by phone about technical issues and describes himself as a "Chartered Tax Adviser". There is no evidence that any AML IoM staff joined technical telephone discussions or otherwise provided any technical input;

(c) his claim that the UK staff were simply protecting their clients so that they were not taken from them by AML IoM staff would have carried more weight if there had been any indication of AML IoM having its own clients, or the documents had not shown that AML staff in the UK were freely sharing contacts with AML IoM in order to provide details for transaction documents;

(2) he was disingenuous when asked about whether early encashment of the Annuity Arrangements had taken place. Consideration of the documents shows that the date on which early encashment would reasonably be expected to take place (i.e. just before the annuity start date) would not yet have been reached, but Mr Lancaster's response was simply that he was not aware of any early encashment. He described in detail why AML would know if there had been early encashment explaining the extent to which AML was assisting HMRC with its enquiries generally and in responding to the information requests included in the bundles. He suggested that HMRC should have checked the companies' accounts to see if any had encashed. Yet in not one of those cases in the bundle would it have made sense (absent extraordinary circumstances) for early encashment to have taken place already, as we explain later in this decision.

22. The reduction in weight given to Mr Lancaster's evidence on these matters does not mean that the burden of proof no longer rests with HMRC. Instead, the position remains that it is for HMRC to prove the matters relied upon by them, but in assessing whether they have done so, any rebuttal by AML relying on Mr Lancaster's evidence on the matters identified by us above is given reduced weight.

23. In relation to the claimed grandfathering of the Pre-Funded EBT Arrangements, we set out our approach in detail to the assessment of the evidence provided by Mr Lancaster and HMRC in the context of our findings of fact on that matter later in this decision.

24. We found the evidence of Mr Lloyd, who not only provided evidence in relation to the pre-funded EBT arrangements, but who also reviewed and adopted the evidence of Mr Wood (the officer previously involved in considering the Annuity Arrangements), to be consistent and reliable and we have given it full weight.

GENERAL FINDINGS OF FACT

25. For ease of reference we first set out our general findings which apply in the context of both sets of arrangements. We then set out our findings about, and discussion regarding the application of the law to, the Annuity Arrangements before setting out our findings about, and discussion regarding the application of the law to, the Pre-Funded EBT Arrangements.

26. AML is a UK company which was incorporated in September 2009. At all material times AML has carried on a business involving the provision of tax advisory services. It is based in the UK and has staff working for it in the UK.

27. Mr Lancaster is the sole director of AML and has been in that position since October 2013. He is described as the "head of tax".

28. AML IoM is based in and operated from the Isle of Man. Mr Lancaster is not a director of AML IoM but provides services to it and five other associated AML companies in the Isle of Man on a self-employed basis.

29. The AML companies do not form a group for tax purposes. In each case their shares are held by the trustees of the trust and the same trustees, or trustees of related trusts, have interests in all of the AML companies.

30. Mr Lancaster is a director of Knox House Trust Ltd, an Isle of Man trust company which has administered employee benefit trusts and other trusts established by AML companies.

31. The finance operation for the AML companies is conducted from the Isle of Man.

32. We make further specific findings regarding the operation of AML and AML IoM in the context of the Pre-Funded EBT Arrangements in which context the matter was particularly in dispute.

The Annuity Arrangements

Findings of fact

Procedure and background

33. On 18 August 2017 HMRC wrote to AML identifying the Annuity Arrangements as "consisting of a situation where an individual employee enters into an agreement with the company or trust granting a deferred annuity. The amount of the resultant annuity premium paid to the individual for this equates to a similar amount outstanding on loans taken, which is then used in satisfaction of that debt". The letter stated that HMRC suspected that the arrangements constituted "notifiable arrangements" and that AML was a promoter. The letter invited comments from AML.

34. Mr Lancaster responded to say that an individual entering into an annuity agreement would not fall within the DOTAS legislation because, in particular, none of the hallmarks was satisfied.

35. Mr Wood wrote again to AML on 13 October 2017 explaining that his concern was that the product appeared to be a ready-made package and that the main purpose test for the standardised tax products hallmark was met, as was the premium fee hallmark. A meeting to discuss the arrangements was suggested by him.

36. On 27 November 2017 Mr Lancaster responded to explain why he maintained that the DOTAS regime did not apply, noting, in particular, that the position would be no different if the shareholders sold any other asset to the company, that the agreements were tailored and in AML's view a premium fee was not charged.

37. On 29 March 2018 Mr Wood wrote, explaining that HMRC's view was maintained and noting that HMRC would consider taking action to apply to the Tribunal for an order. However, he noted that he was keen to maintain an open dialogue with AML and asked if Mr Lancaster would like to meet with HMRC's representatives.

38. On 2 August 2018 Mr Wood wrote to Mr Lancaster setting out his conclusion that the DOTAS rules applied to the arrangements. AML was invited to make the requisite disclosure within 28 days of the letter and was informed that, if no such disclosure was made, HMRC would apply to the Tribunal without further notice.

39. On 30 August 2018 a representative of AML called Pathfinder Tax Investigations ("Pathfinder") wrote to Mr Wood and indicated AML would be willing to meet after late September. Following that, Mr Wood telephoned the representative on 11 September 2018 and discussed the possibility of a meeting. Mr Wood asked the representative what was hoped to be gained from the meeting, given that AML's position was maintained that the Annuity Arrangements were not within the scope of DOTAS. Mr Wood explained that unless AML had something new to offer or discuss, such as evidence that the arrangements were "tax neutral", he would expect disclosure to be made. It was agreed that the representative would respond with a suitable date for a meeting. Mr Wood noted that in the meantime HMRC would proceed with the litigation.

40. No further contact was made by AML or Pathfinder to suggest a suitable meeting date.

The substance of the Annuity Arrangements

41. HMRC estimate that here were at least 136 users of the Annuity Arrangements. The evidence provided in this case concerns five users which we refer to as 3DMX, ADL, CCM, CMF and EMM.

42. The documentary evidence shows:

(1) a loan agreement was entered into in the case of three of the five clients of the Annuity Arrangements (3DMX, CCM and CMF), in each case between the company concerned and an individual director/shareholder. Those loan agreements are set out identically, using the same typeface and formatting. They include the same standard provisions and headings. The terms of the 3DMX and CCM agreements are identical; the only differences are the names of the parties and the amounts of the loans. However, the CMF loan is interest free (whereas the others provide for interest at the HMRC official rate);

(2) in the case of ADL, its statutory accounts show an amount of £582,252 lent to its director through its director's current account as at 31 March 2014. The director's current account shows a debit of £700,752.36 on 31 March 2015 and a credit of £700,000 on the same day which was described as "annuity contract". Although the individual's accountants stated in a letter to HMRC dated 30 January 2017 that there had been no loan "as such" made by the company to the individual, in the statutory accounts for the year ended 31 March 2015 it is stated that during the year the company made advances to the director and the highest amount loaned to him was £700,752 (compared to the £582,252 in the previous year). We therefore conclude that there was a loan or advance made to the director before, or as part of, participation in the Annuity Arrangements;

(3) in the case of EMM there was no loan agreement and there is no evidence of an amount advanced to the individual through the director's loan account or current account. A letter of engagement sent by AML to EMM says that AML will provide EMM with advice in the form of a planning recommendation. AML's remuneration is stated to be £25,250 of the "remuneration payment". The same letter refers to AML making arrangements for all "scheme documentation" to be held in EMM's name. We therefore conclude that in the case of EMM the Annuity Arrangements were used to extract a remuneration payment from EMM to the director without the use of a loan or advance;

(4) an option agreement in the case of each of the five companies between it and an individual. The option agreements grant an option to the individual's company for which the company pays consideration ("Premium"). On exercise of the option, the company is required to pay a small amount of further consideration and can then require the individual to enter into the annuity agreement. The option agreements are set out identically, using the same typeface and formatting. They include the same standard provisions and headings. They each include the same provisions governing:

(a) the exercise of the option, including provision for a payment of "Further Consideration" on exercise in the amount of £1000 in each case except in the case of CCM where the Further Consideration is £1900;

(b) the effect of exercise of the option;

(c) the indefinite period for exercise of the option; and

(d) a formula for adjusting the annuity annual payments in the event that the Further Consideration is paid on or after the date provided in the annuity agreement for the commencement of the annual payments.

(5) The only differences in the option agreements concern the details of the consideration for the grant of the option:

(a) under the terms of the 3DMX, CCM and CMF option agreements the individual is released from his obligations under the terms of the loan agreement entered into by him. In the case of CMF the wording is slightly different in that the consideration is described as being £65,000 plus the irrevocable release of the company's rights under a loan agreement. The correspondence and accounting entries show that the £65,000 was credited against a balance of £76,618 on the director's loan account;

(b) in the case of the ADL Option Agreement the option was granted in consideration of the release by the company of all its rights arising from a contract entered into between the company and the individual for the sum of £700,000;

(c) in the case of the EMM option agreement the option is simply granted in consideration of the payment of £175,000 by EMM to the individual.

(6) an annuity agreement in the case of each of the five companies between it and the relevant individual director/shareholder. The annuity agreements are set out identically, using the same typeface and formatting. They include the same standard provisions and headings. They each include the same terms and conditions, providing for:

(a) the individual granting the company a deferred annuity to commence some years in the future for the life of the individual and to be payable annually;

(b) events of default arising if the individual fails to pay the yearly payment on the due date, or if the company requests early payment of the annuity. The provisions dealing with the events of default are not well drafted and leave some matters unclear on the face of the document. Where the company requests early payment at any time before the commencement date of the annuity a small fixed sum is payable by the individual. If the annuity commences and the individual fails to pay an annual amount on the due date, a much larger default payment is triggered which appears to be the same default amount regardless of when the default occurs. These amounts are illustrated in the table we set out below;

(c) the inability of the individual to assign their rights without the consent of the company and the ability of the company to assign its rights without the consent of the individual;

(d) "boilerplate" notice, communication and governing law provisions.

(7) The variation between the annuity agreements concerns:

(a) the date on which the annuity payments are set to commence;

(b) the amount of the yearly payments;

(c) the amount payable on an event of default, according to whether that arose as a result of the individual failing to pay the annual payment or the company requesting early payment. In each case, however, the amount payable where the company requests early payment is a small sum in comparison to the option premium paid under the option agreement.

43. The annuity payments and the default amount payable if an individual failed to pay an annual payment were calculated as follows. 4% compound interest was applied to the Premium from the date of the option agreement to the annuity start date. That produced the default amount payable by an individual if an annuity payment was not paid on time. That

same compounded future value was used by AML to obtain an annuity quotation for what that amount would buy as an annuity starting on the stipulated annuity start date, by using calculations provided by online pension providers.

44. This table identifies the Premium paid under each of the Option Agreements, the specified start date for the annuity if the option is exercised, the annual annuity amount, the amount payable if the company requests early payment before the annuity start date and the default amount payable if the option has been exercised and the individual fails to pay an annuity payment on time.

Name	Premium	Annuity start	Annual amount	Early amount	Default Amount
3DMX	£94,000	5.4.2048	£16,502	£1,000	£329,758
ADL	£700,000	5.4.2024	£51,490	£10,000	£1,036,171
EMM	£175,000	5.4.2024	£14,041	£5,000	£259,042.75
CCM	£190,000	5.4.2025	£13,722	£1,900	£281,246
CMF	£65,000	5.4.2025	£3,853	£1,000	£96,216

45. Under the terms of its engagement AML said that it would provide advice in the form of a planning recommendation in connection with the tax treatment of private annuities. The fees paid by each of the five users were stated to be 8%. Given the way in which AML's checklist was set out and the figures showing the amounts of fees in fact paid, the 8% was applied to the "amount to be extracted from the company", except in the case of EMM when it was stated to be £25,250 of what is described as "the remuneration payment".

46. Except in the case of EMM the Premium was equal to an amount of loan made to the individual which was credited. In the case of EMM the documents show that the Premium simply reflected a payment of remuneration. In each case the Premium reflected the amount to be extracted from the company.

47. In the case of four of the five companies the annuity agreements have been signed and dated, implying that the options were exercised, albeit that the annuity agreements were dated with the same date as the option agreement in three of those cases. In the case of the other one of those four companies there was a period of nearly 4 months between the date of the option agreement and the date of the annuity agreement. In the case of the fifth company neither agreement is dated, although both are signed. We therefore conclude that the evidence shows that the companies participating in the Annuity Arrangements exercised the options granted to them.

48. Mr Lancaster told us that there are cases of companies where the individuals have started to pay the annuity payments which have been included in the company's tax returns as taxable income. Given the relevance of this evidence, we would expect Mr Lancaster to have been able to produce supporting evidence such as copies of the relevant companies' accounts, but he has not. For the reasons which we have already explained, we do not find his oral evidence to be of sufficient weight for us to rely upon it in this regard.

Reasons for using the Annuity Arrangements

49. Minutes of a meeting between Pareto Lawrence Ltd ("Pareto"), an introducer of the user CCM, and CCM's director state that "in considering ways of extracting cash for [AF's] personal use Pareto prefer to use planning which is transactional and under the radar…. There is a tax strategy which would enable a new director loan account of say £300,000 to be raised and then cleared by a deferred annuity. The cost of this planning is 8%." Further emails described the Annuity Arrangements as an AML scheme providing tax planning for AF. In one email AF says that his main wish is to draw down 25% tax-free from the company.

50. An AML headed document entitled "director loan account annuity planning information checklist" was completed for users. It asks what amount is to be extracted, whether this is to clear an overdrawn director's loan account and what the current amount outstanding on the loan is.

51. AML marketing material described the Annuity Arrangements being used for the repayment of a loan made to an individual by an employee benefit trust (prior to tax rule changes on 9 December 2010). It explains broadly how there can be "tax efficient repayment of loans to trusts" by an employee repaying a loan through entering into an annuity contract with the trustees. The material goes on to describe the annuity planning as "tax efficient profit extraction for UK companies" identifying that it would be used by UK companies with post-tax reserves and/or overdrawn directors loan accounts over £50,000. The reason for engaging in the planning is said to be to mitigate income tax.

52. The marketing sets out further details:

(1) it explains what an annuity is and states that the key principle is that an annuity is an arrangement whereby capital is used to buy future income payments and the agreement would amount to an unsecured promise to make the annuity payments. It is noted specifically that an annuity is not a loan and a private annuity is not regulated by the FSA;

(2) the materials explain that when the private annuity agreement is signed the annuity holder will transfer an agreed sum of money or an asset to the obligor and explains why this is not treated as a gift. Detailed explanations are provided of the tax implications for an individual writing a private annuity in favour of the trustees of an Employee Benefit Trust to repay a loan made to the individual by that trust including consideration of the application of the inheritance tax and capital gains tax rules. An explanation is provided for why the Annuity Arrangements are not a DOTAS product and are not affected by the GAAR;

(3) details of the implementation process for the use in the Employee Benefit Trust scenario are set out step-by-step;

(4) the use of the annuities in other contexts is described and a comparison with a loan is repeatedly made. The materials state that the tax rules which apply to loans will not generally apply to annuities. The materials describe two further uses for the annuities:

(a) sale by an individual to a private company in return for a capital sum which would be tax-free in the hands of the individual. The purchase of the annuity would be accounted for as the purchase of an investment by the company and therefore not qualify for a corporation tax deduction. The annuity would not be treated as a loan so "the rules which apply to loans to participators do not apply"; and

(b) using an annuity contract as an asset which can be transferred in specie to repay an outstanding obligation such as an overdrawn director's loan account or a loan from the trustees of an employment benefit trust

(5) it is noted that tax counsel's opinion is "mandatory on all our solutions". The individual involved in the 3DMX Annuity Arrangements noted that the opinion of tax counsel was discussed with AML.

53. An email between AML and a firm of advisors includes extracts from a counsel's opinion stating that:

(1) the reference in s455 to a close company being treated as making a loan cannot include the amounts due under an annuity which is open-ended; and

(2) the purchase of an annuity is not the making of a loan and does not fall within the giving of any form of credit for the purposes of section 172 and section 173 Income Tax (Earnings and Pensions) Act 2003.

54. In each case (in the evidence provided) the Annuity Arrangements:

(1) have been used to repay an outstanding obligation to a director, or in the case of EMM to enable the extraction of cash from the company, tax-free;

(2) the individual concerned was a participator in a close company.

55. We are satisfied that, given the description in the marketing material, the Annuity Arrangements were directed at such individuals and companies, although other uses for them were envisaged. Although the marketing says that the annuity may be a good investment for a company with surplus cash, the overwhelming message of the marketing material and the correspondence is that the Annuity Arrangements were promoted for tax planning and consequent tax reduction. In particular, they were sold to customers to enable individuals to retain amounts previously lent to them without the company (lender) being charged to tax under s455 and/or to enable profits to be extracted from companies by way of payment of a non-taxable lump-sum. There is no evidence that users or potential users have carried out any consideration of the Annuity Arrangements as giving rise to a commercial investment in and of their own right by, for example, comparing the annuity to other potential investments available for the company's funds.

56. HMRC have said that the evidence shows that there is an intention for the option to be exercised and the company to encash the annuity early, relying, in particular, on a note of telephone call with Andrew Matthews of AML. Mr Lancaster denied that this was the case, but apart from his oral evidence which we have addressed earlier, there is no further evidence to rebut HMRC's case on this point.

57. The note of the telephone call describes the Annuity Arrangements as a "simple scheme" with no third party. The accounting entries would involve debit annuity investment and credit director's loan account. It specifically notes that under section 455 the annuity is not a form of credit although in effect the company swaps one debt for another debt. It describes step two in the process as occurring at, say, five years into the 10 year window at which point the individual forfeits up to £10,000. Nothing has to be included in the individual's tax return. The company suffers an economic loss when it is paid out early for which there is no deduction and it is taxed on the early encashment payment. Mr Lancaster said that the person making the note (who is not identified) must have misunderstood the operation of the Annuity Arrangements. However, we have considered that note in the context of the evidence overall.

58. The marketing materials and correspondence repeatedly referred to repayment of loans or profit extraction. There is no sense conveyed of the individual in the case of repayment of a loan replacing one obligation with another; and the concept of profit extraction does not in itself imply a potential obligation to repay. Furthermore, when we look at the drafting of the documents and the relevant amounts summarised in the table above, it is clear that if the option is exercised by the company there is every incentive for the individual to ensure that early encashment takes place. To take the example of 3DMX, if the option is exercised the further consideration payable by the company to the individual is £1000 and the amount payable by the individual to the company on early encashment is also £1000. These are companies which in each case the individual controls (at least to some extent) and it would make no sense for the individual to leave themselves in the position of a lifetime obligation to pay an annual amount which in the case of 3DMX was £16,502. That position is made even clearer when it is recognised that under the terms of the agreements even one day's delay in payment of the annual annuity amount triggers a payment of the default amount. Indeed, the drafting at this point lacks the commerciality we would expect in such documents: the same default amount is payable regardless of whether the late payment occurred in relation to the first annual payment or after payment of 30 annual payments.

59. Considering the evidence overall we conclude on balance that early encashment of the annuity was intended.

Discussion

60. AML accepts that it was a "promoter" in relation to the Annuity Arrangements.

Specification of the Annuity Arrangements

61. This issue determines whether we have jurisdiction to consider HMRC's applications.

The submissions

62. Mr Waldegrave submits that the Annuity Arrangements have not been sufficiently identified by HMRC. In particular, Mr Waldegrave says that HMRC wrongly identified the use of a loan or loan agreement in the transactions when in fact such a step was not always taken (as shown by the example of EMM). Mr Waldegrave submits that there are significant differences between the transactions undertaken by the various users of the Annuity Arrangements, and, in particular, the five users for whom documents are provided in the evidence. The legislation requiring HMRC to specify the arrangements in respect of which an order is sought should be interpreted in line with the approach adopted in *Hyrax* in which it was said that HMRC must "specify the arrangements in sufficient detail for them to be identifiable". The Tribunal can only properly assess whether the numerous conditions imposed in the legislation are satisfied if it is clear as to the precise scope of the "arrangements" in question. This was recognised in *Root2 Tax Limited* [2017] UK FTT 0696 (TC).

63. While the term "arrangements" is defined very broadly in section 318, Mr Waldegrave submitted that it does not follow that every transaction or series of transactions which have some connection with each other will be encompassed within the "arrangements" by reference to which the legislation must be applied. For example, in the context of the implementation of the Annuity Arrangements by a company, 3DMX, the documents show that the individual, PK, had borrowed funds from the company at various times since February 2014 and it was not until early 2016 that the option agreement under the Annuity Arrangements was executed. The pre-2016 borrowing by PK cannot be seen as part of the "arrangements". Similarly, the loan agreement entered into by 3DMX which recorded the pre-existing indebtedness of PK cannot properly be regarded as part of the "arrangements". Furthermore, the Annuity Arrangements did not necessarily involve a loan agreement as

shown by the use of the arrangements by two companies, and in the case of one of those it appears that there may not have been any pre-existing indebtedness on the part of the relevant individual.

64. Ms Murray submitted that the Annuity Arrangements had been adequately specified as the bare minimum was composed of the option and annuity agreements which were identified in the application. Furthermore, she submitted that the documentation provided by AML showed that, while there was a loan agreement evidencing a pre-existing loan by the company to its director in many cases, in others there was no loan agreement, but there was a debt or a loan. In addition, a second use for the arrangements had been identified in the marketing material. In that case there was a payment for the option by the company so that a capital sum is extracted cash free at that point. In both cases the aim was to avoid the application of section 455 CTA.

Our decision

65. The specific requirement in s314A(2) is that HMRC:

> "must specify the proposal or arrangements in respect of which the order is sought".

66. This was considered by Judge Mosedale in *Hyrax* with whom we agree in saying that:

> "it is enough that the arrangements are identifiable".

67. Mr Waldegrave himself advocated that we should adopt Judge Mosedale's "common sense" approach, relying upon her statement that:

> "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."

68. Furthermore, and importantly, we must recognise the legislative context of the application made by HMRC. Again, as Judge Mosedale described, Parliament must be taken to know that the promoters of 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. It was generally recognised when DOTAS was introduced that it was a means of HMRC finding out about what it did not already know. HMRC will often be unaware of some of the pieces of the puzzle; hence the rules requiring promoters to disclose the full puzzle.

69. We are satisfied that HMRC have sufficiently specified the proposal or arrangements in respect of which the order is sought in the case of the Annuity Arrangements in order that they are identifiable. AML has always been clear as to what arrangements HMRC are referring. They have engaged in detailed correspondence regarding the Annuity Arrangements. There has never been any doubt raised by AML as to which arrangements HMRC are referring. There is no suggestion that there is an alternative annuity arrangement being offered by AML such that it was unclear at which arrangement HMRC's enquiries were directed.

70. Mr Waldegrave submitted that in this case HMRC knew that the Annuity Arrangements did not always involve the use of a loan. Given the conclusions we have already reached we are not satisfied that this is determinative of the issue. What is determinative is whether there was sufficient information in the description of the Annuity Arrangements for AML to understand what HMRC were addressing. There was no doubt shown or query raised by AML as to whether the questions related to use of the Annuity Arrangements with or without a loan. We agree with Ms Murray that the fact that HMRC identified and described the

option agreement and annuity agreement was sufficient even if there was reference to the use of loans or loan agreements when in fact in some cases that added element was not included in the implementation of the arrangements.

71. Therefore we conclude that HMRC have sufficiently specified the Annuity Arrangements in respect of which the order is sought.

Notifiability

72. Section 306 provides:

> "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.

73. The reference to falling "within any description prescribed by the Treasury by Regulations" is to the hallmarks set out in the Regulations. As the standardised tax product hallmark relied upon by HMRC also requires consideration of a tax advantage test and as Mr Waldegrave accepted that the case of *R(oao Root2Tax Ltd)* [2018] EWHC 1254 (Admin) confirms that the same conclusions could be expected in most cases, including this case, in applying those tests, we address the tax advantage condition first.

The tax advantage condition

74. There is no dispute that income tax, corporation tax and capital gains tax are "prescribed".

75. "Advantage" is defined in s318(1) which says that:

> "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 charged 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…"

76. Ms Murray submitted that it was intended from the start that the company would encash the annuity, as shown by hand written notes of the planning arrangements. In reality therefore the intended effect of the arrangements was that a pre-existing loan would be cleared by the individual paying a nominal sum to the company. As a result the arrangements were artificial, tax-driven arrangements which had no genuine commercial purpose. Ms Murray submitted that the Annuity Arrangements purport to avoid a charge to corporation tax under section 455 and to avoid a charge to income tax in respect of a release of a loan. She submits that that is the tax advantage relied upon by HMRC.

77. However, in addition to the avoidance of corporation tax under section 455 CTA, the Annuity Arrangements were also designed to enable the individual to avoid income tax on a distribution and/or income tax and National Insurance Contributions on employment income. Therefore there is an income and/or corporation tax advantage as defined in s318.

78. Mr Waldegrave submitted that in assessing the application of section 306(1)(b), the legislation imposes an objective test as recognised by Mrs Justice Whipple in *R (oao Root 2 Tax Limited)*. The expression "tax advantage" should be interpreted in line with the statements of Lord Wilberforce in *IRC v Parker* [1966] AC 141. Accordingly HMRC must show that the Annuity Arrangements might be expected to give rise to an advantageous tax result in contrast to a hypothetical alternative transaction. As recognised in *Hyrax* that alternative transaction must be identical in economic substance, if not legal form, to the Annuity Arrangements. However, HMRC has not identified any comparator transaction. HMRC have accepted in correspondence that the Annuity Arrangements were capable of giving rise to a range of different tax outcomes.

79. We agree that as Mr Waldegrave submitted, Mrs Justice Whipple in *R (oao Root2 Tax Limited)* confirmed that the test includes an objective element in the words "might be expected to…". We also note that the words "might be" are at the lower end of the range of objective thresholds used in legislative drafting. Parliament is clearly seeking to cast the net widely as would be expected with the purpose we have described above of enabling HMRC to know what they do not know about products which are giving rise to tax advantages.

80. Mr Waldegrave submits that the result of *IRC v Parker* is that HMRC must identify a comparator transaction which must be identical in economic substance, if not legal form, to the Annuity Arrangements. He submits that HMRC have not done this.

81. We agree with the analysis of Judge Mosedale in *Hyrax* to conclude that although the definition of "advantage" does not set out the need to carry out a comparison, it is implicit in the use of the word "advantage" (as recognised by Judge Beare in *HMRC* v *Premiere Picture Ltd [2021] UKFTT 58 (TC)* where he referred to Parker LJ's decision in *IRC v Trustees of the Sema Group Pension Scheme* [2002] EWCA Civ 1857). As noted by Judge Mosedale, the use of terms such as "reduction of a liability" reinforces this conclusion. To know if there is a reduction in a liability one must know that there is a potential liability which is reduced.

82. However, we do not agree with Mr Waldegrave's submission that the comparator must leave all participants in the same economic position. We agree with the analysis of Judge Beare in *Premiere Picture Ltd* in which he said [at para 73]:

> "I do not read [*IRC v Parker*] as limiting the comparison which is required to be made to one involving a transaction in a similar legal form or even one giving rise to similar economic effects… Instead, as is made clear by the extract from Jonathan Parker LJ's decision in *Sema* … It is perfectly possible for a taxpayer to obtain a tax advantage from entering into a transaction where the taxpayer's tax position as a result of so doing is more favourable than that in which it would have been had the taxpayer done nothing."

83. The extract from *Sema* referred to by Judge Beare is in the context of where Parker LJ was himself considering the observation of Aldous J about the meaning of the words "tax advantage" in another statutory context, where he said :

> "the words "tax advantage" … presuppose that a better position has been achieved. However, I respectfully differ from him when he goes on to answer the question "An advantage over whom or what?" by saying: "advantage over persons of a similar class"… In my judgement, the simple answer to that question is that a better position has been achieved vis a vis the Revenue."

84. We refer once more to the need to recognise the purpose of the legislation with which we are concerned and its broad drafting. The concept of economic equivalence pressed on us

by Mr Waldegrave raises questions as to whom the concept is applied and the extent of the equivalence. We are satisfied that there must be a sensible comparator, which is close enough in its material components to give rise to a realistic comparison.

85. Furthermore, in the case of the Annuity Arrangements the comparator identified by HMRC – a loan to the individual by the company - is one expressly used as a comparison in AML's marketing material, not only where the Annuity Arrangements are used in the context of an existing loan, but also where the Annuity Arrangements are used in the sale by an individual to a private company in return for a capital sum in order to extract cash from a company. Extracts from Counsel's opinion provided to users specifically address why the annuity is not a loan and therefore does not attract a charge under s 455.

86. In fact, a loan bears some economic similarities to the Annuity Arrangements: instead of an asset in the company's books in the form of a loan to the individual there is an asset in the form of the rights under the option agreement (or when exercised, the annuity agreement itself) for which the company has paid the consideration or Premium equivalent to the amount which it has already lent, or would otherwise have passed to the individual by way of a loan (together with a small additional payment if the option has been exercised). The individual replaces a liability to the company with the liability under the option agreement/annuity agreement.

87. Mr Waldegrave submitted that using a loan as a comparator does not address cases where there is no pre-existing loan. However, we consider this to be wrong. The comparator does not need to be pre-existing and in this case the comparison to transferring a lump sum to an individual by way of a loan was expressly made by AML in marketing material.

88. We are satisfied that it is appropriate to make the comparison with a loan in the context of a loan made by a close company to a participator given that for the reasons we have explained earlier, the Annuity Arrangements were expressly targeted at such users by AML's marketing material. It is not in dispute that where a loan is made by a close company to a participator, if the loan is outstanding nine months after the end of the accounting period in which it is made, a charge to tax (which is treated as corporation tax) arises under section 455 CTA. If the debt is released or written off, the director/shareholder is liable to income tax under section 415 Income Tax (Trading and Other Income) Act 2005 on the gross amount of the debt released or written off. In comparison, the charge under section 455 CTA does not arise in connection with the Annuity Arrangements. There is therefore a tax advantage which the Annuity Arrangements might (if not otherwise challenged by HMRC) enable a person to obtain; and that is entirely consistent with the way in which the Annuity Arrangements were presented by AML.

89. We have considered in our findings of fact whether or not the evidence shows that, as HMRC has claimed, the expectation would be that the annuity would be encashed early. The figures in the table set out in our findings show why this expectation arises. However, even without early encashment (which AML maintains is not envisaged), the Annuity Arrangements enable the participants to obtain the tax advantage arising from the transfer of a lump-sum to the individual without the imposition of tax under s455 CTA.

The main benefit condition

90. Ms Murray submitted that HMRC contends that it is apparent from the documents that the tax advantage was the main purpose and benefit to be expected from the arrangements. The arrangements had no commercial purpose and were marketed by AML as a tax scheme. She submits that the main benefit should be assessed according to the expectations at the time the Annuity Arrangements were entered into.

91. Mr Waldegrave submits that the test is an objective one which requires the Tribunal to weigh any non-tax benefits against any tax advantage (applying *Curzon Capital* and *R (oao Carlton) v HMRC* [2018] STC 589. He submits that HMRC have not identified comparable evidence to that found in *Hyrax* in marketing material and there are clear non-tax advantages for users of the Annuity Arrangements. In this case there are clear non-tax advantages, or potential advantages, for users of the Annuity Arrangements. In the example of the 3DMX use of the arrangements the company secured a valuable right (subject to the exercise of the relevant option) to receive an annuity while PK benefited by virtue of the discharge of his obligations under the loan agreement.

92. Mr Lancaster sought to maintain that the purchase of the annuities by the companies could be entirely commercial transactions in which the company simply decided to purchase an investment. He explained that there was much effort put into ensuring that the annuity had a real value judged by reference to online pension providers' calculations. However, the fact that the annuities had value and could be chosen as an investment in the ordinary course is not the test. As Judge Beare commented in *Premiere Pictures*, the mere fact that arrangements may have a commercial purpose as one of their purposes does not mean that they cannot also have the securing of a tax advantage as one of their main purposes.

93. Moreover, we have found Mr Lancaster's evidence in this regard again to be disingenuous given the marketing material. AML is not providing investment advice to customers. It is providing tax planning advice as it makes entirely clear in its materials. As Ms Murray submitted, there is no mention in any of the correspondence about the arrangements being for the commercial benefit of a company. There is no evidence of any company considering the Annuity Arrangements as an investment, for example by comparing the likely return on the annuity with other investments.

94. Ms Murray submitted that given the lack of any identified commercial benefit for the companies there is no weighing exercise to be carried out in this case. While we agree with Mr Waldegrave that authorities such as *Carlton* show that a weighing exercise should be carried out, we find little value or weight has been identified which could be placed on the non-tax advantage side of these Arrangements. The "valuable right" referred to by Mr Waldegrave for 3DMX is shown in the company's accounts with the same value as the previous loan to the director; and the claimed non-tax advantages have not been identified.

95. From the point of view of the individual, where the Annuity Arrangements were used to take the place of a loan, the individual replaced a debt liability with the potential liability under the option agreement, followed by the deferred liability under the annuity agreement on exercise of the option. We can see little non-tax benefit for the individual to replace a liability to repay a loan to a company, over which the individual has some control, with the Annuity Arrangements. Even if we were to accept AML's contention (despite our findings to the contrary) that there was no plan to encash the annuity early, the individual is left with an annuity obligation for the remainder of his life with no apparent non-tax benefit.

96. Looking at the evidence overall we therefore find that it is entirely clear that one of the main benefits, if not the main benefit, that might be expected to arise from the Annuity Arrangements is the obtaining of the tax advantage. The consistent focus of marketing material, as well as correspondence and other engagement with customers was about reducing tax liabilities for the users of the Annuity Arrangements. That is shown by our findings in relation to the marketing material, the evidence in the noted telephone call, the Pareto minutes and the AML emails.

The premium fee hallmark

97. There is one remaining condition required under s306 for the Annuity Arrangements to be "notifiable arrangements" which is that they fall within one of the prescribed descriptions or "hallmarks". HMRC submit that the Annuity Arrangements fall within the premium fee hallmark and the standardised tax product hallmark. We address the premium fee hallmark first.

98. The premium fee hallmark requires us to decide whether the Annuity Arrangements are:

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

99. In assessing this, regulation 8 of the Regulations states:

> "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".

100. Ms Murray submits that the best evidence regarding the premium fee hallmark, to show that the hypothetical service recipient would be prepared to pay a fee which is to a significant extent attributable to a tax advantage, is the fee which was in fact charged as a proportion of the loan. The amount of the tax advantage is determined by reference to the amount of the loan. In addition, she relies upon the evidence of the intended users shown by the marketing material, the express endorsement by tax counsel, and evidence of marketing through meetings with potential users to explain the scheme and correspondence by email and telephone to discuss tax consequences.

101. AML accepts that evidence relating to actual fees can be evidence of what the hypothetical "experience person" would pay. However, Mr Waldegrave submits that this will only be the case if HMRC establishes that the actual clients in question were "experienced in receiving services of the type being provided" and HMRC has not provided evidence to show that this was the case. He submitted that HMRC might be expected to discharge that evidential burden by calling some sort of quasi-expert evidence, or at least evidence from someone who is familiar with the market in this area and who would know what fees a person promoting these arrangements would charge. Where there is no such evidence, Mr Waldegrave submitted that an approach such as that taken in *HMRC v Curzon Capital Ltd* [2019] UKFTT 63 (TC) is appropriate. He submitted that in that case the tribunal concluded that the marketing material and the availability of counsel's opinion showed that the arrangements were being aimed at people who were experienced scheme users; but comparable documentation was not in evidence in this case.

102. Mr Waldegrave submitted that HMRC have not suggested that a hypothetical promoter of the Annuity Arrangements would have been able to charge a fee which was "contingent" on the obtaining of a tax advantage. It must therefore be relying upon a hypothetical experience person being prepared to pay a fee which was "attributable to" the tax advantage. However, as HMRC have failed adequately to identify the tax advantage it cannot satisfy this requirement.

103. We are satisfied that it is clear that the hallmark does not require that a premium fee is paid; only that it might reasonably be expected that a promoter of the same or substantially similar arrangements would be able to obtain such a fee from a person experienced in receiving services of the type being provided.

104. In this case a fee was paid. Generally speaking the evidence shows a fee of 8% of the Premium which was equivalent to the amount of the loan in each case where the Annuity Arrangements were used in the context of a loan, although in the case of EMM the fee was a higher percentage of the Premium.

105. The fee was paid for the Annuity Arrangements to be put in place. It has not been suggested that it was paid for anything else and, as we have concluded above, the Annuity Arrangements are arrangements from which a tax advantage is expected to be obtained.

106. The fee was chargeable by virtue of an element of the Annuity Arrangements from which the tax advantage expected to be obtained arose. The fees were generally described as 8% of "the amount to be extracted from the company", except in the case of EMM when it was stated to be £25,250 of what was described as "the remuneration payment". Furthermore, in each case the amount to be extracted from the company, whether involving a loan or not, was reflected in the amount of the Premium.

107. We also conclude (in a similar way to Judge Mosedale in *Hyrax*) that the fee was to a significant extent attributable to the expected tax advantage as there is no other way of explaining why it was charged by reference to the value of the amount to be extracted from the company or remuneration payment. The fee was intrinsically linked to the advantage of being able to pay the sum to the individual with a reduction in tax.

108. As Judge Poole in *Curzon* stated, the fact that users did in fact pay what we have concluded would be a premium fee for the use of the Annuity Arrangements is a strong indicator that a notional promoter of these, or substantially similar, arrangements might reasonably be expected to be able to obtain a premium fee from a notional person experienced in receiving services of the type being provided. In reaching this conclusion we take into account not only the evidence of the fees being charged, but also the fact that HMRC have given evidence that at least 136 users of the scheme have been identified and AML have failed to identify any other fee or payment basis used by other customers. However, we recognise that the evidence does not show whether the participants in the Annuity Arrangements were in fact "experienced in receiving services of the type being provided".

109. In the case of *Curzon* Judge Poole relied upon the level of detail provided in the presentation of the arrangements and the endorsement by specialist leading counsel which he concluded was clearly directed at the serious potential user. We have similarly considered to what extent the evidence shows to whom the Annuity Arrangements were directed In this case the particular evidence on this matter consists of:

(1) the marketing material which sets out in some detail the potential uses for the use of annuities and the tax treatment of the annuities;

(2) extracts which were provided to users from a counsel's opinion as shown in an email. Although the barrister is not identified the extracts show that the opinion was clearly written by a barrister with some level of tax expertise and the AML marketing material expressly states that tax counsel's opinion is always sought;

(3) evidence in correspondence and meeting notes showing that potential users were provided with tax counsel's opinion and discussed it with AML and more generally met

with and spoke to AML representatives by telephone to discuss the operation and tax treatment of the Annuity Arrangements;

(4) evidence relating to Pareto shows that that independent firm of advisers, whom we can reasonably assume had some experience in reviewing these types of arrangements, recommended the Annuity Arrangement. In so doing, Pareto expressly recognised the 8% fee, describing it as the "cost of this planning".

110. We are satisfied that, just as in the *Curzon* case (on which Mr Waldegrave sought to rely) this evidence shows that the Annuity Arrangements were clearly directed at the serious potential user. We do not need to see the full counsel's opinion with identification of its writer to conclude on the basis of the evidence that the Annuity Arrangements were being directed at people who were either already experienced in reviewing these types of planning arrangements themselves, or who would seek advice from others (such as Pareto used by CCM and the individual director involved there) to put themselves in that position.

111. We therefore conclude that HMRC has shown that the premium fee hallmark condition is met.

112. The conclusions we have reached so far mean that HMRC's application under s314 succeeds without more. However, given the extensive arguments relating to the standardised tax product hallmark we consider it is incumbent upon us to reach a conclusion on that alternative basis as well.

The standardised tax product hallmark

113. Under regulation 10 of the Regulations it is necessary for HMRC to show that the Annuity Arrangements are a "product" which is the case 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.

114. Mr Waldegrave confirmed that the elements of this hallmark disputed by AML concerned the requirements for the relevant documentation and transactions to be "standardised".

115. Ms Murray submits that the Annuity Arrangements have standardised documentation, which are not tailored in any material respect so as to reflect the circumstances of the client. She refers, in particular, to the documents used by3DMX, CCM and ADL. The company users must enter into the relevant agreements and the series of transactions and those

transactions are standardised, or substantially standardised in form. AML's contention that a clause in two agreements with slightly different wording shows that the documents are not standardised is no more than a distinction without a difference, as concluded in the case of *HMRC v Root2Tax Limited*.

116. In addition, Ms Murray submits that the Annuity Arrangements are a tax product within the Regulations because it would be reasonable for an informed observer (having studied the arrangements) to conclude that their main purpose was to enable a company user to obtain a tax advantage. Indeed, their only purpose was to obtain an income tax and/or corporation tax advantage.

117. Mr Waldegrave submits that whereas the Annuity Arrangements implemented by 3DMX include a loan agreement, there is no corresponding document for ADL or EMM. There are also significant differences in the drafting of one clause of the option agreement used by 3DMX and EMM which go beyond mere matters of names and figures disregarded by the Tribunal in cases such as *Hyrax*. Substantial changes needed to be made to the documents depending upon whether the consideration for the option took the form of a release of a loan or cash. The annuities had to be tailored to the specific circumstances of the parties involved. Complex calculations were required which depended on factors such as the age, gender and health of the person who would be required to pay the annuity.

118. We are clear that the form of the documentation used to implement the Annuity Arrangements was determined by AML. It is clear that the same standard documentation was used on each occasion as explained in our findings. The fact that the annuity calculations produced different figures does not detract from this conclusion. The fact that the standard terms included different start dates for the annuities, different consideration for the option premium and different amounts for the annuity and default events does not detract from the conclusion that the form of the documents was not tailored to any material extent to reflect the circumstances of the client. The legislation is clear that it is the "form" of the documentation which must be addressed in this context. Inevitably in the context of any tax product details such as the dates on which parties enter into the documents and the amounts involved will change from client to client. We do not consider the fact that the amount of the annuity had to be calculated in each case, according to matters such as the individual's age, affects the form of the annuity agreement. Our comparison of the documents shows us that the "form" is the same in each case.

119. In some cases only the annuity agreement and option agreement were used, but in others a loan agreement was also provided by AML, the terms of which were also in substantially standard form. We are satisfied that the fact that on occasions a loan agreement was used in addition to the option and annuity agreement does not detract from the conclusion that the documentation was standardised. Regulation 10 says that arrangements are product if they have standardised or substantially standardised documentation. The regulation does not require all of the documentation to be identical in each case. We have concluded that the loan was used in combination with the other transaction documents in one, frequently used, scenario. As stated, it was itself in standardised form; but when it was not used the key operative documents – the option agreement and annuity agreement – were substantially standardised.

120. We therefore find that the Annuity Arrangements have standardised, or substantially standardised documentation, but the regulation requires further conditions to be met.

121. It is clear that the purpose of the documentation was to enable the implementation by the client of the Annuity Arrangements.

122. Although not specifically raised by Mr Waldegrave as an issue, for the avoidance of doubt we note that we are also satisfied that the transaction or series of transactions involved in the Annuity Arrangements are standardised or substantially standardised in form. Those transactions are the entering into the option agreement and the annuity agreement onto which a loan agreement may be bolted where the client so wishes.

123. Accordingly the Annuity Arrangements were a "product". Mr Waldegrave conceded that if the Tribunal considers that the Annuity Arrangements constitute a "product" it is recognised that, given the findings which the Tribunal would have had to have reached in considering the "tax advantage" and "main benefit" tests, the Tribunal is likely to conclude that the product was a "tax product". That is indeed the case. Given our conclusions stated earlier regarding tax advantage and main benefit we are satisfied that it would be reasonable for an informed observer (having studied the Annuity Arrangements) to conclude that the main purpose of the Annuity Arrangements was to enable a client to obtain a tax advantage. Indeed, we are satisfied that would be the only reasonable conclusion which an informed observer, having studied the Annuity Arrangements would have reached. Therefore the Annuity Arrangements were a "tax product" as described in regulation 10 of the Regulations.

124. It is not in dispute that AML made the Annuity Arrangements available for implementation by more than one person.

125. Accordingly, we conclude that HMRC have shown that the standardised tax product hallmark in regulation 10 of the Regulations applies to the Annuity Arrangements.

Conclusion regarding notifiability

126. We therefore conclude that the Annuity Arrangements were notifiable under s314A.

127. The parties addressed us at some length regarding the alternative applications made under s306A. Ms Murray submitted that suspicion is not a high hurdle, relying on the Court of Appeal's statement in *R v da Silva* [2006] EWCA Crim 1654 in which it was said that a person suspects something if they "think that there is a possibility which is more than fanciful that the relevant facts exist".

128. She submitted that HMRC have taken all reasonable steps to establish whether the arrangements are notifiable and rely on the communications preceding the application with AML, the enquiries they have made into users and the information thereby obtained.

129. Mr Waldegrave has challenged the application of s306A on the basis that he submits that HMRC did not take "all reasonable steps" to establish whether the Annuity Arrangements were notifiable. He says that HMRC failed to engage adequately with the suggestion of a meeting between HMRC and AML/AML's representatives.

130. We find on the basis of the evidence of the steps taken by HMRC that they did take all reasonable steps to establish whether the Annuity Arrangements were notifiable. Even without consideration of whether sufficient steps had been taken in relation to a proposed meeting, we are satisfied that HMRC had taken the reasonable steps required of them by the legislation by virtue of the exchange of correspondence with AML and the obtaining of documents from users.

131. In addition, HMRC sought a meeting with AML on more than one occasion in October 2017 and March 2018. AML's representatives then suggested a meeting in a letter dated 30 August 2018 which prompted a telephone call between Mr Wood and the representatives in which it was discussed. The content of the note of that meeting has not been challenged and shows that AML's representatives agreed to revert with a suggested meeting date. There is no evidence that they ever did so. When this was put to Mr Waldegrave at the hearing he

submitted that HMRC should have tried to make the meeting happen, but we do not agree. The ball was firmly in AML's court and they did not respond.

132. We are therefore clear that HMRC took all reasonable steps as required by the legislation.

133. Mr Waldegrave challenges the second part of the test under section 306A by referring to the submissions relating to the application of section 314A. However, as Ms Murray submitted, the test sets a low threshold in requiring HMRC to show that they have "reasonable grounds for suspecting that the [Annuity Arrangements] may be notifiable." By definition that is a lower burden on HMRC than the burden of showing that the requirements of section 306A are satisfied. It is clear to us, on the basis of the findings made by us above, that it would be reasonable for HMRC to suspect that the Arrangements would fall within one of the hallmarks, either as a premium fee product or a standardised tax product.

134. Therefore if our conclusions regarding the application of section 314A were wrong the Annuity Arrangements should be "treated as notifiable".

THE PRE-FUNDED EBT ARRANGEMENTS

Findings of fact

Background

135. HMRC discovered use of the Pre-Funded EBT Arrangements in 2014 and opened tax enquiries into the tax returns of a sample of the companies identified as users of the scheme. Documents relating to the Arrangements were requested from these companies.

136. On 23 September 2014 HMRC wrote to AML Tax Limited about the Pre-Funded EBT Arrangements, asking why they had not been disclosed pursuant to the rules in Finance Act 2004. AML treated this letter as having been addressed to it.

137. On 12 November 2014 a meeting was held between representatives of AML and HMRC. Following that meeting AML wrote to HMRC to explain why it considered that the Pre-Funded EBT Arrangements did not fall to be disclosed under the Finance Act 2004 rules.

138. There were further exchanges of correspondence between the parties and another meeting on 1 October 2015 with AML maintaining that the Pre-Funded EBT Arrangements fell outside the DOTAS provisions because the obtaining of a tax advantage was not the main benefit, or one of the main benefits, that might be expected to accrue from them. Instead, the main benefit was said to be the provision of employee benefits. AML also set out why the Pre-Funded EBT Arrangements did not fall within any of the prescribed DOTAS hallmarks. AML said that the Pre-Funded EBT Arrangements fell within the grandfathering provisions for standardised tax products. HMRC responded in a letter dated 2 March 2015 setting out why they maintained that the Pre-Funded EBT Arrangements were notifiable and asking for evidence that they were grandfathered.

139. AML responded in a letter dated 19 May 2015 in which it was asserted that counsel had advised that the burden to demonstrate whether or not the grandfathering provisions applied rested with HMRC and HMRC was asked to confirm whether they had knowledge of implementation of the Arrangements or substantially similar arrangements before August 2006.

140. Correspondence continued in which, amongst other things, HMRC disputed AML's approach to the burden of proof on the matter of grandfathering.

141. A letter from HMRC in March 2018 confirmed that HMRC's records had been checked and there was no record of an arrangement which was same or substantially the same as the Pre-Funded EBT Arrangements prior to August 2006. HMRC explained why it was

considered that the premium fee and standardised tax product hallmarks applied and why it was considered that the main benefit of the Arrangements was a tax one. Two months later, HMRC wrote to AML seeking a response to the March letter. In June 2018 Mr Lloyd spoke to a representative from Pathfinder requesting a response and repeated the request in an email on the same day. AML indicated it would seek to respond by the middle of July.

142. On 16 January 2019 HMRC wrote again to AML noting that there had been no response to the letter 22 March 2018 and informing AML of HMRC's intention to apply to the Tribunal for an order under section 314A or s306A if AML did not make the DOTAS disclosure itself within 14 days. The letter proceeded to set out in detail why HMRC considered the Arrangements to be notifiable.

143. On 4 March 2019 HMRC made the application which is the subject of this decision.

The substance of the pre-funded EBT Arrangements

144. We have been provided with documents relating to transactions involving eight companies.

145. The evidence shows that the principal transactions involved in the implementation of the Pre-Funded EBT Arrangements are, with very little variation, as described in HMRC's application. They were as follows:

(1) AML IoM established an employee benefit trust for each user ("the X EBT"). The trustee was in each case Knox House Trustees Limited. The beneficiaries included employees of AML IoM. AML IoM settled an amount approximately equal to the amount which was to be extracted from the company's profits, say £250,000, to be held on the terms of the X EBT;

(2) by a loan agreement Knox (acting in its trustee role) lent approximately the same amount back to AML IoM on an interest-free, repayable on demand, basis;

(3) the user company entered into a loan agreement with the relevant director or directors ("the Loan") unless such an agreement already existed. The Loan would cover amounts already lent to the director as well as any additional amounts to be lent;

(4) an agreement ("the Purchase agreement") was entered into by AML IoM and the user company under which AML IoM granted to the company the right to require AML IoM to use its powers under the terms of the X EBT to modify the beneficiaries of the X EBT. In consideration of this grant, the company agreed to pay AML IoM an amount, say in this example, £278,000, approximately equal to the lump-sum previously settled by AML IoM. That amount was stated to be payable forthwith and interest was to be charged at 4% above the Bank of England's base rate for so long as any part of it remained outstanding. In fact, this amount was not paid and was left outstanding. On exercise of the right to nominate beneficiaries, AML IoM would exclude all other beneficiaries or potential beneficiaries of the trust;

(5) AML IoM entered into a tripartite assignment agreement for each director with the director and the user company. Under those agreements:

(a) the director concerned undertook to pay a proportion of the amount due from the user company to AML IoM under the Purchase Agreement to AML IoM. In some cases this proportion would be 100%. In other cases, where more than one director was involved or the Pre-Funded EBT Arrangements were to apply for more than one year, the proportions were varied accordingly; and

(b) the user company accepted the director's assumption of liability as full and final repayment of the equivalent proportion of the Loan

(6) the Board of Directors of the user company met and decided that it would pay the director an amount equal to the Loan as consideration for the director agreeing the "assignment" of the relevant proportion of the company's obligation to the director. The amount agreed to be paid to the director would be treated as repaying their Loan. This was not a step addressed before us in the hearing. It is somewhat odd given the existence of the tripartite agreement in which the user company accepts the director's assumption of liability to AML IoM as full and final repayment of the Loan. However, it is not determinative of the matters before us and we therefore say no more in this decision about it;

(7) the debt due to AML IoM from the individuals was not paid by them;

(8) fees of at least 12% of the amount to be extracted from the company (as reflected in the value of the initial loan from the company to the director which was to be eliminated by the Arrangements) were generally paid by the companies using the Arrangements. That fee was paid to AML IoM. Some users also paid separate fees to Knox House Trustees Ltd, although those were not payable in years in which more "planning" was carried out. A set-up fee was also charged in some cases for the original setting up of the trusts.

146. We note that in AML's Statement of Case it is said that an interest in the EBT was sold by AML IoM to company users for an amount which was typically in the region of 12% of the asset value of the EBT. However, we do not have documents showing that step and it is not a matter relied on by HMRC.

147. We have not been provided every document for every transaction identified by us for every user evidenced in the bundle. However, the key documents - the trust deeds, the purchase agreements and the assignments - provided for all of the companies were in the same form and included the same terms. The only variation was for matters such as the names of parties and the amounts.

148. It is not in dispute that the users all entered into the same transactions, although, as noted, in some cases not all of the funds were effectively withdrawn from the EBT within the first year. In some cases there was a larger amount initially settled into the EBT and the subsequent transactions resulting in the credit of the company's loan to the individual were repeated.

149. As a result:

(1) at the end of the transactions the individuals had received a sum from their employer company and the transactions purported to cause the loan of that sum from the company of which they were directors to become, in effect, a loan from AML IoM;

(2) the relevant director or directors became the sole member or members of the class of beneficiaries of the EBT; and

(3) the employer company would treat the amount originally lent to the director or directors concerned as the acquisition cost of an interest in the EBT and as a revenue cost in the company's profit and loss account for "employment costs", for which a corporation tax deduction was claimed.

150. Assuming that the transactions worked and are not successfully challenged by HMRC relying upon anti-avoidance law or otherwise, the Pre-Funded EBT Arrangements enabled pre-existing loans from an individual's company to be credited without the imposition of the charge to corporation tax under section 455. The individual was left with the amount of the

loan without any liability for income tax or National Insurance Contributions. In addition, the companies claimed corporation tax deductions.

The marketing and use of the Pre-Funded EBT Arrangements.

151. The AML information checklist sent to users asked what the amount to be "extracted" from the relevant company was to be.

152. Emails with clients and correspondence between clients and HMRC show that the clients were using the Arrangements to extract cash from the companies and pay it to the relevant directors without the tax charges which would arise on loans to participators.

153. Counsel's opinion was obtained in relation to the Pre-Funded EBT Arrangements, which was provided to accountants or users if requested.

154. There is a one page marketing document, the introduction to which describes AML as a progressive tax planning consultancy which challenges conventional tax planning wisdom. It explains that the purchase of the right to appoint beneficiaries would be for the purpose of providing "tax efficient remuneration" to a company's employees and would be treated as a revenue expense for the company, such that a corporation tax deduction could be claimed as a result of normal accounting treatment in the company's profit and loss account.

155. No material involving clients (including, in particular, marketing, email correspondence and meeting notes) has identified any commercial non-tax benefit in the Pre-Funded EBT Arrangements.

156. We therefore find that the Pre-Funded EBT Arrangements were marketed as a tax scheme to enable users to extract cash from companies in such a way that less tax was paid than if the money was extracted by way of loan or employee remuneration.

AML's involvement

157. The marketing material was issued by AML and provided contact details in London and Manchester as well as AML's email address.

158. We find that AML's staff in the UK acted not only as salesmen in relation to the Pre-Funded EBT Arrangements, but also as people who were managing and organising the implementation of the arrangements by clients for the following reasons:

(1) AML sent an information checklist to potential users identifying matters such as whether a new EBT would be set up, the amount to extract, the details of the relevant directors and any introducer's name;

(2) AML employees would confirm the amount of fees payable by the client. Andrew Simpson of AML described AML's role to a client as providing services including the "complete implementation of the planning";

(3) clients would contact members of AML's staff - in particular, Andrew Simpson or Clair Saunders - in order to proceed with the Pre-Funded EBT Arrangements;

(4) Andrew Simpson responded to technical queries. He was not a person who simply passed the queries to AML IoM as Mr Lancaster claimed. An email shows that when he was asked less routine questions (for example, to what the reference in the option agreement to interest payments referred and how the benefit in kind rules would be applied by HMRC) he responded by saying that it would be a good idea to discuss this on the telephone. Mr Simpson therefore needed to have detailed knowledge of the Pre-Funded EBT Arrangements, how they worked and the relevant tax rules in order to be able to deal with clients in this way. Mr Simpson was held out by AML as a person

with a "wealth of tax knowledge and experience" as shown by AML's website. He describes himself in emails as a "Chartered Tax Adviser";

(5) Draft paperwork was sent out by AML including the agreements we have described earlier and board minutes for the company. Signed documents were then returned to AML. If the draft documents required amendment the client (or their introducer) would request the changes by contacting AML. A key member of AML staff in London involved in these activities was Clair Saunders who was described as the "Administration Manager";

(6) in an email with one user of the Pre-Funded EBT Arrangements, Clair Saunders referred to the "recent planning you have undertaken with AML Tax UK Limited";

(7) AML would contact clients or their advisors to chase up missing or delayed documents;

(8) one client told HMRC that an employee of AML in Manchester had explained the arrangements and after a couple of meetings the decision was made to participate in the planning. There were no meetings between users and staff from AML IoM. Meetings took place in the UK with AML. The client said that the arrangement was "put forward" by that AML employee;

(9) introducers would contact AMP to arrange to proceed with the Arrangements;

(10) staff in the UK working for AML wrote to the finance department asking for invoices for the implementation fees to be issued. In those emails the AML employee set out details regarding the client, the date of signing of agreements, the name of any introducer, the total amount to be settled into a trust and the amount of the fees. AML IoM issued the invoices in which it was specifically stated that if the client had any queries they should contact a named AML employee, such as Andrew Simpson. In general AML would chase late payments. On those occasions when AML IoM issued reminders for payment, the user was directed to raise any queries with an AML member of staff.

159. The picture conveyed by the evidence overall is therefore that AML in the UK managed and organised the implementation of the Pre-Funded EBT Arrangements whilst AML IoM carried out classic "back office" functions, producing documents from templates in accordance with directions from AML and the clients, and running the finance operation for AML. AML IoM's role as settlor of the trusts and party to the Purchase agreements and tripartite agreements did not detract from the management and organisation carried out by AML.

Grandfathering

160. AML say that the Pre-Funded EBT Arrangements were grandfathered. Mr Lancaster's evidence was that he first came across the Pre-Funded EBT Arrangements when a former colleague joined him at his previous firm, "Boston" in around 2008. The colleague had previously worked at another tax planning firm, "Montpelier", and had come to Boston with the idea for the pre-funded EBT, together with an opinion from Robert Argles (who is sadly deceased). Mr Lancaster said that the scheme was operated by Boston in the Isle of Man and one of the first clients of Boston was AML, in around 2009-2010, who acted as an introducer to accountants in the UK. He explained that all of the documents were prepared by Boston and sent to AML, who in turn sent them on to the introducer/client for signature before returning them to Boston. His recollection is that the counsel's opinion was dated prior to 2006. As a result, he is sure that the structure was made available for implementation before August 2006 and this explains why, when he was at Boston, it was concluded that counsel's

opinion about the application of the DOTAS rules was not required - because the arrangements were grandfathered.

161. In cross-examination when Ms Murray identified that the marketing material for AML referred to a counsel's opinion, Mr Lancaster said that when he joined Knox House Trust Ltd in 2011 a new counsel's opinion was obtained, but that was based on the fact that the arrangements being considered were grandfathered.

162. Correspondence shows that Mr Wood has spoken to the HMRC expert who deals with employee benefit trusts and confirmed that the Pre-Funded EBT Arrangements had not previously been notified to HMRC under DOTAS. Mr Lloyd gave evidence that he had received advice from technical experts that structures such as the Pre-Funded EBT Arrangements were a reaction to legislative changes in 2011.

163. Mr Lancaster has said that he is unable to provide documents from his previous employer, Boston. That is entirely understandable. However, he told us that AML were involved in the arrangements as far back as 2009 as an introducer. In that role we would expect the grandfathering issue to have been raised, or at least noted in correspondence with AML and for the Robert Argles opinion to have been referred to in whole or in part. There is no reason why supporting evidence of that nature could not have been provided by Mr Lancaster.

164. In addition, Mr Lancaster referred to a further counsel's opinion obtained by Knox House Trust Ltd in 2011 in which he says there was reference to the grandfathering, yet we have not been provided with even an extract from that opinion to support this contention. When we raised this with Mr Lancaster at the hearing we found that he became increasingly evasive and to dissemble. He said that he would be unable to obtain the opinion because AML had ceased trading. When we commented that we understood that the opinion had been obtained by Knox House Trust, Mr Lancaster acknowledged that the opinion could be obtained from that company, but he then sought to minimise the relevance of the opinion by saying that counsel had simply been told that the arrangements were grandfathered.

165. As Ms Murray identified in the hearing, there are numerous cases concerning the use of EBTs prior to 2006 and HMRC's evidence is that arrangements such as the Pre-Funded EBT arrangements appeared as a result of the introduction of part 7A ITEPA 2003 by the Finance Act 2011. In essence, Part 7A treats amounts provided to employees through third parties as employment income and HMRC's evidence is entirely plausible.

166. Given the issues which we have identified with Mr Lancaster's evidence we are not satisfied that his evidence alone is sufficient to discharge the burden of proof on AML. We therefore conclude that, as a matter of fact, AML have not shown that arrangements which were the same or substantially the same as the Pre-Funded EBT Arrangements were implemented or made available for implementation before 1 August 2006.

Discussion

167. We refer to the discussion in the context of the Annuity Arrangements for the description of the law so far as this part of our decision addresses the same parts of the legislation. In relation to different areas of dispute we set out the relevant law in context below.

Specification of the Arrangements

168. Mr Waldegrave submitted in his skeleton argument that HMRC have also inadequately specified the Pre-Funded EBT Arrangements. He submitted that HMRC have incorrectly identified AML rather than AML IoM as party to the relevant agreements. His oral submissions, however, recognise that HMRC's application, as opposed to the skeleton

argument, correctly identifies the key steps as having been taken by AML IoM, but submits that HMRC later becomes confused when talking about the payment of the fee.

169. Ms Murray submits that a transaction is not defined by its parties. It does not matter which AML company was the settlor and consequently the party to other steps in the Arrangements. The transactions are clearly identified by reference to the agreements cited in HMRC's application and those agreements clearly showed that it was "AML Limited", referred to as AML who was the settlor.

170. In fact, it appears that much of the confusion has arisen as a result of skeleton arguments using different defined terms for AML and AML IoM when compared to the terms used in HMRC's application. As we emphasise in our findings, HMRC defined the UK company which we have called AML, as "AML UK" and the Isle of Man company, AML IoM, as AML. Once this is recognised, it is clearly apparent that HMRC have identified the correct company as settlor and party to agreements when referring to "AML" (as defined by HMRC rather than as defined in this decision and in the skeletons) as the settlor.

171. There is therefore no error of identification of the transacting party and that in itself resolves this matter. The "arrangements" were clearly and correctly specified by HMRC. Their summary accords with our findings of the constituent parts of the Pre-Funded EBT Arrangements.

172. We do not agree with Mr Waldegrave's submission that account should be taken of the fact that HMRC's application incorrectly went on to state that fees had been paid to the UK company, rather than the Isle of Man company, in the context of considering the premium fee hallmark. That element of the application was part of HMRC's analysis of the Pre-Funded EBT Arrangements, but was not the part identifying or specifying those arrangements. Indeed, as Mr Waldegrave accepted at the hearing before us in the context of HMRC's application in relation to the Annuity Arrangements, the application could have been significantly shorter and simply stopped at the description of the arrangements in order for it to satisfy the requirement to specify the arrangements, without embarking upon, what is in effect, the equivalent of a statement of case, setting out HMRC's arguments regarding the application of the legislation.

Is AML a "promoter" of the Pre-Funded EBT Arrangements?

173. If AML is not a promoter in relation to the Pre-Funded EBT Arrangements, HMRC's application cannot succeed. We therefore address this issue next.

174. So far as relevant in this case, a person is a "promoter":

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

> "…
>
> (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"

(2) in relation to notifiable arrangements if:

> "in the course of a relevant business…he is to any extent responsible for—
>
> (i) the design of the arrangements, or
>
> (ii) the organisation or management of the arrangements

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

(a) involves the provision to other persons of services relating to taxation…"

175. Ms Murray submits that it is not relevant that AML was not a party to the transactions. Being a promoter is an entirely different role. AML is a promoter as it provided tax specialist services, the provision of which is a relevant business; and the documentary evidence shows that it implemented the arrangements together with AML IoM. AML IoM sent out invoices, but the marketing document was provided by AML in the UK and asks potential users to contact AML in the London and Manchester offices. AML provided a checklist for carrying out the transactions. Emails show that UK staff sent out documents for review, prepared and amended documents and provided advice on the arrangements prior to implementation. All of those activities amounted to making the proposal available for implementation. In addition, in the course of its relevant business AML was to some extent responsible for the organisation or management of the Pre-Funded EBT Arrangements.

176. Mr Waldegrave submits that AML was not a promoter in relation to these Arrangements. AML did not have the resources in the UK to make the Pre-Funded EBT Arrangements "available for implementation" or to organise or manage their implementation to any extent. Key elements of the Pre-Funded EBT Arrangements were linked to the Isle of Man (including, in particular, the settlement of the relevant trust by AML IoM). Fees relating to use of the Pre-Funded EBT Arrangements were paid to AML IoM's account in the Isle of Man.

177. Mr Waldegrave relied upon the decision in *Hyrax* and submitted that Judge Mosedale relied on the fact of the company's status as counterparty as being crucial to her conclusion that one of the respondents in that case was the promoter. That, in essence, he said set the standard for assessing management and organisation of arrangements. When we asked Mr Waldegrave to address the meaning of "managed and organised" Mr Waldegrave submitted that it is inherent in both of those concepts that the person in question has control and has the ability to deliver the arrangements in question. They must do more than simply provide an introduction to someone else. AML in the UK did not have that ability in relation to the Pre-Funded EBT Arrangements.

178. Mr Waldegrave contrasted the Pre-Funded EBT Arrangements with the Annuity Arrangements where it was accepted that AML acted as promoter because those arrangements involved transaction documents which could all be executed in the UK and involved a relatively straightforward movement of money or discharge of debt from a company to an individual in the UK. Therefore all could be managed and organised by AML's staff in the UK. In the Pre-Funded EBT Arrangements, settlement of the money takes place in the Isle of Man and cannot be delivered by AML in the UK. Mr Lancaster's evidence had been that all decisions of substance were taken in the Isle of Man. The emails relied upon by HMRC were with salesmen, but everything was sent back to the Isle of Man. The fact that the fees were always paid to the Isle of Man was consistent with that being the location where the arrangements were made available from, organised and managed.

179. We note that the legislation only requires it to be shown that a person, acting in the course of a relevant business, is to any extent responsible for the organisation or management of the arrangements. We have set out in the findings of fact the reasons why we have concluded that the evidence shows that AML was clearly responsible to some extent for the organisation and management of the Pre-Funded EBT Arrangements. Indeed, the evidence shows that AML was responsible for much of the organisation and management of the arrangements. The fact that AML IoM was a party to transactions as part of the Pre-Funded

EBT Arrangements and carried out "back office" functions such as issuing invoices and producing the individual documents from templates, does not detract from the conclusions reached regarding AML's activities.

180. We agree with the submissions made by Ms Murray that being a party to transactions is not part of the test for being a promoter and that the words used in the legislation should be given their ordinary meaning.

181. We do not agree with Mr Waldegrave's submission that *Hyrax* has in some ways set a standard for assessing the test of "organisation or management of the arrangements" in requiring a person to be a counterparty in order to satisfy that role. Judge Mosedale concluded that Hyrax was a promoter because it made the notifiable proposal available for implementation by the scheme users as a result of agreeing to be the counterparty to all the necessary contracts. She then addressed the management and organisation issue and concluded that on the facts before her, as Hyrax was the counterparty and the evidence showed that information on the arrangements had been obtained from Hyrax personnel, it was consistent with the likely scenario that Hyrax also managed and organised the arrangements. She noted, in particular, that no evidence had been led by the respondents in that case to counter that natural inference. When considering whether two other companies were also promoters, she was satisfied that there was no evidence that they were responsible for the organisation and management of the arrangements.

182. None of Judge Mosedale's analysis leads to the conclusion that a person needs to be a counterparty in order to organise or manage arrangements; and we see no basis to read such a requirement into the plain words of the legislation.

Notifiability

The tax advantage condition

183. Ms Murray submits that the comparator against which the Pre-Funded EBT Arrangements should be assessed in order to determine whether there is a tax advantage is leaving the loan made by the company to its director outstanding. Mr Waldegrave submits that this is not adequate as a comparator as it is not economically equivalent because the identity of the creditor to whom the individual owes money is different and the company no longer holds an asset in the form of a loan to the individual.

184. We refer to our conclusions about the law in the context of the discussion of this issue for the Annuity Arrangements. For the reasons we have stated, we are satisfied that the comparison can be drawn between the company and individual entering into the Pre-Funded EBT Arrangements and the company making a loan to the individual. In this case the correspondence shows that the clients were using the Pre-Funded EBT Arrangements to extract cash from the companies and pay it to the relevant directors without the tax charges which would arise under s455 CTA on payments of monies as loans left outstanding. That is therefore the most appropriate comparison to make and the tax advantage lies in the avoidance of that tax charge under s455 CTA.

185. Furthermore, in making this comparison, even if it was considered that there should be some economic similarity between the situation with or without the Pre-Funded EBT Arrangements, the parties are in economically much the same position. The individual starts with a liability to the company for the amount of the loan and ends with a liability to AML IoM for approximately the same amount. The company replaces an asset in the form of a loan with an asset in the form of the right to appoint beneficiaries in the EBT, with a value approximately equal to the loan it would have, or had already, made.

186. We therefore conclude that HMRC have shown that the tax advantage condition has been satisfied in relation to the Pre-Funded EBT Arrangements.

The main benefit condition

187. Ms Murray submitted that there was no question of weighing commercial benefits of the Pre-Funded EBT Arrangements against tax benefits because there was no commercial rationale for the transactions. In essence, the only purpose of the Pre-Funded EBT Arrangements was to obtain a tax advantage.

188. Mr Waldegrave struggled to identify commercial benefits of the Pre-Funded EBT Arrangements. His first suggestion was that the company gets a way of rewarding its employees without having to lay out cash, but, as we commented in the hearing, the company pays, or has already paid, the cash in the form of a loan to the individual concerned.

189. He also submitted that the individual obtains some benefit in owing money to AML IoM, whom he described as a friendly creditor, rather than the company of which the individual is a director. This made little sense to us given that the individual has at least some control of the company of which the individual is a director, and indeed, shareholder. His response was that although there was no suggestion of this being the plan, the indebtedness could all be unwound with the individual paying AML IoM, AML IoM repaying the trust and the trust then making a "loan or whatever" to the individual. However, if, as he says, this was not part of the plan, it is hard to see how this could be taken into account as a potential benefit of the Pre-Funded EBT Arrangements. (The unwinding of the debts in the manner described by Mr Waldegrave is not something which HMRC have asked us to address and we say no more, save to comment that if this was in fact part of the Arrangements, we would be clear that the comparison for the purposes of consideration of the tax advantage of the Pre-Funded EBT Arrangements should be between this form of them and a loan which is made by the company and subsequently released.)

190. Finally, Mr Waldegrave submitted that the company may have doubts about its ability to collect the amount due from the individual and is replacing that potentially doubtful asset with a mechanism through its rights to appoint beneficiaries in the EBT to reward its employees. However, this overlooks the fact that the value in the EBT takes into account the value of the payment obligation assumed by the individual.

191. The challenges faced by Mr Waldegrave in identifying commercial benefits for the Pre-Funded EBT Arrangements merely emphasise what is clear from the documentary evidence, and, in particular, the marketing materials, which is that there was no identifiable commercial benefit in these Arrangements.

192. We are therefore satisfied that when carrying out the weighing exercise to determine the main benefit which might be expected there is little or no weight on the commercial side of the scales to set against the significant tax benefit weight. One of the main benefits, if not the only real benefit, that might be expected to arise from the Pre-Funded EBT Arrangements is the obtaining of a tax advantage.

The Premium fee hallmark

193. Mr Waldegrave relied upon the same arguments regarding the lack of evidence from HMRC as in the case of the Annuity Arrangements. He noted that there is just one page of marketing material in contrast to the detailed materials addressed in the case of *Curzon*. In addition, as HMRC have failed to identify clearly the tax advantage to which the Pre-Funded EBT Arrangements were expected to give rise, they cannot establish that any fee was attributable to that tax advantage.

194. Ms Murray also relied on the same arguments as she had made in the context of the Annuity Arrangements. Actual fees of 12% are strong evidence of what the hypothetical experience user would be willing to pay. This is a pre-packaged marketed avoidance scheme endorsed by tax counsel. The marketing document did not reflect the totality of the marketing. The evidence shows that AML had meetings with potential users.

195. We have found that the evidence shows a fee of at least 12% of the amount to be "extracted" from the relevant company user was paid. The fee was paid for the Pre-Funded EBT Arrangements to be put in place. It has not been suggested that it was paid for anything else and, as we have concluded above, those Arrangements are arrangements from which a tax advantage is expected to be obtained. The fees are calculated by reference to the value of the sums extracted from the company which in turn determines the level of the resulting tax advantage.

196. We also conclude (again in a similar way to Judge Mosedale in *Hyrax*) that the fee was to a significant extent attributable to the expected tax advantage as there is no other way of explaining why it was charged as a percentage of the money to be extracted by the company/ the loan to the director. We come back to our conclusion that the Pre-Funded EBT Arrangements enabled the director to continue to enjoy the receipt of an amount previously lent to him or her by the company without the imposition of the s455 charge and therefore the fee was intrinsically linked to the advantage of doing so.

197. The fact that the fee was not in fact paid to AML, but to AML IoM, does not affect the application of the rules as we must consider what a notional promoter might reasonably be expected to charge.

198. The fact that users did in fact pay what we have concluded would be a premium fee for the use of the Pre-Funded EBT Arrangements is a strong indicator that a notional promoter of these, or substantially similar, arrangements might reasonably be expected to be able to obtain a premium fee from a notional person experienced in receiving services of the type being provided. In reaching this conclusion we take into account not only the evidence of the fees being charged, but also the fact that HMRC have given evidence that at least 46 users of the scheme have been identified and AML have failed to identify any other fee or payment basis used by other customers. Again though, we recognise that the evidence does not show whether the participants in the Pre-Funded EBT Arrangements were in fact "experienced in receiving services of the type being provided".

199. Of particular relevance in that regard are the following:

(1) AML obtained tax counsel's opinion for the Pre-Funded EBT Arrangements. This was something to which they could refer in discussing and selling them and AML has confirmed would be provided to potential users when requested. Some of the wording in the documents was specifically approved by counsel;

(2) participating in the Pre-Funded EBT Arrangements generally involved potential users and/or their representatives meeting with AML staff or putting detailed questions about their operation to those staff;

(3) the Pre-Funded EBT Arrangements require a certain amount of readiness to engage in a series of detailed steps in order to achieve the intended result. They were clearly aimed at participants who had sufficient experience of knowledge of such products themselves not to be deterred by the actions required, or who could access advice from those with the requisite tax scheme experience; and

(4) AML's marketing material describes it as providing progressive tax planning consultancy which challenges conventional tax planning wisdom. That clearly implies that the product will be outside the areas of standard tax planning.

200. We are therefore clear that the Pre-Funded EBT Arrangements were being directed at people who were either already experienced in reviewing these types of planning arrangements themselves, or who would seek advice from others to put themselves in that position.

201. We therefore conclude that HMRC has shown that the premium fee hallmark condition is met.

Standardised tax product hallmark

202. Again, we address the alternative hallmark given the extensive submissions. In this case the first question is whether the Pre-Funded EBT Arrangements are grandfathered as AML submits, because, if so, they are specifically excluded from this hallmark.

203. Mr Waldegrave relied on the evidence of Mr Lancaster to the effect that he is sure that the Pre-Funded EBT Arrangements (or substantially similar ones) were available before August 2006. Mr Lloyd's evidence that HMRC had looked to identify whether such arrangements had been in place prior to August 2006 and had been unable to find them was limited evidence to rebut Mr Lancaster's, given that Mr Lloyd's efforts only extended to a conversation with one other person and there was no comprehensive search of a database (if such a thing exists). In addition, the DOTAS rules were changed significantly from the beginning of August 2006. The previous regulations did not have a standardised tax product description so it was arguable that arrangements such as the Pre-Funded EBT Arrangements would not have been notifiable under the earlier regulations. Therefore if Mr Lloyd and his colleague only considered arrangements which had been notified, it may not be surprising that they did not find ones such as the Pre-Funded EBT Arrangements.

204. Ms Murray submitted that Mr Lancaster's evidence was inadequate. He had been unable to describe the transactions, how any tax advantages arose and what the legal analysis at the time was. AML has not made out a prima facie case and therefore there is no burden on HMRC to show that the grandfathering rules do not apply.

205. We have set out our consideration of the evidence in this context and the findings of fact made as a result earlier on this decision. We recognise that the test for the grandfathering is not whether the Pre-Funded EBT Arrangements or arrangements similar thereto, were in fact implemented before 1 August 2006, but whether they were available for implementation before that date.

206. There have been numerous examples of tax planning involving EBTs since and before 2000, including in the context of the EBTs making loans to the individuals. To take just one example, in the case of *RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) v Advocate General for Scotland (Respondent) (Scotland)* [2017] UKSC 45, a tax scheme was operated by the company from the tax year 2001-2002 in which Rangers would fund an EBT with monies which would then be lent by the EBT to the individual employee concerned. The loans were not repaid or written off. Those arrangements therefore not only involve an EBT but also contain the element of loans seen in the Pre-Funded EBT Arrangements, yet it has not been suggested that they are sufficiently similar for the grandfathering provisions to apply.

207. It is therefore entirely possible that any arrangements which Mr Lancaster believes were available for implementation prior to August 2006 involved elements which are present in the Pre-Funded EBT Arrangements, but which would not fall within the grandfathering

requirement of being the same as, or substantially the same as, the Pre-Funded EBT Arrangements.

208. Even if, as Mr Waldegrave submitted, any similar arrangements available for implementation prior to August 2006 were not in fact notifiable, so that HMRC would be unable to identify whether they were in existence, the burden of proof rests with AML. For the reasons we have explained earlier in our findings of fact, we are not satisfied that the evidence provided by Mr Lancaster on its own, is sufficient to show that the Pre-Funded EBT Arrangements or similar such arrangements were available for implementation prior to 1 August 2006.

209. Turning to the application of the rules on the basis that the Pre-Funded EBT Arrangements are not grandfathered, Ms Murray submitted that the documents show that the arrangements are standardised. She referred to her submissions in the context of the main benefit of the Arrangements in relation to the purpose of the Arrangements.

210. Mr Waldegrave did not seek to argue before us that the Pre-Funded EBT Arrangements did not have standardised or substantially standardised documentation. The documents provided in the bundle of evidence show the documents to be standardised or substantially standardised, that their purpose is to enable the implementation by the client of the Arrangements and the form of them is determined by AML and not tailored to any material extent to reflect the circumstances of the client. Similarly, the documents show that the clients were required to enter into a specific transaction or series of transactions which were also standardised or substantially standardised in form.

211. In relation to the main purpose condition of this hallmark, Mr Waldegrave conceded that if we conclude that the main benefit test was satisfied (as we have) then the main purpose test will also be satisfied.

212. We therefore conclude that the Pre-Funded EBT Arrangements fall within the standardised tax products hallmark.

Conclusion regarding notifiability

213. As a result of our conclusions above we have decided that the Pre-Funded EBT Arrangements were notifiable under section 314A.

214. As for the Annuity Arrangements, we have also considered the alternative application made under section 306A. Mr Waldegrave has not identified any particular issue with the engagement by HMRC in relation to the Pre-Funded EBT Arrangements and we are entirely clear that HMRC took all reasonable steps to investigate the Arrangements, given, in particular, HMRC's actions in obtaining information from users and the correspondence described in the findings of fact. Notably, AML failed to respond to a letter from HMRC in March 2018 despite several requests to do so. One year later it was clear that no further information would be provided by AML.

215. Given our findings of fact and our conclusions regarding the application of s314A it is clear that we are satisfied that the lower threshold of "reasonable grounds for suspecting" that the Pre-Funded EBT Arrangements may be notifiable is satisfied.

216. Therefore had we not decided that the preferred order under s314A should be made, we would have no hesitation in making the alternative order under s306A.

CONCLUSION

217. For the reasons set out above, we hereby make the requested orders under section 314A to the effect that:

(1) the Annuity Arrangements are notifiable arrangements; and

(2) the Pre-Funded EBT Arrangements are notifiable arrangements.

NO RIGHT TO APPEAL

218. This document contains full findings of fact and reasons for the decision 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.

TRACEY BOWLER
TRIBUNAL JUDGE

Release date: 30 MARCH 2022

ANNEX

Finance Act 2004 provisions

The applications

<u>Section 314A. Order to disclose</u>

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

(a) a proposal is notifiable, or

(b) arrangements are notifiable.

(2) An application must specify—

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

(b) the promoter.

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

<u>Section 306A. Doubt as to notifiability</u>

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

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

(b) arrangements are to be treated as notifiable.

(2) An application must specify—

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

(b) the promoter.

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

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

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

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

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

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

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

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

(6) Where an order is made under this section in respect of a proposal or arrangements, the prescribed period for the purposes of section 308(1) or

(3) in so far as it applies by virtue of the order—

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

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

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

Notifiability

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

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

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

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

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

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

Prescribed arrangements – Premium fee and standardised arrangements

Regulation 8 — Description 3: Premium Fee

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

Regulation 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.

Grandfathering rules

Regulation 11 — Arrangements excepted from Description 5

(1) The arrangements specified in this regulation are—…

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

Definition of "promoter"

219. Section 307, so far as relevant for these applications, states:

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

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

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

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

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

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

(i) the design of the arrangements, or

(ii) the organisation or management of the arrangements

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

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

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

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

(3) For the purposes of this section anything done by a company is to be taken to be done in the course of a relevant business if it is done for the purposes of a relevant business falling within subsection (2)(b) carried on by another company which is a member of the same group.

Further relevant definitions

220. Section 318, so far as relevant for these applications, states:

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

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

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

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

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

Corporation Tax Act 2010

Loans to participators rules

Section 455 Charge to tax in case of loan to participator

(1) This section applies if a close company makes a loan or advances money to a relevant person who is a participator in the company or an associate of such a participator.

(2) There is due from the company, as if it were an amount of corporation tax chargeable on the company for the accounting period in which the loan or advance is made, an amount equal to 25% of the amount of the loan or advance.

(3) Tax due under this section in relation to a loan or advance is due and payable in accordance with section 59D of TMA1970 on the day following the end of the period of 9 months from the end of the accounting period in which the loan or advance was made.

(4) For the purposes of this section and sections 456 to 459, the cases in which a close company is to be treated as making a loan to a person include a case where—

(a) that person incurs a debt to the close company, or

(b) a debt due from that person to a third party is assigned to the close company.

In such a case, the close company is to be treated as making a loan of an amount equal to the debt.

(5) If a company (C) controls another company (D), a participator in C is to be treated for the purposes of this section as being also a participator in D.

(6) In this Chapter, "relevant person" means—

(a) an individual, or

(b) a company receiving a loan or advance in a fiduciary or representative capacity.

Section 454 “Participator”

(1) For the purposes of this Part, *“participator”,* in relation to a company, means a person having a share or interest in the capital or income of the company.

(2) In particular, *“participator”* includes—

(a) a person who possesses, or is entitled to acquire, share capital or voting rights in the company,

(b) a loan creditor of the company,

(c) a person who possesses a right to receive or participate in distributions of the company or any amounts payable by the company (in cash or in kind) to loan creditors by way of premium on redemption,

(d) a person who is entitled to acquire such a right as is mentioned in paragraph (c), and

(e) a person who is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for the person's benefit.

Section 415 Income Tax (Trading and Other Income) Act 2005 Charge to tax under Chapter 6

(1) Income tax is charged if–

(a) a company is or was chargeable to tax under section 455 of CTA 2010 (loans to participators in close companies etc.) in respect of a loan or advance, and

(b) the company releases or writes off the whole or part of the debt in respect of the loan or advance.

Income Tax (Earnings and Pensions) Act 2003

Taxation of earnings

Section 62

Earnings

(1) This section explains what is meant by “earnings” in the employment income Parts.

(2) In those Parts “earnings”, in relation to an employment, means—

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) “money's worth” means something that is—

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee.