[2018] UKFTT 232 (TC)

TC06465

Appeal number: TC/2017/01045

CORPORATION TAX – appeal against paragraph 1 Schedule 36 information notice – whether burden of proof on HMRC - whether documents reasonably required for the purpose of checking the appellant's tax position – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

UPPERCUT FILMS LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Taylor House, London on 8 March 2018

Conrad McDonnell, counsel, instructed by Reynolds Porter Chamberlain LLP, solicitors, for the Appellant

Paul Shea, HMRC officer, for the Respondents

DECISION

Introduction

1. This is an appeal against an information notice issued by the Respondents ("HMRC") on 12 August 2016 under paragraph 1 of Schedule 36 to the Finance Act 2008 in the same terms to a number of companies, including the Appellant ("Uppercut") that had used a tax avoidance scheme known as the dividend replacement strategy ("DRS") or "Aikido". Uppercut's appeal was designated as the lead appeal under rule 5(3)(b) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("Tribunal Rules") on 14 August 2017. The information notice issued to Uppercut requires five documents to be provided ("limited list").

2. On 13 May 2016 HMRC issued an information notice under paragraph 1 of Schedule 36 to the Finance Act 2008 to a number of other companies that had used the DRS or Aikido, including Cliftonville Consultancy Limited ("Cliftonville"). This information notice requires full information and documents to be provided by the companies ("full documents"). Cliftonville's appeal against the notice requiring the full documents was also designated as the lead appeal under rule 5(3)(b) of the Tribunal Rules on 14 August 2017 and it was joined to be heard together with Uppercut's appeal.

3. This decision relates to the limited list information notice issued to Uppercut. The parallel decision relating to the full documents information notice issued to Cliftonville is under reference TC/2017/00122. The common facts, law and conclusions that relate to both Uppercut and Cliftonville are reflected in both decisions, but certain issues are relevant and considered only in one or other decision.

Background

4. The DRS was disclosed under Disclosure of Tax Avoidance Schemes ("DOTAS") by RSM Tenon Group plc on 15 August 2011 and was allocated the reference number SRN 19509036. The scheme was explained as follows:

> "A UK company ("Holdco") looking to pay a dividend will either have an existing subsidiary company or will incorporate a new one ("Subco"). Shares in Subco will be settled into an IIP trust for the benefit of the Holdco shareholders. The terms of the IIP trust will be such as to ensure that Holdco retains an interest in the trust under s625 ITTOIA 2005. If Holdco has incorporated a new Subco, Holdco will inject cash equal to the dividend to be paid by way of a new share subscription into mainly share premium. The share premium account will then be cancelled and the reserves will be transferred to distributable reserves. If Holdco has an existing Subco with sufficient reserves then this step is unnecessary. A dividend is then paid by Subco. Any dividend paid to the IIP trusts will be passed onto the shareholders under the terms of the trust. However, under s624 ITTOIA 2005, the income is treated for tax purposes as that of Holdco. Accordingly, if the marginal rate of tax on income for Holdco is less than that of the shareholders then a tax advantage will arise. The dividend should not be taxed under any other provision due to the protection of s716 ITEPA 2003."

5. At a meeting between HMRC and the promoters of the DRS in 2013 it was agreed that HMRC would pursue enquiries into, and make detailed requests for information and documents from, ten representative users of the scheme ("the first sample"). Information and documents equivalent to those requested in the full documents notice were provided following an informal request from HMRC. The enquiries into the tax returns of the individual shareholders of the first sample, which did not include the shareholders of Uppercut or Uppercut, have concluded and the appeals by Ms Clipperton and Mr Lloyd have been designated lead cases under a direction made under rule 18 of the Tribunal Rules on 24 August 2017 (the "lead cases"). The appeals are due to be heard by the First-tier Tribunal in December 2018. The enquiry in the holding company relevant to the lead cases, Winn & Co (Yorkshire) Ltd, was concluded on 16 March 2016. The closure notice stated that HMRC did not need to make any amendments to the company's tax return.

6. On 8 December 2015 HMRC decided to open enquiries into 23 further users of the DRS ("the second sample"), and to seek full documents from some users and a limited list of documents from the other users of the scheme. As noted above, Uppercut is one of the cases where a limited list of documents has been requested and Cliftonville is an example of the cases where full documents have been sought.

7. The first sample of ten cases and the second sample of twenty three cases together represent 10% of the 300 companies plus that have implemented the DRS. There is no representative sample agreement ("RSA") in place in relation to either sample for the DRS.

Evidence and findings of fact

8. The Tribunal was provided with two bundles of documents prepared by HMRC and two bundles prepared by the Appellants. HMRC officers Hilary Woolston and Timothy Lintott provided witness statements and gave oral evidence. Mrs Woolston joined HMRC's Counter Avoidance business unit in August 2014 and was the HMRC technical lead for the DRS arrangement between September 2014 and June 2016, and is technical lead for the arrangement again since November 2017. Mr Lintott joined HMRC's Counter Avoidance business unit in November 2013 and was HMRC technical lead for the DRS arrangement from June 2016 until November 2017. On the basis of the evidence I make the following findings of fact:

8.1 Uppercut's tax return and computation accounts for the accounting period ended 31 May 2012 include a CT600J disclosure that the company had implemented a scheme with the reference number 19509036. It noted that the end date of the expected advantage is 31/05/2012. Uppercut's accounts include the following notes:

"During the year to 31 May 2012, the company incorporated a subsidiary company, Chris Squared Films Limited, acquiring 100% of the Ordinary A share capital."

"Subsequently, the company acquired an additional Ordinary A share in Chris Squared Films Limited for £400,001. Due to a dividend payment in the year by Chris Squared Films Limited, an impairment was required against this investment of £400,000."

Chris Squared Films Limited is referred to as "the subsidiary" below.

8.2 On 28 February 2014 HMRC opened an enquiry into Uppercut's corporation tax return for the period ended 31 May 2012.

8.3 As noted in paragraph 5 above, Uppercut was not one of the users of the DRS selected as part of the first sample and its shareholder has not made an appeal that is stayed behind the lead cases. Ms Woolston decided that the first sample was not adequate to provide a sufficiently large enough pool of cases to establish how the scheme operated and she decided to increase the pool. On 12 February 2016 HMRC made an informal request to Uppercut to provide five documents relating to its use of DRS. As the documents were not supplied by Uppercut, HMRC issued a notice under paragraph 1 of schedule 36 to the Finance Act 2008 requiring the documents on 12 August 2016 ("the Notice"). The information notice states that the officer, Mr D O'Hara, believes that the documents are reasonably required "so that I can check the company's Corporation Tax position. I need them so that I can further consider the tax consequences of the company's use of the Dividend Replacement Strategy (known as "Aikido") scheme, having DOTAS reference number 19509036."

8.4 Uppercut's representative, Reynolds Porter Chamberlain LLP ("RPC"), appealed against the notices issued to some 5 of their clients, including Uppercut. The appeal was acknowledged and, as HMRC confirmed their decision, RPC requested a review of the decision. The statutory review concluded by letter dated 12 January 2017 that all the items on the Notice are reasonably required for the purpose of checking the company's tax position and the HMRC's decision to include those items on the Notice was upheld.

8.5 Uppercut appealed to the Tribunal on 20 January 2017.

Law

9. The Notice was issued by HMRC under the powers given in schedule 36, Finance Act 2008 ("Schedule 36"). Paragraph 1(1) of Schedule 36 provides:

"(1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")—
(a) to provide information, or
(b) to produce a document,
if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position."

10. Paragraph 58 of Schedule 36 provides that "checking" includes carrying out an investigation or enquiry of any kind. Paragraph 63 provides that, except where the context otherwise requires, "tax" means all or any of a list of taxes including income tax, capital gains tax, corporation tax and VAT. It also specifies that in Schedule 36 "corporation tax" includes any amount assessable or chargeable as if it were corporation tax.

11. Paragraph 64 of Schedule 36 provides that "tax position", in relation to a person, means the person's position as regards any tax, including the person's position as regards past, present and future liability to pay any tax and, where appropriate, a

reference to the person's position as regards any deductions or repayments of tax, or of sums representing tax, that the person is required to make under PAYE regulations.

12. HMRC's power under Schedule 36 is restricted under paragraph 21 where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns). In these circumstances a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period unless, or only to the extent that, certain conditions are satisfied. These include circumstances in Condition A in which a notice of enquiry has been given in respect of the return and those in Condition D in which the notice is given for the purpose of obtaining any information or document that is required for the purpose of checking the person's position as regards any deductions or repayments of PAYE.

13. The restrictions in Part 4 of Schedule 36 also state at paragraph 23 that an information notice does not require a person to provide privileged information, or to produce any part of a document that is privileged as it is information or a document in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

14. Part 5 of Schedule 36 sets out the provisions allowing a taxpayer who is given a taxpayer notice to appeal against the notice or any requirement in the notice, unless the tribunal has approved the giving of the notice in accordance with paragraph 3 of Schedule 36. On an appeal the tribunal may:

"(a) confirm the information notice or a requirement in the information notice,
(b) vary the information notice or such a requirement, or
(c) set aside the information notice or such a requirement."

Submissions

15. Uppercut claim that HMRC's decision to issue the Notice is wrong in fact and in law. The information sought is not 'reasonably required' by HMRC for the purpose of checking Uppercut's tax position. Uppercut submit that none of the documents requested has any bearing on its corporation tax position. HMRC should not be permitted to use the Notice in order to circumvent the much tougher requirements (in paragraphs 2 and 3 of Schedule 36) to obtain the approval of the Tribunal for a third party notice relating the individuals who have asserted the tax benefit.

16. Uppercut submit that the burden of proof of showing that the officer reasonably requires the documents in the Notice is on HMRC.

17. HMRC submit that each item requested is reasonably required to check Uppercut's tax position. The purpose of the request for the documents is to examine the precise implementation of the scheme by Uppercut and it will not be until this is supplied that HMRC can make its analysis of the tax position. HMRC acknowledges that where the scheme has been implemented correctly with no unusual features, for the users examined in detail to date, it considers that the tax consequences arise on the individual shareholders. However, it is Uppercut, and not the shareholders, who have

implemented the scheme and until that implementation has been reviewed in detail, it is not possible to say what the precise tax consequences may be, and on whom they arise.

18. Neither party addressed the question of whether of the items requested in the Notice form part of the taxpayer's statutory records.

Ground of appeal regarding the sample not within the Tribunal's jurisdiction

19. RPC's response to the informal request for documents in February 2016, the grounds of appeal in their letter of appeal dated 9 September 2016, the notice of appeal to the Tribunal and the Skeleton Argument prepared for the hearing all raise the issue of HMRC's decision to broaden the sample. Uppercut submit that it was neither reasonable nor appropriate for HMRC to extend the sample.

20. HMRC accept that an informal agreement was reached regarding the size of the sample but, in the absence of an RSA, they decided that the sample should be extended.

21. It was agreed by the parties that the decision to expand the sample is not an appealable decision within the jurisdiction of this Tribunal but a question for judicial review.

Burden of proof

22. Mr McDonnell submitted in opening that HMRC bear the burden of proof of showing that the documents listed in the Notice are 'reasonably required'. This was not raised in its Skeleton Argument. Mr Shea did not make a submission in response, but he said that HMRC had discharged the burden of proof by producing their witness evidence.

23. Mr McDonnell's argument is that, in the absence of statutory guidance on the burden of proof, it is a tenet of civil litigation that the burden of proof is on the party who asserts that position.[1] He contrasts this with the provisions of section 50 Taxes Management Act (tax appeals against assessments) that state that HMRC's decision (the assessment) shall "stand good" if the tribunal is not persuaded by the appellant that it should be reduced. Mr McDonnell referred to the detailed analysis of the case law on Schedule 36 and the precursor provision by Judge Redston in *Joshy Mathew v The Commissioners for Her Majesty's Revenue & Customs* [2015] UKFTT 139 (TC) ("*Joshy Mathew*"), but asked the Tribunal to take a different view on the basis that the authorities relied upon by Judge Redston related to the judicial review of third party notices that had been approved by the tribunal before their issue. He submits that it is

[1] The authority cited in *Phipson on Evidence* (19th edn, 2017 at 6-06) for the general rule that the burden of proof lies upon the party who substantially asserts the affirmative of the issue is *Robins v National Trust Co* [1927] A.C. 515 at 520. The passage goes on to explain that in deciding which party asserts the affirmative; regard must be had to the substance of the issue. This means that where a given assertion, whether affirmative or negative, forms an essential part of a party's case, the proof of such assertion rests on him.

not appropriate to apply the presumption of regularity to the objective condition for the issue of a notice under paragraph 1(1) Schedule 36 and so the burden of proof should be determined in accordance with the general rules of evidence.

24. I have taken HMRC's statement that it considers that it has discharged the burden of proof and its decision not to make a submission in response on this issue as agreement that I should consider this case on the basis that it has the burden of proof. This reflects the position that HMRC appear to have taken in a number of recent cases as referred to in paragraphs 28, 29 and 30 below. However, in case this does not represent HMRC's position, I have set out below why I have considered the appeal on the basis that the burden is on HMRC to establish that the documents are reasonably required for the purpose of checking the company's tax position.

25. In Joshy Mathew Judge Redston set out a cogent analysis of the cases of R v Commissioners of Inland Revenue ex parte T C Coombs & Company [1991] 2 AC 283 ("Coombs") and R (oao) Derrin Brother Properties Ltd v HMRC [2014] EWHC 1152 (Admin) ("Derrin") and, in particular, the 'presumption of regularity'. This is a presumption that a statutory authority has acted lawfully and in accordance with its duty, with the result that it is for the other party to rebut this presumption. Judge Redston concluded that "the weight of authority is that the burden of proof in relation to the "reasonably required" test in Schedule 36 notices rests on the appellant, and not on HMRC." The decision notes that this conclusion was reached in the absence of a decision of the Upper Tribunal or courts on this issue in the context of Schedule 36 notices provided to taxpayers, and concedes that, because of the differences between these cases and the applications for judicial review of a third party notices considered, "it remains arguable that the burden is on HMRC."

26. In Gold Nuts Limited; R Square Properties Limited; Corona Properties Limited; Bronze Nuts Limited; Venture Pharmacies Limited; Blackbay Ventures Limited v The Commissioners for Her Majesty's Revenue & Customs [2017] UKFTT 354 (TC) ("Gold Nuts") Judge Redston referred to her earlier conclusion in Joshy Mathew but, as neither party made a submission on the issue, she proceeded on the basis that the burden rests with HMRC.

27. In *Eudora Thompson v HMRC* [2013] UKFTT 103 (TC) Judge Brannan found that the onus of proof in relation to an appeal in respect of an information notice lies upon HMRC. He noted that where the information notice specifies information or a document which is reasonably required for statutory purposes and that information or document (such as a bank or credit card statement) is prima facie within the taxpayer's possession or power, the burden shifts to the taxpayer to demonstrate why that information or document cannot be produced.

28. In *New Way Cleaning Limited v The Commissioners for Her Majesty's Revenue & Customs* [2017] UKFTT 293 (TC) Judge Brannan refers to Judge Redston's conclusion in *Joshy Mathew*, but noted that "HMRC accepted that it bore the burden of proof in this case and it seemed to me that this was a pragmatic and sensible way to proceed."

29. In *Marylin May Phillipou v HMRC* [2017] UKFTT 20 (TC) HMRC "were content to accept that the burden of establishing that the information sought by the notices was reasonably required, was on them" and the appellant agreed with this approach. Judge Popplewell referred to the discussion in *Joshy Mathew*, but concluded that as HMRC had met the burden of establishing that the information sought by the notices was reasonably required, the tribunal did not need to decide this point.

30. Similarly, in *Codexe Limited v HMRC* [2017] UKFTT0569 (TC) Judge Mosedale approved the conclusion reached by the tribunal in *Joshy Mathew*, but HMRC had proceeded on the basis it had the burden of proof and it was found that it had met the burden.

31. I also agree with the analysis in *Joshy Mathew*, but I find that a point made in the later decision of the Court of Appeal in *Derrin* [2016] EWCA Civ 15 suggests that there is a third alternative of taking a combined view of the procedures in relation to third party notices. This would favour a conclusion that an appeal to the tribunal in relation to a taxpayer notice should not be compared with the position on either *ex parte* proceedings or an application for judicial review in isolation, but with the combined procedures for third party notices for the reasons, and with the consequences, explained below.

32. In the Court of Appeal decision in *Derrin* Sir Terence Etherton C said (at paragraph 80) "Parliament has balanced those extensive rights of HMRC to obtain documents and information from third parties, at the investigatory stage of checking possible tax avoidance or evasion, with a number of protections against abuse and excessive intrusion by the executive". In the context of the appellants' challenge that their rights were infringed because judicial review does not allow appellants access to court to determine whether the documents the subject of the notice are 'reasonably required' he concludes (at paragraph 114) that he "cannot see any good reason why the judicial monitoring scheme in Schedule 36 *combined with* [my emphasis] judicial review should not be sufficient to satisfy the appellants' article 6 rights combined with article 8 [of the European Convention for the Protection of Human Rights]".

33. The power under paragraph of 2 Schedule 36 to issue a third party notice requires the information or document to be reasonably required by the officer for the purpose of checking a tax position in the same way as a taxpayer notice, but it may not be given without the agreement of the taxpayer or the approval of the tribunal. What is significant is that the protection in paragraph 3(3)(b) Schedule 36 sets a condition that the tribunal may not approve the giving of either a taxpayer notice or a third party notice unless it is satisfied "that, in the circumstances, the officer giving the notice is justified in doing so".

34. The extracts from the authorities cited in *Joshy Mathew* and below confirm that a 'presumption of regularity' applies to the officer's decision, but that it becomes "strong" when the decision is approved because the tribunal is satisfied that the officer is justified in issuing the notice. The presumption of regularity in relation to the exercise of information powers is most clearly described by Lord Lowry in *Coombs* as follows (in the context of the provisions of section 20 TMA):

"Parliament designated the inspector as the decision-maker and also designated the commissioner as the monitor of the decision. A presumption of regularity applied to both … the presumption that the inspector acted *intra vires* when giving the notice can only be displaced by evidence which cannot be reconciled with the inspector's having had the required reasonable opinion."

35. This presumption, and the role of the tribunal with regard to third party information notices, was considered by Simler J in *Derrin* in the judicial review hearing (at paragraphs 14, 15 and16) who concluded that:

"It follows that the tribunal must be satisfied not merely that the officer holds the relevant opinion that the documents are reasonably required for checking the tax position of the taxpayer and is justified in so concluding, but also that as a matter of fact, the factual matters identified in Sch 36 para 3(3) are satisfied."

"A number of further matters in relation to third party notices of this kind are well established by reference to the predecessor s 20 TMA 1970 scheme and apply with equal force to Sch 36 notices, as the parties agreed. First, and significantly, as held in *R v Commissioners of Inland Revenue ex parte T C Coombs & Company* [1991] 2 AC 283, 300C-F, 302E-F, [1991] 3 All ER 623, [1991] STC 97 (Lord Lowry) the tribunal is the independent person designated by Parliament with the duty of supervising the exercise of HMRC's intrusive powers. Parliament designated the officer as the decision-maker and the tribunal as the monitor of the decision. A presumption of regularity applies to both, and is strong in relation to the tribunal in particular."

"Accordingly, in challenging a third party notice, what must be proved are facts which are inconsistent or irreconcilable with the authorised officer's conclusion that documents are reasonably required for checking the taxpayer's tax position and the tribunal being satisfied that the officer is justified in the circumstances in giving that notice. The resolution of this question will usually depend on confidential information or evidence which is not before the court on judicial review. The tribunal, able to receive such confidential information or evidence in an ex parte hearing, is therefore in a much better position to make a proper appraisal of it than this court on judicial review. The fact that the tribunal, having heard an application, approved the giving of the notice is therefore evidence which the court should take account of in this respect, not least since the tribunal's approval is the real and intended safeguard in the statutory scheme."

36. This last passage demonstrates that the officer is to provide information or evidence to the tribunal so that it can appraise whether the he is justified in issuing the third party notice. While this is required as part of the combined mechanism to provide protections on the issue of third party notices in the absence of a right of appeal, it is clear that the presumption of regularity in relation to the officer's decision is not expected to be sufficient to satisfy the tribunal without the officer providing his reasons, information or evidence to allow the tribunal to appraise his decision.

37. The weight attached to the commissioner's consent (the tribunal's approval) by Lord Lowry in *Coombs* was also referred to by Sir Terence Etherton in the Court of Appeal in *Derrin* as follows (at paragraph 11):

> "He said that, where the commissioner gave his consent, there was a presumption that he reasonably held the opinion that the tax inspector (giving the third party notice) was justified in proceeding under section 20, and that presumption could only be displaced by evidence showing that the inspector could not reasonably have held the opinion (required by section 20(3)) that the documents specified in the third party notice contained or may have contained information relevant to the taxpayer's tax liabilities."

38. This passage considers the officer's decision to issue the third party notice, the judicial monitoring of an officer's decision and the application for judicial review as a combined picture for the purpose of determining the onus, and reflects the combined view referred to in paragraphs 31 and 32 above.

39. It is suggested that if this combined view of procedures in relation to third party notices is compared with the position on an appeal against a taxpayer notice, the starting position is that the condition for the issue of an information notice under both paragraphs 1 and 2 of Schedule 36 is that the officer reasonably requires the information or a document for the purpose of checking the taxpayer's tax position. If the approval of the tribunal is sought and obtained for the issue of a third party notice, the appellant will bear the burden on an application for judicial review because the tribunal has confirmed that the officer has already satisfied the conditions for the approval of the third party notice, creating the strong presumption of regularity. If the approval of the tribunal is not sought it still remains a condition that the information or document is reasonably required by the officer and this is to be established by HMRC when a taxpayer appeals to the tribunal. In this case, HMRC must establish its assertion that the items requested are reasonably required by the officer for the purpose of checking the appellant's tax position, and then the onus is on the appellant on the grounds of its appeal, including grounds that an item is not a statutory record or that a restriction in Part 4 of Schedule 36 applies. This approach reflects the position on a combined view of the procedures in relation to third party notices.

Discussion

40. The question for the Tribunal under paragraph 32(3) of Schedule 36 is whether the requirements of the Notice should be confirmed, varied or set aside. I have considered each of the requirements of the Notice below, but the parties made the same submissions in relation to a number of the requirements and these are therefore addressed first to put my comments on the specific items in context.

Uppercut's tax position v tax position of the individual

41. Mr McDonnell submits that as the Notice states that the documents are required so that the officer "can check the company's Corporation Tax position" it is not open to HMRC to require them to check the company's tax position more generally. It was

open to HMRC to check a wider range of issues, including the company's position with regard to deductions or repayments of PAYE, but the drafting of the Notice limits the check to the company's corporation tax position. Mrs Woolston referred to the drafting an 'unfortunate', but it reflects the fact that HMRC's enquiry is into the company's corporation tax return for the period ending 31 August 2012.

42. I accept Mr McDonnell's submission that the drafting of the Notice has limited the purpose for which the documents can be required to checking the company's corporation tax position.

43. Mr McDonnell also submits that, other than the engagement letter, not one of the documents listed in the Notice is reasonably required to check the corporation tax position of Uppercut. The investment in the subsidiary and the payment of a dividend by the subsidiary does not give rise to corporation tax for the parent. The DRS only affects the individuals' tax position and the Notice cannot be used to require documents to check the individuals' tax position. Even if the DRS fails for some reason and the dividend is re-characterised as a dividend paid by the parent to the individuals, that would not result in any corporation tax consequences for the company.

44. Mr Shea submits that the DRS is an arrangement that transferred value from Uppercut to its director shareholders. This may be taxed a dividend paid by the company or the subsidiary (which would have no tax consequences for the company as Mr McDonnell submits), or it may be found that the DRS implementation gave rise to a loan or remuneration which could have tax consequences for the company, but "checking" includes determining whether the tax position is as claimed or whether a different treatment should apply. Mrs Woolston gave the example that a charge may have arisen under section 455 Corporation Act 2010 if the DRS was implemented in a way that gave rise to a loan or advance to a participator or to the trustees of a settlement of which a participator is a potential beneficiary.

45. I agree with Mr Shea that "checking" Uppercut's corporation tax position includes carrying out an enquiry into whether its declaration of the company's tax position as a result of its implementation of the DRS is full and correct as it is not possible to be sure that this tax treatment applies until the documents have been reviewed. HMRC accept that the tax consequences arise on the individuals and not the company where the scheme has been implemented correctly and has no unusual features, but it is not a speculative or far-fetched proposition (as Mr McDonnell submits) that a different tax position could have arisen if the arrangements, which transferred value from a company to director shareholders, gave rise to remuneration or a loan. It is not for this Tribunal to decide whether there are any tax implications for the company as a result of implementing the DRS, but to consider whether the documents in the Notice are reasonably required to allow HMRC to carry out this enquiry.

46. The checking may therefore include an investigation into how the arrangement should be characterised for the company given the terms of the documents used and, based on HMRC's conclusion, checking whether the company's return of the transaction is full and correct. The checking must be based on the arrangements that

the company has implemented. This checking may or may not result in a corporation tax charge or amendment to the company's tax computation. The fact that Mrs Woolston has suggested that the scheme could be treated as giving rise to remuneration, a loan or a dividend does not limit the "checking" to a consideration of these possibilities in order to determine if the corporation tax return is correct or whether a closure notice should include an adjustment for the remuneration expense or a charge under section 455. For example, as the company has claimed a deduction for the fees incurred in the implementation of the DRS, HMRC's "checking" will include a determination of the deductibility of the fees paid.

Tax Avoidance Scheme / Lead case

47. Both parties made submissions that refer to the fact that the items in the Notice relate to arrangements entered into by the company for purposes of the tax avoidance scheme registered under DOTAS number 19509036.

48. HMRC's position is summarised in the statement made in the independent review of its decision that "the company has used a tax avoidance scheme, the items requested pertain to that tax avoidance scheme, it follows that those items are reasonably required by HMRC to check the company's tax position." At the hearing Mr Shea took this submission further to say that the Tribunal should stand back and see what HMRC is seeking to check and then consider whether the list of items is reasonably required for the purpose of checking what the scheme is and how it was implemented, notwithstanding that certain items may have no immediate relevance in isolation.

49. It is to be expected that HMRC's powers to obtain information may be used when they suspect that tax has been avoided using a marketed scheme, but there is no different test to be applied under Scheme 36 in these circumstances. I have considered each document on the basis that it may only be requested if it is reasonably required for the purpose of checking Uppercut's corporation tax position.

50. Mr McDonnell seeks to rely on the fact that the DRS has been disclosed, and that extensive enquiries into the implementation of the scheme by other taxpayers have concluded in rule 18 litigation that seeks only to charge the individual to tax, as evidence that HMRC cannot reasonably require the items listed in the Notice to check the company's tax position and that a more reasonable approach would be to await the outcome of the lead cases.

51. HMRC have opened an enquiry into Uppercut's corporation tax return and issued the Notice in relation to its tax position, but it is not at the stage of litigation nor is its shareholder within the rule 18 direction relating to the lead cases. It is not open to Uppercut to seek to delay either process behind the lead cases that concern litigation in relation to the tax treatment of the scheme for individual beneficiaries of the first sample of cases. Each item in the Notice must be considered in the context of the whether it is reasonably required to check the corporation tax position of Uppercut based on its implementation of the scheme.

Consideration of the Specific Requirements of the Notice

The Notice is set out in full in the Appendix to this decision. The letters and numbering used below refer to those used in the Notice set out in the Appendix.

Documents 1 and 2 – Engagement letter and Advice Letter

52. HMRC's evidence is that these documents will help them to understand how the scheme was expected to work by reference to the specific needs and requirements of the business. They may also help HMRC to consider the nature and purpose of the company's expenditure. Uppercut submits that these documents relate to the tax position of the individuals rather than that of the company, and that it is difficult to see how the engagement letter is relevant to the company's tax position other than in relation to the claim for a corporation tax deduction in respect of the fees payable under this agreement.

53. I accept Mr Lintott's evidence that an engagement letter is reasonably required for the purpose of checking the company's corporation tax position as Uppercut has claimed a corporation tax deduction for the fees incurred under the terms of the engagement letter.

54. If a deduction had not been claimed I agree that it is difficult to see how the officer could reasonably require a copy of the engagement letter to determine how a scheme such as the DRS was in fact implemented or for the purpose of checking the company's corporation tax position.

55. I note with regard to document 2 that a taxation advice letter in the company's hands falls outside the restrictions in paragraph 25 Schedule 36, and that Mr McDonnell has not raised any of the other restrictions in Part 4 Schedule 36 in relation to the advice letter. I therefore have to consider whether I am satisfied that HMRC reasonably require the advice letter for the purpose of checking the company's corporation tax position.

56. I agree with Uppercut that advice cannot determine a company's tax position without more, but the inclusion of the restriction in paragraph 25 demonstrates that Parliament considered that there could be circumstances in which HMRC may reasonably require tax advice for the purpose of checking a company's tax position. HMRC's evidence is that as the advice letter sets out how the DRS is to work by reference to the specific needs and requirements of the business, as compared to the generic scheme which HMRC is aware of, it is reasonably required to help them check the analysis of the company's corporation tax position. For example, it will assist them to consider the nature and purpose of the expenditure incurred and the payments made. It may also confirm the company's commitment to pay the fee.

57. Uppercut's submission that the advice letter relates to the tax position of the individual shareholder ignores the fact that the document requested is a letter

addressed to the company that relates to its steps to implement and report the tax consequences of the DRS.

58. On the balance of probabilities I accept that this item is reasonably required for the purpose of checking the company's tax position because will assist HMRC to consider the nature and purpose of the expenditure incurred and the payments made.

Documents 3, 4 and 5 – Nominee deed, Letter of direction in respect of dividends and Minutes of board meeting to pay dividend

59. HMRC's evidence is that document 3 will help them to understand the nominee element of the arrangement and the company's interest in the scheme. Mr Lintott's evidence is that document 4 is required to confirm the amounts actually paid to the individual beneficiaries of the scheme and the company. Similarly document 5 is required to establish the amounts paid. He explained that the amounts actually paid are relevant to determining the fee payable for the scheme and to consider its deductibility. Once this check has been completed HMRC will issue closure notices in respect of any amendments to the corporation tax return. In addition each of these documents is required to check the tax position of the company as a result of the implementation of the scheme.

60. Uppercut submits that documents 3, 4 and 5 relate to other taxpayers (the trustees and the subsidiary company), and that they are not relevant to any issue relating to the tax position of the company.

61. I accept that HMRC has satisfied the burden of proof that documents listed at 3, 4 and 5 are reasonably required to determine how the arrangements were implemented for the purpose of checking the company's tax position for the reasons set out in paragraphs 45 and 46 above.

Decision

62. I confirm the Notice.

63. . As this appeal is representative of a number of appeals and arrangements will need to be made in relation to all of the companies concerned, I have not specified the period within which Uppercut must comply, but it must comply within such period as is reasonably specified in writing by an officer of Revenue and Customs following the release of this decision.

64. This document contains full findings of fact and reasons for the decision. There is no right of appeal in respect of this decision as stated in paragraph 32(5) Schedule 36 Finance Act 2008.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 23 APRIL 2018

APPENDIX

Schedule of documents needed to carry out our check

Documents

1. a copy of the Engagement Letter returned to Premier Strategies Ltd by your company, to include the completed Confirmation of Engagement section.

2. a copy of the Advice Letter returned to Premier Strategies Ltd by your company, to include the completed Confirmation of Advice Letter section.

3. a completed copy of the deed under which R T Corporate Trustee Ltd holds an interest in a share as nominee, under the "Aikido" scheme of arrangement.

4. a copy of the Letter of Direction issued for and on behalf of R T Corporate Trustee Ltd in respect of any dividends paid on the shares held, as detailed at item 3 above.

5. a completed copy of the minutes of the Board Meeting(s) at which it was resolved to pay a dividend(s) by the company which issued the share, as detailed at item 3 above.

Notes

In this context 'document' means anything in which information of any description is recorded. This includes any records held on computer, magnetic tape, optical disk (CD-ROM/DVD), hard disk, memory stick, flash drive, floppy disk or other recording media.