[2021] UKFTT 0058 (TC)

TC08043

INCOME TAX, CAPITAL GAINS TAX AND CORPORATION TAX – disclosure of tax avoidance schemes – applications for orders that arrangements arising pursuant to the implementation of two schemes involving the acquisition and disposal of film rights were, or should be treated as, notifiable under either Section 314A or Section 306A of the Finance Act 2004 – held that each set of arrangements was notifiable because it fell within the description in either paragraph 10 or paragraph 12 of the Arrangements Regulations and gave rise to tax advantages for the participants which were the main benefit that might be expected to arise from it – orders to that effect made under Section 314A of the Finance Act 2004

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/00444; TC/2018/00441

BETWEEN

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

-and-

PREMIERE PICTURE LIMITED — **Respondent**

TRIBUNAL: JUDGE TONY BEARE

The hearing took place on 11 and 12 February 2021. The form of the hearing was V (video) on the Tribunal video platform. A face-to-face hearing was not held because of the COVID 19 pandemic. The documents to which I was referred included a documents bundle of 3417 pages (the "DB") and an authorities bundle of 539 pages. Together, these contained the written evidence, legislation and case law relevant to the hearing.

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.

Mr Christopher Stone, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Applicants

Mr David Southern QC and Mr Michael Avient, counsel, instructed by JS and Co LLP, for the Respondent

DECISION

INTRODUCTION

1. This decision is concerned with the question of whether two schemes which were connected with film production fell within the ambit of Sections 306 to 319 of the Finance Act 2004 (the "FA 2004") - the provisions in the UK tax legislation relating to the disclosure of tax avoidance schemes – and regulations which are ancillary to those provisions in the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations (SI 2006/1543) (the "Arrangements Regulations"). For the purposes of this decision, unless otherwise indicated, all references to section numbers are to sections in the FA 2004.

2. The schemes in question were designed to encourage investment in the film industry by giving rise to losses for those who invested in the schemes in circumstances where the losses could be offset against the other income or capital gains of the participants ("sideways loss relief").

3. One of the schemes involved an investment by individuals in a general partnership (a "GP") which dealt in film rights (the "Sovereign Individual Scheme"), whilst the other involved an investment by owner-managed private companies in a limited liability partnership (an "LLP") which dealt in film rights (the "Sovereign Corporate Scheme"). It is common ground in these applications that both arrangements were based on earlier arrangements which were first implemented in November 2005 under which a sole trader dealt in film rights (the "Trader Scheme") and that the only difference between the Trader Scheme and the Sovereign Individual Scheme was that the former involved an acquisition and disposal of film rights by individuals as sole traders whereas the latter involved the same activities by individuals acting together through a GP. It is also common ground in these applications that the Sovereign Individual Scheme was first implemented in March 2009 and that the Sovereign Corporate Scheme was first implemented in December 2010.

4. Both of the applications which are the subject of this decision were made by the Applicants on 20 December 2017.

5. The application in relation to the Sovereign Individual Scheme was for an order that:

(1) under Section 314A, the arrangements which arose when an individual became a participant in the Sovereign Individual Scheme were "notifiable arrangements" (as defined in Section 306(1)) in relation to which the Respondent was the "promoter" (as defined in Section 307); or

(2) in the alternative, under Section 306A, the arrangements which arose when an individual became a participant in the Sovereign Individual Scheme should be treated as "notifiable arrangements" (as defined in Section 306(1)) in relation to which the Respondent was the "promoter" (as defined in Section 307).

6. The application in relation to the Sovereign Corporate Scheme was for an order that:

(1) under Section 314A, the arrangements which arose when an individual became a participant in the Sovereign Corporate Scheme were "notifiable arrangements" (as defined in Section 306(1)) in relation to which the Respondent was the "promoter" (as defined in Section 307); or

(2) in the alternative, under Section 306A, the arrangements which arose when an individual became a participant in the Sovereign Corporate Scheme should be treated as

"notifiable arrangements" (as defined in Section 306(1)) in relation to which the Respondent was the "promoter" (as defined in Section 307).

7. On 4 April 2019, Judge Poole directed that the two applications were to be joined (but not consolidated) and heard together.

THE RELEVANT LAW

8. As noted above, the applications have been made under the rules requiring the disclosure of tax avoidance schemes which are set out are in Part 7 of the FA 2004 and in various sets of regulations which have been enacted pursuant to those provisions.

The primary legislation

9. The rules in relation to the disclosure of tax avoidance schemes were introduced initially in 2004 but have been the subject of numerous changes since then. Indeed, the two sections to which each application relates were not introduced until 2007.

10. Section 314A provides as follows:

"314A Order to disclose

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

(a) a proposal is notifiable, or

(b) arrangements are notifiable.

(2) An application must specify—

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

(b) the promoter.

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

11. Section 306A provides as follows:

"306A Doubt as to notifiability

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

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

(b) arrangements are to be treated as notifiable.

(2) An application must specify—

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

(b) the promoter.

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

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

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

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

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

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

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

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

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

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

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

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

12. There are several features of the above provisions which are worth noting, as follows:

(1) first, both provisions distinguish between notifiable arrangements, which are defined by reference to the three conditions in Section 306(1), and notifiable proposals, which are proposals to enter into arrangements which, if entered into, would be notifiable arrangements. That distinction runs throughout Part 7 of the FA 2004 and the regulations made thereunder. For instance, Section 308 requires the disclosure of a notifiable proposal to be made within a prescribed period of the "relevant date", as defined in Section 308(2), whereas that section requires the disclosure of notifiable arrangements to be made within a prescribed period of the promoter's becoming aware of any transaction forming part of those arrangements;

(2) secondly, it is clear that the issue which falls to be determined pursuant to an application under either section in relation to arrangements is merely to decide whether or not to make an order that the relevant arrangements are notifiable or are to be treated as notifiable. Neither section requires the application to specify when the relevant arrangements were implemented or should have been notified. I must confess that, in the context of legislation which has changed in various respects over the period between the date when the two sections were added to the regime and the date when the relevant applications in this case were made, I find this omission somewhat strange. Having said that, the omission inevitably raises a question as to whether the form of the legislation which needs to be applied in determining whether the specified arrangements are, or should be treated as, notifiable, is the form which it took when the relevant arrangements were first implemented or the form which it took when the relevant application was made.

It is common ground – and I share this view – that the answer to that question is that it is the former. That is to say that, in this case, whether or not arrangements arising pursuant to the implementation of the Sovereign Individual Scheme are, or are to be treated as, notifiable should be determined by reference to the legislation as it stood in March 2009, when the first set of arrangements arising pursuant to the implementation of the Sovereign Individual Scheme were implemented, whilst whether or not arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme are, or are to be treated as, notifiable should be determined by reference to the legislation as it stood in December 2010, when the first set of arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme were implemented. In passing, I note that this was the approach agreed by the parties in *The Commissioners for Her Majesty's Revenue and Customs v Curzon Capital Limited* [2019] UKFTT 0063 (TC) ("*Curzon*") and adopted by Judge Poole at paragraphs [46] and [47] in his decision in that case;

(3) thirdly, both Section 314A and 306A are worded in a way that might be taken to suggest that the First-tier Tribunal has a discretion as to whether or not to make an order under the relevant section even if all of the conditions set out in Section 306(1) are met – see Section 314A(3) and Section 396A(3). I address this question in more detail in the discussion in paragraphs 124 to 135 below; and

(4) finally, both provisions require that the order identifies the promoter. The definition of promoter is set out in Section 307. However, as it is common ground that, if the arrangements arising pursuant to the implementation of either or both schemes are, or are to be treated as, notifiable, then the Respondent was the promoter of the relevant arrangements, I do not propose to address that question in this decision.

13. In March 2009 and December 2010, the following were the relevant provisions in Part 7 of the FA 2004:

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

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

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

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

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

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

308 Duties of promoter

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

(2) In subsection (1) "the relevant date" means….

(3) A person who is a promoter in relation to notifiable arrangements must, within the prescribed period after the date on which he first becomes aware of any transaction forming part of the notifiable arrangements, provide the Board with prescribed information relating to those arrangements, unless those arrangements implement a proposal in respect of which notice has been given under subsection (1)….

(5) Where a person is a promoter in relation to two or more notifiable proposals or sets of notifiable arrangements which are substantially the same (whether they relate to the same parties or different parties), he need not provide information under subsection (1) or (3) if he has already provided information under either of those subsections in relation to any of the other proposals or arrangements….

318 Interpretation of Part 7

(1) In this Part—

“advantage”, in relation to any tax, means—

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

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

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

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

“tax” means—

(a) income tax,

(b) capital gains tax,

(c) corporation tax,…”

<u>The Arrangements Regulations</u>

14. One of the conditions in the definition of notifiable arrangements in Section 306 – see Section 306(1)(a) – is that the arrangements in question must fall within any description prescribed in the Arrangements Regulations.

15. The Arrangements Regulations took effect from 1 August 2006 and, as at March 2009 and December 2010, the following were the provisions in the Arrangements Regulations which were potentially relevant to the applications:

“Citation, commencement and effect

1.(1) These Regulations may be cited as the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006, and shall come into force on 1st August 2006.

(2) These Regulations do not have effect—

(a) …

(b) for the purposes of section 308(3) of FA 2004 (duties of promoter relating to any notifiable arrangements), if the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements falls before 1st August 2006;…

5.— Prescribed descriptions of arrangements

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

(2) The provisions are—

(a) ….

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

(f) regulation 12 (description 6: loss schemes);…

Description 5: standardised tax products

10.(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.

Arrangements excepted from Description 5

11.(1) The arrangements specified in this regulation are—

(a) …

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

Description 6: Loss schemes

12. Arrangements are prescribed if—

(a) the promoter expects more than one individual to implement the same, or substantially the same, arrangements; and

(b) the arrangements are such that an informed observer (having studied them) could reasonably conclude—

(i) that the main benefit of those arrangements which could be expected to accrue to some or all of the individuals participating in them is the provision of losses, and

(ii) that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax."

THE APPLICATIONS

16. I have set out in the Appendix to this decision excerpts from the applications in which the Applicants describe in some detail the arrangements arising pursuant to the implementation of each scheme.

17. For the purposes of the body of this decision, it suffices to note the following.

18. The Sovereign Individual Scheme involved capital contributions by various individual participants to a GP, the acquisition of film rights by that GP from a warehousing company which had acquired the relevant rights from the producer and then the sale of those rights by the GP to a distributor in return for a share of the future income arising from those rights. Key to the attractiveness of the scheme was the fact that, at the end of the accounting period of the GP in which the acquisition and disposal occurred, the GP was required by generally accepted accounting practice ("GAAP") to accord a low value to its interest in the film rights under the distribution agreement, with the result that the GP, and hence the individual participants, were expecting to realise a loss from the activities of the GP. That loss could then be set off against the income or capital gains of the participant by way of sideways loss relief. The income tax or capital gains tax benefit arising as a result of that relief, coupled with the fact that a significant portion of the relevant participant's contribution to the GP was funded by way of limited recourse loan, meant that, even if the film rights never produced any revenue in the future, the relevant participant would make a significant return on the part of his or her capital contribution to the GP which was not funded by way of the limited recourse loan.

19. The Sovereign Corporate Scheme worked in an identical fashion as regards the realisation of the loss in relation to the film rights. The only differences between the two schemes in that respect was that:

(1) instead of the entity which acquired and disposed of the film rights being a GP, that entity was an LLP, which, like the GP, was transparent for tax purposes;

(2) the members of that LLP (apart from the designated members, who were related to the Respondent, earned a minimal profit share and are not considered further in this decision) were not the individuals to whom the scheme was sold but instead small private companies owned by those individuals; and

(3) each company which contributed capital to the LLP was funded by way of a full recourse loan from the individual who owned the company and that individual was in turn funded by way of a limited recourse loan.

20. The features described in paragraphs 19(2) and 19(3) above meant that arrangements arising pursuant to the Sovereign Corporate Scheme gave rise to an additional tax benefit for the participants over and above the loss in relation to the film rights because each corporate member of an LLP was able to distribute to its individual owner the profits which it had made from activities other than its participation in the LLP and those distributions could be made

on a tax-free basis by way of loan repayment, instead of as payments of emoluments or distributions, which would have given rise to less attractive tax consequences.

THE EVIDENCE

21. The evidence in this case was voluminous. The DB comprised over 3,000 pages and, in addition, I heard the evidence of two witnesses – Mr Robert Jones, a tax avoidance specialist at the Applicants whose investigations into the schemes had led to the applications - and Mr David Rogers, the director and sole shareholder of Premiere Capital Limited (the parent of the Respondent at the time when the first set of arrangements arising pursuant to the implementation of each scheme were implemented).

22. The main points emerging from the DB were as follows:

(1) on each occasion that arrangements arising pursuant to the implementation of the Sovereign Individual Scheme were implemented, the main documents involved in the establishment and financing of the GP (the "Sovereign Individual Structural Documents") were as follows:

(a) an information memorandum, on the basis of which the individuals who were going to be members of the GP agreed to participate in the arrangements and the terms of which were incorporated by reference in the application form signed by the individual when he or she became a member of the GP;

(b) the GP agreement, and associated documentation, pursuant to which the individuals who were going to be members of the GP agreed to become members of the GP;

(c) a services agreement, pursuant to which the Respondent and one of its affiliates would agree to provide services to the GP, including sourcing, acquiring and selling the film rights and administering the GP, in return for an initial service fee which was generally equal to 2% of the acquisition price of the film rights acquired and an annual administration fee which was generally equal to 1% of that acquisition price;

(d) two loan agreements, pursuant to which GBF Capital Limited, an affiliate of the Respondent ("GBFL"), provided finance to the individual who was to become a member of the GP on terms which meant that the finance was ultimately limited recourse to the film rights; and

(e) a banking agency agreement, pursuant to which the relevant individual appointed an affiliate of the Respondent to handle the flows of money from GBFL to the individual and then on to the GP without the further involvement of the individual;

(2) in addition to the Sovereign Individual Structural Documents, on each occasion that arrangements arising pursuant to the implementation of the Sovereign Individual Scheme were implemented, there were 2 main types of operational documents involving the GP (the "Sovereign Individual Operational Documents"), namely:

(a) acquisition agreements, pursuant to which the GP acquired film rights from Pavilion Acquisitions Limited, a film rights warehousing vehicle resident in Guernsey ("PAL"); and

(b) distribution agreements, pursuant to which the GP sold film rights to a distributor – an entity which was often connected with the producer - in return for a share in future income;

(3) on each occasion that arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme were implemented, the main documents involved in the establishment and financing of the LLP (the "Sovereign Corporate Structural Documents") were as follows:

(a) an information memorandum, on the basis of which the individuals whose companies were going to be members of the LLP agreed to participate in the arrangements and the terms of which were incorporated by reference in the application form signed by the company when it became a member of the LLP;

(b) the LLP agreement, and associated documentation, pursuant to which the private companies who were the members of the LLP agreed to become members of the LLP. Under clauses 13.10 to 13.14 of the LLP agreement, all powers of management of the LLP, including the execution of the documents described in paragraph 22(4) below on behalf of the LLP, were delegated to an executive committee comprising only those members of the LLP who were affiliates of the Respondent;

(c) a services agreement, pursuant to which the Respondent and one of its affiliates would agree to provide services to the LLP, including sourcing, acquiring and selling the film rights and administering the LLP, in return for an initial service fee which was generally equal to 2% of the acquisition price of the film rights acquired and an annual administration fee which was generally equal to 1% of that acquisition price;

(d) a loan agreement, pursuant to which GBFL provided limited recourse finance to the individual whose company was a member of the LLP;

(e) a loan agreement, pursuant to which the relevant individual lent the money on to his or her company on full recourse terms;

(f) two banking agency agreements, pursuant to which each of the relevant individual and his or her company appointed an affiliate of the Respondent to handle the flows of money from GBFL to the individual, then on to the company and then on to the LLP, without the further involvement of the individual or company;

(g) a security package comprising:

(i) a limited recourse guarantee by the company of the loan made by GBFL to the individual;

(ii) various charges – one given by the company to the individual, one given by the company to GBFL and one given by the individual to GBFL;

(iii) a deed of priorities, the effect of which was to give priority to the amounts owed by the company to GBFL under the limited recourse guarantee; and

(iv) payment directions given by both the individual and the company, the effect of which was that any amount due to the company from the LLP was directed to be paid directly to GBFL; and

(h) an additional fees deed, under which the individual and the company agreed that an additional fee would be paid to an affiliate of the Respondent in two cases, as follows:

(i) whenever the company made a loan repayment to the individual funded out of income or resources of the company other than income received by the company from the LLP, an amount equal to 5% of that loan repayment; and

(ii) if the amount received by the company by way of tax relief in the first 5 accounting periods of the LLP was more than 120% of the amount of capital contributed to the LLP other than capital funded indirectly by way of the loan provided by GBFL, an amount equal to 25% of that excess. (Clause 1 of the deed referred simply to "returns" in general but clause 3 of the deed made it clear that the word "returns" was merely referring to returns arising as a result of corporation tax relief and did not include any revenue arising out of the film rights);

(4) in addition to the Sovereign Corporate Structural Documents, on each occasion that arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme were implemented, there were 2 main types of operational documents involving the LLP (the "Sovereign Corporate Operational Documents"), namely:

(a) acquisition agreements, pursuant to which the LLP acquired film rights from PAL; and

(b) distribution agreements, pursuant to which the LLP sold film rights to a distributor – an entity which was often connected with the producer - in return for a share in future income;

(5) the information memorandum in relation to each scheme:

(a) posited 2 possible structures for participating in the GP or LLP – one involving the limited recourse gearing referred to in paragraphs 22(1) and 22(3) above and the other involving no gearing (see pages 822, 824, 1770 and 1772 in the DB);

(b) did not provide any specific information about any particular film rights which the individual would be invited to acquire through the GP or LLP or make any financial projections in relation to those film rights but merely stated that it was not possible to quantify future revenues as that would ultimately be a function of the films' success;

(c) provided information as to the films with which the Respondent had been involved in the past, although did not disclose any information in relation to the profitability of those films (see pages 814 and 1765 in the DB);

(d) described in detail the potential tax benefit which would arise to the member of the GP or LLP as a result of the writing down of the film rights in the accounts of the GP or LLP, including an illustration of the return deriving from that tax benefit, expressed as a percentage of the portion of the capital contributed by the member to the GP or LLP which was not funded directly or indirectly by GBFL by way of limited recourse loan. The return in question was significant – the example in the information memorandum in the DB relating to the Sovereign Individual Scheme showed a potential return of between 135% and 139% and the example in the information memorandum in the DB relating to the Sovereign Corporate Scheme showed a potential return of between 204% and 212% (see pages 823 and 1771 in the DB);

(e) included within the illustration of the potential return based on the tax benefit was the fact that an additional return would be generated in the event that, following the first accounting period, the film rights were to be revalued to nil from the nominal figure at which they would be valued at the end of the first accounting period (although the overall aggregate return would be 4% (in the case of the Sovereign Individual Scheme) and 8% (in the case of the Sovereign Corporate Scheme) higher if, instead of proving totally worthless, the GP or LLP were to receive distribution income in an amount equal to the value to which the film rights were initially written down) (see pages 823 and 1771 in the DB);

(f) referred (in the case of the information memorandum for the Sovereign Individual Scheme) to an additional 25% fee which would be payable by a participant to an affiliate of the Respondent if the return derived by the relevant participant as a result of tax relief exceeded a specified amount (see page 1767 of the DB). The information memorandum for the Sovereign Corporate Scheme did not refer either to the equivalent fee based on the tax-related return mentioned in paragraph 22(3)(h)(ii) above or to the fee for loan repayments mentioned in paragraph 22(3)(h)(i) above. However, the information memorandum for both schemes also referred to an obligation to pay additional fees if the aggregate distribution income from the film rights exceeded a certain amount (see pages 817 and 1767 in the DB);

(g) contained a section to the following effect (with minor immaterial divergences between the two information memoranda):

"Of course, your intention in undertaking the Trade is to make a profit through the acquisition and exploitation of Film Rights. However, in the First Accounting Period, it is expected that the accounts of the Partnership drawn up in accordance with GAAP will reflect a trading loss due to the expenditure on the Film Rights and the likelihood that Distribution Income, once valued under GAAP, will probably be low or insignificant at that time. The Participant may benefit from any…tax relief available in respect of these accounting losses, possibly resulting in a cash flow advantage" (see pages 815 and 1764 in the DB);

(h) referred to the relevant scheme as a "ready-made business structure" (see pages 820 and 1762 in the DB); and

(i) contained a timetable for the first 2 years of the GP's or LLP's trade showing exactly when the relevant member could expect to receive the benefit of the sideways loss relief but referring less specifically to the receipt of future distribution income (see pages 826 and 1775 in the DB);

(6) a screenshot from the Respondent's website referred to the Sovereign Corporate Scheme in the following manner:

(a) on the page headed "Our Products", it invited potential participants to "trade media rights for profit with potential additional benefits for corporation tax, efficient profit extraction and resolve overdrawn director's loan accounts" (see page 1589 in the DB); and

(b) on the page describing the product in detail, it expanded on both the potential income which might be made from the film rights and the tax benefits arising from the structure (see page 1590 in the DB). In that regard, mention was made of "tax efficient profit extraction" and the ability to create a "director's loan account surplus", in addition to the loss which might arise from the writing down of the film rights in the accounts;

(7) on each occasion that film rights were acquired, the Respondent would obtain valuations from Atlantic Film Group ("Atlantic") in relation to the package of film rights which were to be acquired by the relevant GP or LLP (see pages 3046 and following in the DB) and the basis of those valuations were then verified and appraised by Shipleys LLP, an accountancy firm with acknowledged expertise in the film industry ("Shipleys") which would consider whether "the analysis, methodology and calculation have been carried out in a manner that is fair and reasonable given the analysis and the information available" (see pages 3404 and following in the DB). The valuations were provided to potential participants when they were invited to participate in the relevant film rights (see pages 1873 and following in the DB);

(8) on 19 October 2005, representatives of the Respondent (including Mr Rogers) and its advisers attended a consultation with Mr Jonathan Peacock QC in relation to, inter alia, the application of the disclosure legislation to the Trader Scheme. The note recording that consultation (at pages 3278 and following in the DB) included counsel's advice in relation to the scheme to the effect that the sole traders who participated in the arrangements should not buy film rights jointly with other participants in order to avoid being treated as being in partnership with them;

(9) on 13 December 2006, the Respondent obtained the advice of DLA Piper UK LLP ("DLA") in relation to, inter alia, the application of the disclosure legislation to the Trader Scheme (see pages 423 and following in the DB). That letter included advice to the effect that, although it was arguable that the main benefit of the arrangements arising pursuant to the implementation of the Trader Scheme was the potential returns to be derived from the acquisition and disposal of film rights and that the loss arising from that implementation was not one of the main benefits of the arrangements, that conclusion was uncertain and it would be prudent to assume for disclosure purposes that at least one of the main benefits which might be expected to arise from the arrangements was a tax advantage (see page 424 in the DB);

(10) on 1 December 2010, the Respondent obtained the advice of DLA in relation to, inter alia, the application of the disclosure legislation to the Sovereign Corporate Scheme (see pages 3301 and following in the DB). That letter included advice to the effect that, although it was arguable that the main benefit of the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme was the potential returns to be derived from the acquisition and disposal of film rights by the LLP and that the loss arising from that implementation was not one of the main benefits of the arrangements, that conclusion was uncertain and it would be prudent to assume for disclosure purposes that at least one of the main benefits which might be expected to arise from the arrangements was a tax advantage (see pages 3324 and 3325 in the DB);

(11) on 11 December 2015, the Respondent obtained the advice of Mr John Baldry in relation to, inter alia, the application of the disclosure legislation to the Sovereign Corporate Scheme. The note recording that consultation (at pages 3332 and following in the DB) tracked closely the analysis by DLA referred to in paragraph 22(10) above; and

(12) on 11 December 2007, the Applicants wrote to the Respondent to enquire into why the Trader Scheme had not been disclosed. This led to an extensive exchange of correspondence between the Applicants and the Respondent (see pages 434 and following in the DB). The Applicants accepted that the first implementation of the

scheme, which had occurred prior to 1st August 2006, was not disclosable but alleged that the implementations of the scheme which occurred after that date were within the scope of the regime (see pages 440, 441, 447, 459, 465, 468 and 473 in the DB). A meeting between the parties was held on 21 June 2010 (see page 477 in the DB), following which the Respondent made an offer to disclose the scheme subject to certain assurances from the Applicants, in particular in relation to penalties (see page 481 in the DB). On 6 August 2012, the Applicants provided the Respondent with the assurances requested and asked the Respondent to make the disclosure (see page 484 in the DB). The Respondent replied immediately to ask for more time as a result of the holiday season but, on 24 September 2012, the Applicants wrote again to request that disclosure be made (see pages 485 and 486 in the DB). On 2 October 2012, the Respondent replied to say that it was taking further advice on the matter and would respond more fully as soon as possible (see page 487 in the DB). Thereafter, there were no further communications between the parties in relation to the disclosure legislation until Mr Jones wrote his letters in March 2016 which led to the present applications in relation to the Sovereign Individual Scheme and the Sovereign Corporate Scheme.

23. Turning then to the witness evidence, I found both witnesses to be honest, credible and helpful in my consideration of the applications.

24. The main points emerging from Mr Jones's evidence were as follows:

(1) the Applicants had first become aware of the two schemes which were the subject of the applications in July 2015 and he had begun his investigations in September 2015;

(2) as a result of reaching the preliminary view that arrangements arising pursuant to the implementation of the schemes comprised notifiable arrangements, he had written to the Respondent in March 2016 to ask why the Respondent did not consider that to be the case;

(3) following comments received from the Respondent in April and May 2016, he had written to the Respondent again on 17 October 2016 to say that the Applicants would be applying for the orders which are the subject of this decision and the Respondent had replied on 4 December 2017 to set out the reasons why it did not agree with the views of the Applicants.

(4) he accepted that:

(a) the Applicants had been aware of the Trader Scheme well before July 2015 and that he had been aware when he wrote his letters of March 2016 that there had been both exchanges of correspondence and a meeting between the parties in relation to the potential application of the disclosure legislation to the Trader Scheme between 11 December 2007 and 2 October 2012 which ultimately had not led to any disclosure;

(b) the three key elements of each scheme as regards the losses to which it gave rise were the existence of a limited-recourse loan, the fact that, as a result of the operation of GAAP, a loss would arise to the relevant member of the GP or LLP in the first year of operation and that that loss would qualify for sideways loss relief. This meant that the acquisition of the film rights were central to the fact that losses would arise to the members of the GP or LLP because, without the acquisition of the film rights, the losses could not arise;

(c) the specimen initial email to the partners in one of the GPs and the specimen covering letter attaching the documents in relation to that GP had not referred either to any specific film or to the anticipated loss;

(d) the specimen email to those partners describing the film rights which it was proposed be the subject of the activities of that GP had set out three potential valuations for those rights and those valuations showed that, in certain circumstances, it was possible for significant revenues to arise from those rights;

(e) his initial correspondence had given no indication that he had conducted any comparison between the potential commercial benefits of the film rights as revealed by those valuations and the tax benefit arising out of the losses. However, he explained that this was because the likelihood that the film rights would ever give rise to revenues of the magnitude shown in the valuations was so low that he had discounted that possibility. He added that none of the 6 GPs which had been involved in arrangements arising pursuant to the implementation of the Sovereign Individual Scheme had made a profit in any of its accounting periods and that only 2 of the 55 LLPs which had been involved in arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme had ever made a profit in any accounting period. In addition, neither of those 2 LLPs had realised enough revenue to match the capital put in initially, let alone made a profit overall; and

(f) each acquisition agreement had a different definitions clause (clause 1) and schedule (description of the film delivery schedule and specification), reflecting the specific identity of the film rights acquired.

25. The main points emerging from Mr Rogers's evidence were as follows:

(1) he had been advising businesses and individuals in relation to the film industry for some twenty years and had been involved in over 100 films;

(2) so far as the Trader Scheme and the two schemes which are the subject of this decision were concerned, he had had an extensive involvement in both the design of the relevant scheme and the selection of film rights for the individuals, the GPs or the LLPs to acquire. He had also assisted the marketing team in their approaches to the advisers of potential participants. In addition, as a chartered accountant and principal in JS & Co LLP ("JS & Co"), he had also provided advice to the GPs and LLPs in relation to the GAAP accounting valuations and the preparation of their accounts. The Respondent had also received substantial advice from other independent external advisers;

(3) potential participants were sourced by marketing the relevant scheme to professional advisers, who would then recommend participation to their clients;

(4) at the time when a potential participant was first approached, the participant would be told generically about the structure and how it worked but no specific film rights would at that stage be identified. However, once a participant decided to proceed with the structure, then he or she would be offered identified film rights and asked for his or her views on them. If a participant did not wish to participate in a particular film, then those rights would be offered elsewhere and the rights in another film would be offered to that participant;

(5) film rights were sourced either by the Respondent's approaching producers or by producers' approaching the Respondent. In either case, the producer of the potential film would prepare a film submission form and then the film would be subjected to a

script report and an extensive review by a committee which would mark the film by reference to various criteria. The aim was to choose only those films whose prospects were good so that the relevant individual, GP or LLP would make a commercial profit from them. This was a rigorous process. At one point in his evidence, he said that around 6 to 10 films would be considered every month but, at another, he estimated that, over the years, the Respondent might have considered some 10,000 films and financed only some 140 of them;

(6) the highest scoring films were then acquired from the producer by PAL, before being offered for on-sale to participants. The advantage of having PAL as a warehousing vehicle was that it could acquire all available distribution rights to a film and not just those in a particular territory - using a single acquisition agreement with the relevant producer - and then offer some or all of those rights to participants;

(7) each GP or LLP would generally be offered rights in more than one film in order to spread risk. In the event that a film did not proceed or was delayed because the producer was unable to obtain all the funding which it needed, rights in other films would be acquired by PAL and then by the relevant participants instead. In addition, if, following the initial acquisition of film rights, some members of a GP or LLP wished to acquire additional film rights but other members did not, the relevant GP or LLP agreement would be amended to recognise the new introduction of capital by the members who wished to participate and effectively to treat the new film rights as a separate venture so that profits and losses arising from those were allocated only to the participating members;

(8) once negotiations with the producer for the acquisition of the film rights reached an advanced stage, valuations would be commissioned from Atlantic as an independent valuer. The three valuations produced by Atlantic in each case, and the basis on which they were made, were as follows:

> (a) Valuation A – which was the lowest of the three valuations, was the basis for the acquisition price to be paid by the GP or LLP and was based on the minimum predicted sales estimate over the first five years after the film's release;
>
> (b) Valuation B - which was the middle of the three valuations, was also based on the minimum predicted sales estimate but this time took into account the first fifteen years after the film's release; and
>
> (c) Valuation C, which was the most optimistic of the three valuations, was based on the predicted sales estimate if the film were to be successful, again over the first fifteen years after the film's release;

(9) the above valuations were conducted on the basis of the Black-Scholes Valuation Method - which was the method used for valuing financial instruments - and was based on advice obtained from Shipleys;

(10) Mr Rogers did not see any difference between the Sovereign Individual Scheme and the Trader Scheme which preceded it. The generic structure involving the loss as a result of the GAAP valuation had originally been offered as the Trader Scheme in 2005 to individuals to pursue on their own account separately as a replacement to the prior statutory relief for dealing in films which had just been withdrawn. However, following requests from various individuals to be allowed to participate in that scheme together with others, the Sovereign Individual Scheme involving a GP with multiple individuals had been offered in 2009. Thereafter, an individual could either participate separately on his or her own account or participate through a GP;

(11) the reason why there was a need to develop a new structure for obtaining tax benefits for dealing in films was because such dealings were inherently speculative. Unless tax benefits were provided, no private individual would be willing to provide finance because the risks were too great. This was a point which the Respondent had made at paragraphs 12 to 18 of its statement of case when it said, inter alia:

"There is not a choice between film financing without tax breaks (good), and film financing with tax breaks (bad). No tax breaks – no films";

(12) he was aware of the fact that, in order for the loss arising out of each scheme to be capable of offset by way of sideways loss relief, the relevant GP or LLP needed to be carrying on a trade with a view to profit. However, that was the case in any event, as was demonstrated by the lengths which were taken to identify films that were likely to be successful and the professional valuations which were obtained. The intention and purpose at all times was to make a profit from each set of film rights. Those steps were genuine and not merely an attempt to dress up a tax avoidance scheme by making it look like a trade;

(13) having said that:

(a) the film business was highly speculative. It was inevitable that many films would make no money. However, the hope was always that the odd film would give rise to such significant income as to offset those which gave rise to losses and thus produce a profit overall;

(b) he accepted that Mr Jones was right in saying that the film rights acquired by the GPs and LLPs in this case had not generated any meaningful income; and

(c) he was very disappointed with that outcome and the overall performance had not met his expectations at inception;

(14) in relation to the documentation implementing the arrangements in each case:

(a) each Sovereign Individual Structural Document, Sovereign Corporate Structural Document, Sovereign Individual Operational Document and Sovereign Corporate Operational Document was prepared by the Respondent and its advisers for the purpose of enabling each participant in the relevant arrangements to enter into the arrangements;

(b) on each occasion that arrangements arising pursuant to the implementation of the Sovereign Individual Scheme were implemented, each of the Sovereign Individual Structural Documents forming part of the arrangements was on similar, if not identical, terms and, on each occasion that arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme were implemented, each of the Sovereign Corporate Structural Documents forming part of the arrangements was on similar, if not identical, terms. In the case of each such document, the only differences between the relevant documents were the participant-specific details such as names and addresses and amounts borrowed and contributed;

(c) on each occasion that arrangements arising pursuant to the implementation of the Sovereign Individual Scheme were implemented, the operative clauses in each of the Sovereign Individual Operational Documents forming part of the arrangements were on similar, if not identical, terms and, on each occasion that arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme were implemented, the operative clauses in each of the Sovereign

Corporate Operational Documents forming part of the arrangements were on similar, if not identical terms; and

(d) however, in relation to each of the Sovereign Individual Operational Documents and the Sovereign Corporate Operational Documents, the definitions clause and the schedule in each case were specific to the film in question and the arrangements relating to that film. As Mr Rogers put it, "the skeleton of each document was the same but the flesh on that skeleton was different". Referring back to the statement in each information memorandum to the effect that each scheme was a "ready-made business structure" – see paragraph 22(5)(h) above – Mr Rogers said that, although the structures may have been standard, the transactions implemented by the GP or LLP were bespoke to the film rights actually acquired;

(15) as the information memorandum in the case of each scheme was generic and did not relate to any identified film rights, it could not have contained any financial projections which were based on the precise film rights to be acquired. However, Mr Rogers went on to say that participants had separately been provided with the valuations from Atlantic in relation to those film rights to be acquired and could therefore see the potential income which might arise in certain scenarios;

(16) he accepted that the information memorandum in relation to the Sovereign Corporate Scheme made no mention of the profit extraction benefit to which reference was made on the Respondent's website - see paragraph 22(6) above. However, he said that this benefit would have been explained to potential participants at the initial marketing meeting and that materials showing that benefit - which had not been provided to the Applicants - would have been made available to potential participants at those initial marketing meetings;

(17) in answer to the question as to why the limited recourse loans in the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme had not been made directly to the company which was the member of the LLP but had instead been lent to the individual and then on-lent to that company, he said that GBFL was unwilling to lend to companies and was prepared to lend only to individuals;

(18) he explained that, in order to finance its loans to the individuals in each case, GBFL entered into a borrowing from PAL (or in some cases from the producer) so that, in effect, the money comprising the loan-funded element of the capital contributed to the GP or LLP flowed in a circle. I was taken to an example of a collection account management agreement in the DB, dealing with the allocation between the various interested parties of any income from the film rights, which showed that, at least in that case, the producer, and not PAL, had been involved in the circle of funding with GBFL;

(19) he said that the tax benefit arising to each member of the GP or LLP arose automatically as a result of the application of GAAP and, in particular, a mismatch between the basis of the valuations which had been conducted by Atlantic and the somewhat more prudent basis of valuation required by GAAP because the films in question were so early in their production cycle. He explained that the GAAP valuations were prepared by BDO LLP or JS & Co;

(20) he accepted that, in terms of the economics, in no case did an individual who chose to participate in the scheme elect to do so on the alternative ungeared basis referred to in the relevant information memorandum (see paragraph 22(5)(a) above). Instead, each individual chose the limited recourse financing option described in the information memorandum. The ratio of loan-financed capital to capital provided out of

the individual's own resources was generally 88 to 15. In other words, in a typical case, an individual would invest 103 in the GP or LLP of which 88 had been provided by GBFL on a limited recourse basis. The GP or LLP would then pay 3 to the Respondent or an affiliate by way of fees and use the remaining 100 to pay the acquisition price to PAL for the film rights. PAL would take a fee of 3 out of the 100 it received and lend 88 to GBFL. As a result, only 9 out of the 103 of capital contributed to the GP or LLP – which is to say, 100 minus 3 minus 88 - would actually be realised by the producer for the film rights sold by the producer to PAL; and

(21) he said that, as regards the potential application of the disclosure legislation:

(a) the Respondent had been advised by Jonathan Peacock QC in 2005 that the Trader Scheme was not notifiable;

(b) subsequently, advice to the same effect on the potential application of the disclosure legislation to the Sovereign Individual Scheme had been obtained from Howard Kennedy and Mazars;

(c) when the Sovereign Corporate Scheme was introduced in 2010, the Respondent had again sought advice on the potential application of the disclosure legislation to that scheme, this time from DLA and Mr John Baldry; and

(d) the Applicants had conducted a detailed review of the Trader Scheme between 2007 and 2012 which had ended inconclusively and it was reasonable for the Respondent to have concluded from that that the Applicants no longer wished to pursue the point.

AGREED FACTS AND FINDINGS OF FACT

26. In paragraph 27 below, I set out those facts in relation to which the parties are agreed and, in paragraph 28 below, I list those paragraphs in the sections below in which my findings of fact are set out. (I have chosen to set out those findings of fact in the section to which they relate, as opposed to this section, for ease of reference).

27. The agreed facts are as follows:

(1) arrangements arising pursuant to the implementation of the Trader Scheme were first made available prior to 1 August 2006, arrangements arising pursuant to the implementation of the Sovereign Individual Scheme were first made available in March 2009 and arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme were first made available in December 2010;

(2) the only difference between the arrangements arising pursuant to the implementation of the Trader Scheme and the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme were that the former involved individuals acting separately on their own account whereas the latter involved individuals acting together through a GP;

(3) no arrangements arising on any implementation of the Trader Scheme have previously been notified;

(4) in the case of both arrangements arising pursuant to the implementation of the Sovereign Individual Scheme and arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme:

(a) the Respondent was the "promoter", as defined in Section 307;

(b) the Respondent made the arrangements available for implementation by more than one person; and

(c) arrangements pursuant to the relevant scheme have actually been implemented on more than one occasion; and

(5) in the case of arrangements arising pursuant to the implementation of the Sovereign Individual Scheme:

(a) the Respondent expected more than one individual to implement the same, or substantially the same, arrangements; and

(b) if an informed observer, having studied the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme, were reasonably to conclude that the main benefit of the arrangements, which could be expected to accrue to some or all of the individuals participating in the arrangements, was the provision of losses, then that same informed observer could reasonably have concluded that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax.

28. The paragraphs of this decision which contain findings of fact are paragraphs 62, 69 and 79.

ISSUES FOR DETERMINATION

29. The terms of the legislation described in paragraphs 8 to 15 above means that the following issues need to be determined in relation to the potential application of Section 314A to the arrangements arising pursuant to the implementation of each scheme:

(1) did those arrangements amount to "arrangements" (as defined in Section 308(1))? ('Issue 1")

(2) if so, did those arrangements fall within any description in the Arrangements Regulations (see Section 306(1)(a))? (Issue 2")

(3) if so, did those arrangements enable, or might they have been expected to enable, any person to obtain an advantage in relation to any tax (as defined in Section 318(1)) that is so prescribed in relation to arrangements of that description (see Section 306(1)(b))? ("Issue 3")

(4) if so, were the arrangements such that the main benefit, or one of the main benefits, that might have been expected to arise from the arrangements was the obtaining of that advantage (see Section 306(1)(c))? ("Issue 4") and

(5) if so, does the language used in Section 314A(3) mean that I nevertheless have a discretion not to make the order under Section 314A which has been requested by the Applicants or am I bound to make that order once all the conditions in Section 306(1) are met and, if the former is the case, should I exercise my discretion not to make the order in relation to the arrangements? ("Issue 5")

30. In relation to Issue 2, the Applicants contend that the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme fell within two of the descriptions (or hallmarks) in the Arrangements Regulations - Description 5 (see paragraph 10 of the Arrangements Regulations) and Description 6 (see paragraph 12 of the Arrangements Regulations) and that the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme fell within one of those descriptions (or hallmarks) - Description 5 (see paragraph 10 of the Arrangements Regulations).

31. This means that Issue 2 gives rise to the following sub-issues in relation to each of the arrangements:

(1) did the Respondent first become aware of any transaction forming part of the arrangements comprising the Sovereign Individual Scheme or the Sovereign Corporate Scheme before 1 August 2006 (see paragraph 1(2) of the Arrangements Regulations)? ("Issue 2A")

(2) did the relevant arrangements amount to a "product" within the meaning of paragraph 10(2) of the Arrangements Regulations because:

(a) the arrangements had standardised, or substantially standardised, documentation

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

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

(b) the client entered into a specific transaction or series of transactions; and

(c) that transaction or that series of transactions were standardised, or substantially standardised in form? ("Issue 2B")

(3) were the relevant arrangements a "tax product" within the meaning of paragraph 10(3) of the Arrangements Regulations because an informed observer (having studied the arrangements) would conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage? ("Issue 2C")

(4) were the relevant arrangements "standardised" within the meaning of paragraph 10(4) of the Arrangements Regulations because the Respondent made the relevant arrangements available for implementation by more than one person? ("Issue 2D") and

(5) were the relevant arrangements the same, or substantially the same, as arrangements arising pursuant to the implementation of the Trader Scheme (because those were first made available for implementation before 1 August 2006) (see paragraphs 10(1) and 11(1)(b) of the Arrangements Regulations)? ('Issue 2E").

32. It also means that, as regards arrangements arising pursuant to the implementation of the Sovereign Individual Scheme but not arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme, Issue 2 gives rise to the following issues:

(1) did the Respondent expect more than one individual to implement the same, or substantially the same, arrangements (see paragraph 12(a) of the Arrangements Regulations) ? ("Issue 2F") and

(2) were the arrangements such that an informed observer (having studied them) could reasonably conclude

(a) that the main benefit of those arrangements which could be expected to accrue to some or all of the individuals participating in them was the provision of losses, and

(b) that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax

(see paragraph 12(b) of the Arrangements Regulations) ? ("Issue 2G")

33. If, after examining each of the issues described in paragraphs 29 to 32 above in relation to the arrangements arising pursuant to the implementation of the schemes, my conclusion is that I should not make the order under Section 314A in relation to the arrangements arising pursuant to the implementation of one or both schemes, then I need to address the following additional issues in relation to the potential application of Section 306A to the arrangements arising pursuant to the implementation of that scheme or those schemes:

(1) have the Applicants taken all reasonable steps to establish whether the arrangements comprising the relevant scheme or schemes were notifiable (see Sections 306A(3)(a) and 306A(4))? ("Issue 6")

(2) if so, do the Applicants have reasonable grounds for suspecting that the arrangements may be notifiable (see Sections 306A(3)(b) and 306A(5))? ("Issue 7") and

(3) if so, does the language used in Section 306A(3) mean that I may nevertheless refuse to make the order requested by the Applicants or am I bound to make that order and, if the former is the case, should I exercise my discretion not to make the order in relation to the arrangements? ("Issue 8")

PRELIMINARY ISSUE

34. Before I start my discussion in relation to each of the above issues, in turn, there is one preliminary point which I should make in relation to the form of the applications.

35. As I have noted in paragraph 12(1) above, the disclosure regime proceeds on the basis of a distinction between arrangements – which is to say, a transaction or series of transactions that has or have actually been implemented - and a proposal to enter into those arrangements.

36. As may be seen from the excerpts set out in the Appendix, each application has been drafted by:

(1) setting out, in generic terms, a description of the transactions comprising the relevant scheme but without referring to any single set of transactions which comprised 1 manifestation of those transactions as actually implemented; and

(2) then applying for an order to the effect that the arrangements comprising the relevant generic scheme are, or are to be treated as, notifiable arrangements.

37. This led me to wonder initially whether each application might in fact actually be describing a proposal and not arrangements and therefore to be misconceived insofar as it sought an order under Section 314A or an order under Section 306A in relation to arrangements. I therefore invited the parties to make submissions on that question at the start of the hearing.

38. Having done so, I was satisfied that my initial view was misconceived for the following reasons.

39. First, there is no doubt that each application is describing arrangements which were actually entered into on numerous occasions. So much is common ground. It follows that, on each of those occasions, there were arrangements which, subject to the satisfaction of the various conditions necessary for arrangements to be notifiable, could constitute notifiable arrangements. Thus, the description in each application was not describing a proposal to enter into arrangements but was rather describing, in generic terms, the form of arrangements which had actually been implemented on numerous occasions.

40. Moreover, as I have noted in paragraph 12(2) above, neither Section 314A nor Section 306A requires on its terms an application under the relevant section to set out the date on

which the relevant arrangements were implemented or the date when the arrangements became notifiable. Whilst I find those omissions a little strange, they tend to support the proposition that, in applying for an order under either of Section 314A or Section 306A to the effect that specified arrangements are, or are to be treated as, notifiable, the Applicants are entitled to refer to the relevant arrangements generically and not to limit themselves to any single manifestation of that generic description.

41. Finally, I observed that this appeared to be the approach which had generally been adopted in relation to prior applications of this nature – for example, in the First-tier Tribunal decisions in *The Commissioners for Her Majesty's Revenue and Customs v Root2Tax Limited and Root3Tax Limited (in liquidation)* [2017] UKFTT 696 (TC) ("*Root2*") at paragraphs [3] to [7], [12], [47] and [48], in *Curzon* at paragraphs [40]] and [42] and in *The Commissioners for Her Majesty's Revenue and Customs v Hyrax Resourcing Limited, Bosley Park Limited and Peak Performance Head Office Services Limited* [2019] UKFTT 175 (TC) ("*Hyrax*") at paragraphs [3] and following and paragraphs [126] to [129].

42. I therefore concluded that each application had been drafted appropriately in referring to arrangements and not to a proposal.

DISCUSSION

43. I now turn to examine each of the issues set out in paragraphs 29 to 32 above – in other words, the issues which are relevant to the making of an order under Section 314A. In each case, I will set out the submissions made by each of the parties in relation to the relevant issue and then my findings of fact (if any) and conclusions in relation to it.

<u>Issue 1</u>

44. I can dispense with this issue briefly given that it is common ground. On each occasion that the Sovereign Individual Scheme was implemented, the transactions which occurred in the course of its implementation constituted "arrangements" and the same was true on each occasion that the Sovereign Corporate Scheme was implemented.

45. There are two points which I should make at this point since they are relevant to the issues which follow.

46. The first is that, as I have indicated in paragraph 44 above, each implementation of either scheme gave rise to arrangements which were separate and distinct from the arrangements which arose when the same scheme was implemented on another occasion or, for that matter, when the other scheme or the Trader Scheme were implemented. This conclusion is in accordance with the decision of Green J in *R (on the application of Walapu) v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWHC 658 (Admin) ("*Walapu*") at paragraph [147] and the decision of Sir Kenneth Parker in *R (on the application of Graham and others) v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWHC 1197 (Admin) ("*Graham*") at paragraphs [33] to [41] and it has a significant consequence so far as the transitional provision set out in paragraph 1(2) of the Arrangements Regulations is concerned – see paragraphs 51 to 56 below.

47. The second is that, when I refer to the arrangements which arose when a scheme was implemented, I am including within the term "arrangements" both the architecture involved in the formation and funding of the GP or LLP (in other words, the transactions effected by the Sovereign Individual Structural Documents and the Sovereign Corporate Structural Documents) but also the acquisitions and disposals of film rights which were made by the relevant GP or LLP (in other words, the transactions effected by the Sovereign Individual Operational Documents and the Sovereign Corporate Operational Documents). I say that because, within each set of arrangements, the execution of the Sovereign Individual

Structural Documents and the Sovereign Corporate Structural Documents were insufficient, in and of themselves, to give rise to the tax benefit which was intended to arise from the arrangements in question. On the contrary, as Mr Avient was keen to point out during his cross-examination of Mr Jones, without the acquisitions and disposals of film rights which were made by the relevant GP or LLP, no loss would have arisen to the members of the relevant GP or LLP. The transactions implemented by the Sovereign Individual Operational Documents and the Sovereign Corporate Operational Documents were therefore a fundamental part of the arrangements in each case.

48. I do not think that I detected any disagreement between the parties in relation to the above. My understanding of Mr Stone's submissions in relation to Issue 2B (at paragraphs 57 to 64 below) was that he accepted that the Sovereign Individual Operational Documents and the Sovereign Corporate Operational Documents were part of the arrangements in each case but merely challenged the relevance of those documents to the tests set out in paragraph 10(2) of the Arrangements Regulations. However, even if have I misunderstood Mr Stone's position on this question, my conclusion on it is as set out in paragraph 47 above, for the reason set out in that paragraph.

Issue 2

49. The first condition which needs to be satisfied before arrangements can be said to be notifiable is that the arrangements in question need to fall within one of the descriptions set out in the Arrangements Regulations. In this case, the Applicants have based their applications on the submissions that the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme fall within both Description 5 and Description 6 in paragraphs 10 and 12 of the Arrangements Regulations and that the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme fall within Description 5 in paragraph 10 of the Arrangements Regulations. It is therefore necessary for me to address sequentially the various conditions in paragraphs 10 and 12 of the Arrangements Regulations.

50. The burden of proof in relation to each of the issues which arises out of those paragraphs is on the Applicants, with the exception of Issue 2A – which relates to the relief from the Arrangements Regulations as a whole under paragraph 1(2) of the Arrangements Regulations – and Issue 2E - which relates to the relief from paragraph 10 of the Arrangements Regulations set out in paragraph 11(1)b) of the Arrangements Regulations – and where the burden of proof is accordingly on the Respondent.

Issue 2A

51. Before addressing the issues which arise out of paragraphs 10 and 12 of the Arrangements Regulations, I need first to consider whether the arrangements arising pursuant to the implementation of each scheme are taken out of the Arrangements Regulations altogether by the grandfathering in paragraph 1(2)(b) of the Arrangements Regulations and it is to that that I now turn.

52. Paragraph 1(2) of the Arrangements Regulations provides that the Arrangements Regulations will not have effect in relation to arrangements if the date on which the promoter first became aware of the arrangements falls before 1 August 2006.

53. In order to answer that question, it is essential to identify the arrangements which are in issue because, if the arrangements arising pursuant to either the Sovereign Individual Scheme or the Sovereign Corporate Scheme were to be the same arrangements as those comprising the arrangements arising pursuant to the Trader Scheme, the Respondent will first have become aware of a transaction forming part of the arrangements before 1 August 2006.

54. In my view, as I have indicated in paragraph 46 above, each time a scheme was implemented, the transactions which occurred in the course of that implementation amounted to arrangements which were distinct and separate from the arrangements which arose pursuant to each other implementation of the same scheme (or the arrangements which arose pursuant to the implementation of any other scheme for that matter).

55. The fact that the transactions which occurred in the course of each implementation of a scheme amounted to arrangements which were distinct and separate from the arrangements which arose pursuant to each other implementation of the same scheme (or the arrangements which arose pursuant to the implementation of any other scheme) means that paragraph 1(2) of the Arrangements Regulations is of no avail to the Respondent in relation to either scheme. This is because it is common ground that the first implementation of the Sovereign Individual Scheme did not occur until March 2009 and that the first implementation of the Sovereign Corporate Scheme did not occur until December 2010. Thus, by definition, it was impossible for the Respondent to have become aware of any transaction forming part of any arrangements which arose on the implementation of either scheme before 1 August 2006. I believe that Mr Southern accepted that this was the case during the course of his submissions at the hearing.

Issue 2B

56. Paragraph 10(1) provides that, subject to the exclusions in paragraph 11 of the Arrangements Regulations, the only potentially relevant one of which is addressed in the analysis on Issue 2E in paragraphs 88 to 101 below, arrangements are prescribed if they are a "standardised tax product". The definition of "standardised tax product" is broken into three parts, as follows:

(1) first, whether not the arrangements amount to a "product". This is to be determined by reference to paragraph 10(2) of the Arrangements Regulations and is addressed in the analysis in this section of this decision;

(2) secondly, whether not the arrangements amount to a "tax product". This is to be determined by reference to paragraph 10(3) of the Arrangements Regulations and is addressed in the analysis on Issue 2C in paragraphs 65 to 84 below; and

(3) finally, whether not the arrangements are "standardised'. This is to be determined by reference to paragraph 10(4) of the Arrangements Regulations and is addressed in the analysis on Issue 2D in paragraphs 85 to 87 below.

57. Before embarking on my analysis of the various provisions which make up paragraph 10, I pause to note that each of paragraphs 10(2) and 10(3) of the Arrangements Regulations refers to "a client" and "the client". In this case, that language does not give rise to any complications in the case of arrangements arising pursuant to the implementation of the Sovereign Individual Scheme because the Respondent's client in that case was obviously the individual to whom the scheme was marketed and who became a member of the GP. The position is a little more nuanced in the case of arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme because the recipients of the desired tax benefits in that case included both the individuals to whom the scheme was marketed and each such individual's company, which became the member of the LLP. I have considered whether, in the context of arrangements arising pursuant to that scheme, the only "client" might be the individual to whom the scheme was marketed, and did not extend also to that individual's company and have concluded that that would be an unjustified restriction on the scope of the word "client" in this context. That is because the company which became the member of the LLP was just as much the Respondent's "client" as the individual owner of the company. It benefited from the sideways loss relief arising out of the arrangements and was

responsible for the fees of the Respondent. The analysis below therefore proceeds on the basis that, in the case of arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme, each of the individual to whom the scheme was marketed and that individual's company was a "client". In addition, to simplify the language I use in my analysis in each case, I will use the word "participant" as a shorthand for the individual (in the case of arrangements arising pursuant to either scheme) and the corporate member of the LLP in the case of arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme. (I note in passing that the version of the Arrangements Regulations which was in place at the time when the applications were made and at present contain references to "a person" or "the person" instead of "a client" and "the client", following the changes made to paragraph 10 of the Arrangements Regulations in 2016 but that version is not relevant to this decision for the reasons set out in paragraph 12(2) above and, in any event, I do not think that those changes would make any difference to the analysis below).

58. Paragraph 10(2) of the Arrangements Regulations provides that arrangements amount to a "product" if:

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

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

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

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

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

59. Mr Southern maintained that the documents which were the basis for the arrangements arising pursuant to the implementation of each scheme in this case were not "standardised or substantially standardised in form". He pointed out that:

(1) to some extent, all legal documentation was standardised in that it tended to follow previous documentation of the same nature. The key point was that the documents in this case were specific to the actual transactions undertaken;

(2) both the Sovereign Individual Operational Documents and the Sovereign Corporate Operational Documents were an integral part of the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme and the Sovereign Corporate Scheme, respectively, because the sideways loss relief obtained by each member of the GP or LLP did not just depend on the architecture surrounding the formation of the GP and the LLP but also depended on the acquisition and disposal of the film rights which occurred by virtue of each acquisition agreement and each distribution agreement;

(3) each Sovereign Individual Operational Document and Sovereign Corporate Operational Document was specific to the particular film rights to which it related. That much could be seen in the differences in the definitions clause and schedule of each such document; and

(4) therefore it followed that, at least in relation to each Sovereign Individual Operational Document and Sovereign Corporate Operational Document, the form of the relevant document was tailored to reflect the circumstances of the client (so that the condition in paragraph 10(2)(a)(ii) was not met) and the transaction to which that

document gave rise – namely, the acquisition or disposal of film rights – was not in substantially standardised form (so that the condition in paragraph 10(2)(c) was not met).

60. For his part, Mr Stone submitted as follows:

(1) first, it was clear from the language used in paragraph 10(2)(a) and the interaction between paragraph 10(2)(b) and paragraph 10(2)(c) that paragraph 10(2) as a whole was focused solely on the documents and transactions entered into by the client in the course of the arrangements and not all of the documents and transactions comprising the arrangements. Consequently, the only documentation which needed to be considered in this context was the documentation to which the participant or participants was or were a party – in other words, the Sovereign Individual Structural Documents and the Sovereign Corporate Structural Documents. The documentation to which the GP or the LLP was a party – in other words, the Sovereign Individual Operational Documents and the Sovereign Corporate Operational Documents - did not need to be considered because they related to transactions entered into by the GP or LLP and not transactions entered into by the relevant participant or participants;

(2) secondly, even if that analysis of the legislation was incorrect, and the Sovereign Individual Operational Documents and the Sovereign Corporate Operational Documents did need to be taken into account in this context, it was clear that all of the documents comprising the arrangements, including those documents, satisfied the definition. The word "standardised" was not the same as the word "identical". A document could still be "standardised" even if it had been tailored to cover the specific unique details of a participant or a film. That did not involve tailoring to the extent required to fail the condition – which is to say, a material extent. In support of this contention, Mr Stone referred me to the application of paragraph 10(2) in previous decisions of the First-tier Tribunal – in *Root2* at paragraph [35], in *The Commissioners for Her Majesty's Revenue and Customs v EDF Tax Limited (in creditors' voluntary liquidation)* [2019] UKFTT 598 (TC) ("*EDF*") at paragraphs [127] to [145] and in *Curzon* at paragraphs [67] to [70]; and

(3) finally, the information memorandum in relation to each scheme had referred to the relevant scheme as a "ready made structure".

61. In order to reach my conclusions of law on this issue, it is first necessary for me to set out certain findings of fact.

62. I have drawn the following conclusions of fact based on the evidence in the DB and the witness evidence:

(1) each Sovereign Individual Structural Document, Sovereign Corporate Structural Document, Sovereign Individual Operational Document and Sovereign Corporate Operational Document was prepared by the Respondent and its advisers for the purpose of enabling each participant in the relevant arrangements to enter into the arrangements;

(2) the form of each Sovereign Individual Structural Document and Sovereign Corporate Structural Document was such that the only differences between the version of one of those documents which was used for one participant and the version of the same document which was used for another participant were those that were required to take into account the unique personal details of each participant and were not material. Indeed, Mr Rogers in his evidence conceded that that was the case. Mr Stone took him through each of the documents in turn and he candidly agreed that, in relation to each

participant, there were immaterial differences in relation to each Sovereign Individual Structural Document and Sovereign Corporate Structural Document;

(3) the form of each Sovereign Individual Operational Document and Sovereign Corporate Operational Document was slightly more tailored than the form of each Sovereign Individual Structural Document and Sovereign Corporate Structural Document because those documents had to reflect the specific details of the film rights that were the subject of acquisition and disposal and those details were slightly more voluminous than the details which constituted the differences between the participants which had to be factored into each Sovereign Individual Structural Document and each Sovereign Corporate Structural Document; and

(4) however, notwithstanding the increased number of differences, there was still a considerable degree of commonality in those documents. In particular, the operational clauses in each Sovereign Individual Operational Document and Sovereign Corporate Operational Document were the same. The only differences were to be found in the definitions clause and the schedule, where the specific nature of the particular film rights had to be dealt with. Moreover, even in the schedules, there was a large degree of commonality – see the acquisition agreement for the West One Film Productions Partnership on pages 2017 to 2036 in the DB in comparison to the acquisition agreement for the same partnership on pages 1971 to 1992 in the DB and the distribution agreement for the West One Film Productions Partnership on pages 2037 to 2060 in the DB in comparison to the distribution agreement for the same partnership on pages 1993 to 2016 in the DB. In an analogy which struck me as being particularly apt, although I think that Mr Rogers had drawn a different conclusion from mine as a result of the relevant fact, Mr Rogers said of those documents that "the skeleton of each document was the same but the flesh on that skeleton was different". In my view, it was inevitable that dealing with the details of each set of film rights would involve a little bit more tailoring of those documents than was involved in preparing each Sovereign Individual Structural Document and each Sovereign Corporate Structural Document. However, that tailoring was not material in the context of the documents as a whole. Moreover, it reflected the differences in the nature of the film rights and not the differences in the circumstances of the participants.

63. Turning then to the law, I would comment as follows:

(1) in relation to the question of which documents need to be considered in this context, I think that, ultimately, I cannot accept Mr Stone's contention to the effect that each Sovereign Individual Operational Document and each Sovereign Corporate Operational Document is irrelevant in this context. I say this for the reasons which follow:

(a) as I have already noted in paragraph 47 above, it is my view that the Sovereign Individual Operational Documents and Sovereign Corporate Operational Documents formed part of the arrangements arising pursuant to the implementation of the relevant scheme. Those documents were integral to the implementation of the arrangements by each participant because, without them, no loss would have arisen to the relevant participant and the tax benefit sought by the arrangements would not have arisen;

(b) the term "standardised, or substantially standardised" appears twice in paragraph 10(2);

(c) although neither party addressed this distinction specifically in their submissions at the hearing, it appears to me that there is a difference between those two occasions in that, when the term is used in paragraph 10(2)(a), it is with reference to the documentation for the arrangements and refers to the purpose and form of that documentation whereas, when the term is used in paragraph 10(2)(c), it is with reference to the transaction or transactions into which the relevant participant has entered and refers to the form of that transaction or transactions;

(d) I think that very little turns on the distinction between "documentation", on the one hand, and "transaction or transactions", on the other. This is because it seems to me that a standardised transaction is likely to be implemented by way of a standardised document and that a standardised document is likely to give rise to a standardised transaction;

(e) however, a potentially more meaningful distinction arises out of the fact that paragraph 10(2)(a) refers to the documentation for the arrangements in general whereas paragraph 10(2)(c), with its cross-reference back to paragraph 10(2)(b), refers to the transaction or transactions into which the relevant participant has entered;

(f) the language in the preamble in paragraph 10(2)(a) strongly suggests that the documentation which needs to be considered in that paragraph is all of the documentation which implements the arrangements in question. It is true that paragraphs 10(2)(a)(i) and 10(2)(a)(ii) both refer to the relevant participant, in that the condition requires that the purposes of the documentation be enabling the implementation of the arrangements by the relevant participant and that the form of the documentation be determined by the promoter and not tailored to any material extent to reflect the circumstances of the relevant participant. However, I can detect nothing in that language which confines the documentation that needs to be considered in paragraph 10(2)(a) to documentation executed by the relevant participant. The mere fact that the purpose of the documentation must be to enable the implementation of the arrangements by the relevant participant and must not be tailored, to any material extent, to reflect the circumstances of the relevant participant does not lead me to infer that certain documents relating to the implementation of the arrangements can be ignored;

(g) moreover, the purpose of the Sovereign Individual Operational Documents and the Sovereign Corporate Operational Documents in each case was to enable the implementation of the arrangements by the participants because, without those documents, the arrangements would not have given rise to the sideways loss relief which was their purpose. Thus, those documents clearly fell within the ambit of the documents to which paragraph 10(2)(a)(i) refers;

(h) it follows that, regardless of the point which I make below in relation to the proper interpretation of paragraph 10(2)(c), the Applicants need to show that all of the documents implementing the arrangements in the case of each scheme were in standardised or substantially standardised form and satisfied the condition in paragraph 10(2)(a)(ii);

(i) in contrast, I agree with Mr Stone that, on the second occasion when the phrase is used, in paragraph 10(2)(c), the focus of the language is solely on the transaction or series of transactions into which the relevant participant has entered, as opposed to all of the transactions comprising the arrangements;

(j) having said that, both the Income Tax Acts and the Corporation Tax Acts make it clear that the transactions of a GP or LLP are to be treated for income tax and corporation tax purposes as the transactions of its members – see Sections

848 and 863(1) of the Income Tax (Trading And Other Income) Act 2005 and Sections 1258 and 1273(1) of the Corporation Tax Act 2009 - and therefore I would regard the transactions entered into by each GP or LLP in the course of any arrangements implemented pursuant to either scheme as being required to be treated for the purposes of applying the tax legislation as having been entered into by each member of the relevant GP or LLP;

(k) it follows that, even in the context of paragraph 10(2)(c), each Sovereign Individual Operational Document and each Sovereign Corporate Operational Document should be regarded as effecting a transaction into which the member of the GP or LLP entered; and

(l) consequently, I have concluded that it is not correct to disregard each Sovereign Individual Operational Document and each Sovereign Corporate Operational Document (and the transaction or transactions to which they give rise) in applying the tests in paragraph 10(2);

(2) despite the conclusion which I have drawn in paragraph 63(1) above, it is my view that, based on the findings of fact in paragraph 62 above, in the case of each set of arrangements arising pursuant to the implementation of each scheme, all of the documents implementing the arrangements:

(a) were in standardised, or substantially standardised, form;

(b) were in a form determined by the Respondent, as the promoter of each scheme; and

(c) were not tailored to any material extent to reflect the circumstances of each participant, and

that all of the transactions entered into pursuant to those documents were in standardised or substantially standardised, form;

(3) I say that because there were no material differences in any of the documents or the transactions undertaken pursuant to those documents reflecting the circumstances of the relevant participant. Instead, there was in the case of each set of arrangements simply an almost entirely uniform and standard package of documents to which minor changes had to be made to deal with the personal details of the relevant participant and the details of the specific film rights;

(4) although that conclusion is sufficient to dispose of this point, I would add, so far as each Sovereign Individual Operational Document and each Sovereign Corporate Operational Document is concerned, that changes reflecting the particular nature of the film rights which were the subject of the relevant document are outside the scope of the language in paragraph 10(2)(a)(ii) in any event. That paragraph refers only to tailoring to a material extent to reflect "the circumstances of the client" (ie the relevant participant). Thus, a document which was tailored to a material extent to reflect the film rights would still satisfy the condition provided that it was in a form determined by the promoter and was not tailored to a material extent to reflect the circumstances of the relevant participant in addition to the film rights; and

(5) in short, I agree with the statement made by the Respondent in each information memorandum that each scheme involved a "ready-made structure".

64. It follows from the above that I consider that the conditions in paragraph 10(2) of the Arrangements Regulations are met in the case of each set of arrangements arising pursuant to the implementation of each scheme.

Issue 2C

65. Paragraph 10(3) of the Arrangements Regulations provides that 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". This language requires consideration of two questions, both of which are to be addressed from the perspective of the informed observer with knowledge of the arrangements, namely:

(1) would it be reasonable for that informed observer to conclude that the arrangements gave rise to a tax advantage for the relevant participant? and

(2) if so, would it be reasonable for that informed observer to conclude that the main purpose of the arrangements was to enable the relevant participant to obtain that tax advantage?

66. I therefore start with the question of whether the arrangements which were implemented pursuant to each scheme gave rise to a tax advantage for the relevant participant. Section 318(1) provides 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 charge to that tax or an assessment to that tax or the avoidance of a possible assessment to that tax,

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

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

and stipulates that the word "tax" in that context includes each of income tax, capital gains tax and corporation tax.

67. Mr Southern submitted that the arrangements in this case did not give rise to a tax advantage for any participant for the following reasons:

(1) each set of arrangements involved the establishment of an entity to carry on a genuine trade in film rights the purpose of which was to make profits. The profit motive could be discerned in the lengths to which the Respondent went to ensure that only the most promising film rights were selected for acquisition and disposal. Those lengths included painstaking reports and meetings in relation to identifying which film rights should be offered to participants, the preparation of professional valuations, discussions with participants in relation to specific film rights and the rejection of many film rights which became available to it. There was no evidence to the effect that the valuations which had been obtained were works of fiction;

(2) it followed that an informed observer, looking at each set of arrangements when they were implemented, would have concluded that the relevant GP or LLP was carrying on a serious business designed to make a profit;

(3) however, as Mr Rogers had explained in giving his evidence, the film business was highly speculative and the risks inherent in it meant that it was impossible to persuade people to invest in it without offering some sort of tax incentive. This was why the legislation had previously contained statutory reliefs for investing in films and why the schemes in this case had had to include the accounting-based write down to give rise to the sideways loss relief. It was also why the information memorandum in relation to each scheme had accentuated the benefit of the loss which would arise in the first accounting period of each GP's and LLP's operation. The information memoranda

were marketing documents designed to encourage investment and it was inevitable therefore that they would accentuate the tax benefit arising from participating in the arrangements arising pursuant to the implementation of the scheme;

(4) the House of Lords decision in *Inland Revenue Commissioners v Parker* [19966] AC 141 ("*Parker*") showed that, in order for a tax benefit arising as a result of a transaction to be said to have given rise to a tax advantage, there needed to be an alternative way of having implemented that transaction which would not have given rise to that tax benefit. As Lord Wilberforce had put it in *Parker* (at page 178F and following), when construing similar language in Section 43(4)(g) of the Finance Act 1960:

"The paragraph, as I understand it, presupposes a situation in which an assessment to tax, or increased tax, either is made or may possibly be made, that the taxpayer is in a position to resist the assessment by saying that the way in which he received what it is sought to tax prevents him from being taxed on it; and that the Revenue is in a position to reply that if he had received what it is sought to tax in another way he would have had to bear tax. In other words, there must be a contrast as regards the "receipts" between the actual case where these accrue in a non-taxable way with a possible accruer in a taxable way, and unless this contrast exists, the existence of the advantage is not established";

(5) in this case, no such alternative transaction existed either in relation to the sideways loss relief which arose through being a member of a GP or LLP or in relation to the loan which was made by the individual owner of a company which was a member of an LLP to that company. As regards the former, the loss which arose was an inevitable consequence of carrying on the trade in film rights because it was a function of the application of GAAP. It arose automatically by reason of the application of GAAP to the transactions implemented by the GP or LLP. There was no way for the GP or LLP to effect an acquisition and disposal of film rights which would not have given rise to the same loss. Putting it another way, the tax benefit did not arise from the arrangements as such. Instead it arose as a result of the application of GAAP to the arrangements. As regards the latter, the repayment of a loan would not normally give rise to a tax liability and therefore there was no alternative situation involving the advance of a loan and its repayment which would have given rise to a worse tax outcome than the nil tax outcome to which the relevant loans in this case gave rise;

(6) it was only by focusing on the limited recourse loans and circularity of money flows which were a feature of the arrangements that one could point to an alternative transaction which might give rise to a better tax outcome but neither Parliament nor the courts had indicated that limited recourse loans were not truly loans or that circularity of funding meant that payments had not been made. For example, as recorded in the decision of Etherton J in *BMBF (No 24) v Inland Revenue Commissioners* [2002] STC 1494 at paragraph [160], the Special Commissioners in that case had rejected the argument that the part of sums spent on equipment which had been lent back to the taxpayer had not been incurred and, in *Barclays Mercantile v Mawson* [2003 STC 66 ("*Mawson*") at paragraphs [40] to [42], Peter Gibson LJ held that mere circularity of funding did not mean that expenditure purportedly incurred on a pipeline had not been incurred; and

(7) in any event, the cases under the disclosure legislation where a tax benefit had been held to amount to a tax advantage were all cases which had no commercial purpose apart from the avoidance of tax – see, for example, *Root2*, *Curzon*, *Hydrax* and *EDF* - whereas, in this case, there was a clear non-tax-related commercial purpose for the establishment and activities of the GPs and LLPs.

68. Mr Stone disagreed with Mr Southern on this for the following reasons:

(1) first, he pointed out that the Respondent's own statement of case had admitted that the sideways loss relief amounted to a tax advantage – see paragraphs [16], [48], [56], [57] and [80];

(2) secondly, he noted that the arrangements arising pursuant to the Sovereign Corporate Scheme involved two tax benefits – both the sideways loss relief and the tax-free extraction of profits from each corporate member of the LLP – and the Respondent's statement of case had not explained why the Respondent considered that the latter was not a tax advantage;

(3) thirdly, he said that Mr Southern's submission that, before there could be a tax advantage, there needed to be an alternative way of achieving the same commercial outcome, was too limiting. That had been the case on the facts in *Parker* because, in that case, there had been an alternative way of extracting profits from the company in a manner which would have given rise to a greater tax liability than did the issue and repayment of the bonus debentures in that case. However, a tax advantage could also arise where a person entered into a transaction which meant that that person's tax liabilities were lower than those which they would have been had the transaction not occurred;

(4) the authority for this was the judgment of Jonathan Parker LJ in *Inland Revenue Commissioners v Trustees of Sema Pension Group* [2002] All ER (D) 304 ("*Sema*") in relation to similar language in Section 709(1) of the Income and Corporation Taxes Act 1988 when he said at paragraphs [109] and [110]:

"109. In my judgment, what the draftsman was manifestly trying to do when defining 'tax advantage' in s.709(1) was to cover every situation in which the position of the taxpayer vis-à-vis the Revenue is improved in consequence of the particular transaction or transactions. As I read s.709(1) the distinction between 'relief and 'repayment' is not based on any conceptual difference between the two; the true interpretation of s.709(1) is in my judgment much simpler than that. In my judgment, 'relief in s.709(1) is intended to cover situations where the taxpayer's liability is reduced, leaving a smaller sum to be paid, and 'repayment' is intended to cover situations in which a payment is due from the Revenue. In the same way, the references to ' increased relief and 'increased repayment' are directed at situations in which the taxpayer is otherwise entitled to a relief or repayment, with which the 'relief or 4 repayment' referred to in s.709(1) must be aggregated.

110. It follows that I respectfully agree with the observation of Aldous J in Sheppard (at p.253e) that the words 'tax advantage' in the relevant statutory provision (Aldous J was concerned with s.466(1) of the 1970 Act: the forerunner of s.709(1)) 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: "An advantage over persons of a similar class". In my judgment, the simple answer to that question is that a better position has been achieved vis-à-vis the Revenue";

(5) the above showed that the relevant question to ask in relation to this issue was not whether there was an alternative transaction which would have achieved the same commercial result but at a higher tax cost but simply whether the relevant participant in entering into the transaction in question had secured a better tax position. Applying that test in this case, it was obvious that, by entering into the arrangements which arose pursuant to an implementation of either scheme and obtaining sideways loss relief, the relevant participant obtained a reduction in the relevant participant's tax liabilities (or a repayment of taxes previously paid). Both of those fell within the definition of "advantage" – as that definition covered both the avoidance or reduction of a charge to

tax and a repayment of tax and both amounted to an improvement in the relevant participant's position vis-à-vis the Applicants. Thus, both of those outcomes amounted to a tax advantage. It followed that the sideways loss relief obtained by each member of a GP or LLP was a tax advantage regardless of the absence of an alternative more adversely-taxed alternative means of acquiring and disposing of film rights;

(6) he added that, notwithstanding the view set out in paragraphs 68(3) to 68(5) above, the information memorandum relating to each scheme had set out two variants of the relevant scheme – one of which was ungeared (and was never in fact implemented) and the other of which involved the limited recourse financing (and was the one adopted by each participant in practice). Since the geared version of the scheme gave rise to greater tax benefits than the ungeared version, the existence of the ungeared version as an option showed that there was in fact a more adversely-taxed alternative to the transaction which was implemented, even applying the more restricted approach to the definition of tax advantage advocated by Mr Southern;

(7) in any event, as regards participants in arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme, there was an alternative means of extracting profits from the company that was the member of the LLP which would have given rise to more adverse tax consequences – namely, the payment of a dividend or the payment of remuneration. Thus, even on the basis of the more restricted definition of tax advantage given by Mr Southern, each set of arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme gave rise to a tax advantage for the participants;

(8) the approach he had outlined above had been applied in other cases on the disclosure legislation – see *Curzon* at paragraph [49], *Hyrax* at paragraphs [179] to [187] and [197] to [199], *Root2* at paragraphs [44] and [45] and *EDF* at paragraph [102]; and

(9) finally, he noted that, in its advice in relation to the application of the disclosure regime to both the Trader Scheme and the Sovereign Corporate Scheme, DLA had said that it would be prudent to assume that the relevant scheme gave rise to a tax advantage.

69. My findings of fact in relation to whether or not the arrangements arising pursuant to the implementation of each scheme gave rise to a tax advantage are as follows:

(1) by entering into the arrangements arising pursuant to either scheme, the member of the GP or LLP who obtained sideways loss relief put itself in a better tax position vis-à-vis the Applicants than that in which that member would have been had it not entered into those arrangements. This is because that member was either able to shelter tax liabilities which would have arisen had the member not entered into the arrangements or to obtain a repayment of tax which would not have become available to that member had it not entered into the arrangements; and

(2) in addition, in the case of arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme, the individual owner of the company which was the member of the LLP in that case was able to extract profits out of the company in tax-free form, by way of loan repayment, whereas, had those profits been paid to him or her in another way such as by way of dividend or by way of remuneration, he or she would have been subject to income tax in respect of the receipt.

70. My conclusions of law in relation to this question are that Mr Stone is right in saying that:

(1) the arrangements arising pursuant to the implementation of each scheme gave rise to a tax advantage in the form of the sideways loss relief; and

(2) the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme gave rise to a tax advantage in the form of the loan repayments made by the corporate member of the LLP.

71. I say that because, as I have indicated in paragraph 69 above, those tax benefits amounted either to the avoidance or reduction of a charge to tax or to a repayment of tax and led to the relevant participant's "being a better position …vis-à-vis the Revenue", as mentioned by Jonathan Parker LJ in *Sema*.

72. My starting point is to note that there is nothing in the language of the definition of "advantage" itself to give any indication that a comparator is required. So far as that language is concerned, any avoidance or reduction of a charge to tax or repayment of tax is an "advantage" regardless of whether or not there is an alternative scenario in which that avoidance or reduction or repayment would not have arisen. Having said that, it might be said that the defined term "advantage" somehow imports the concept of a comparator into the definition and, in any event, I am constrained by the superior courts to adopt the approach of considering whether or not there is a comparator.

73. However, although *Parker* was a case which, on its facts, involved two distinct transactions – the actual transaction and the transaction which might otherwise have occurred in the absence of the actual transaction – I do not read it 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 (which was the issue addressed in *Hyrax* at paragraphs [198] to [200]). Instead, as is made clear by the extract from Jonathan Parker LJ's decision in *Sema* set out in paragraph 68(4) above, 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. On that basis, both schemes involved arrangements which gave rise to tax advantages for the participants.

74. I should add that, even if I am wrong in approaching the definition of tax advantage in the way I have, I agree with:

(1) Mr Stone's point in paragraph 68(6) above that, in this case, the ungeared version of each set of arrangements amounts to a less tax-advantageous comparator transaction to the actual transaction which was implemented (in the case of the sideways loss relief); and

(2) Mr Stone's point in paragraph 68(7) above that, in this case, the distribution of profits by way of dividend or remuneration amounts to a less tax-advantageous comparator transaction to the actual transaction which was implemented. I do not agree with Mr Southern's proposition that, because loan repayments are generally tax free, there is not a less tax-advantageous comparator transaction to the double loan structure. The correct question to ask is whether there was a less tax-advantageous method of extracting profits from the corporate member of the LLP and not whether there was a less tax-advantageous method of repaying loans.

75. Finally, in my view, it is nothing to the point in this context that the participants in the arrangements might have been carrying on a trade with a view to profit or that limited recourse loans and circular money flows in general have not been found to be objectionable by the courts although I would take issue with Mr Southern on his submission in relation to limited recourse loans as it seems to me that it is clear from the House of Lords decision in

Ensign Tankers (Leasing) Limited v Stokes (Inspector of Taxes) [1992] STC 226 and the analysis of that decision by Peter Gibson LJ in *Mawson* at paragraphs [40] and [41] that the existence of limited recourse funding has in the past been considered to be objectionable by the courts and resulted in a reduction of claims for capital allowances by the limited recourse borrower.

76. Given my conclusion that the arrangements which arose pursuant to the implementation of both schemes gave rise to tax advantages for the participants, it is now necessary to consider whether it would have been reasonable for an informed observer, having studied the arrangements, to have concluded that enabling the participants to obtain those tax advantages was the main purpose of the relevant arrangements.

77. In that regard, Mr Southern relied on the submissions which I have summarised in paragraph 67 above to demonstrate that, even if the tax benefits arising out of the arrangements were tax advantages, they were not a main purpose of the arrangements at all. He said as follows:

(1) the test in this case was what an informed observer would have considered the main purpose of the arrangements to be, when considering the arrangements at the time when they were implemented and not with the benefit of hindsight;

(2) that was an entirely objective test and therefore the answer did not depend in any way on the subjective motives of the participants;

(3) the objective nature of the test was demonstrated by the decision of Nugee J in *Seven Individuals v The Commissioners for Her Majesty's Revenue and Custo*ms [2017] STC 1682 ("*Seven Individuals*"). In that decision, which concerned the meaning of the same phrase in a different context, Nugee J had rejected the taxpayer's submission that the test was wholly subjective;

(4) the informed observer in this case would objectively have considered that the participants had become parties to the arrangements in order to derive profits from the film rights. He or she would not have considered that they had done so for the purposes of tax avoidance. The existence of a serious business purpose meant that there could not be a tax avoidance purpose. The tax benefits arising from the arrangements were simply a means to an end – the end of making profits from films – and were not an end in themselves; and

(5) the position of the Applicants was wholly circular. They were saying that just because the arrangements gave rise to tax benefits, those tax benefits must be the main purpose of the arrangements. However, prior case law showed that, before tax benefits arising from arrangements could be said to be the main purpose of the arrangements, there needed to be no commercial purpose to the arrangements and the arrangements must have existed solely for the tax benefits to which they gave rise - examples of this were the schemes that were the subject of *Root2* (see paragraph [45]), *Curzon* (see paragraphs [49], [52] and [64]) and *Hyrax* (see paragraph [205]).

78. In response, Mr Stone submitted as follows:

(1) although the burden of proof in relation to this question was on the Applicants, it was important to note that what the Applicants had to show was not that, on the balance of probabilities, the main purpose of the arrangements was to enable the tax advantages to be obtained but rather that, on the balance of probabilities, it was reasonable for an informed observer to conclude that that was the case. Accordingly, there was a lower threshold to the burden of proof;

(2) having said that, the Applicants did not need to rely on that lower threshhold in this case because it was clear that the main purpose of the arrangements was to enable the tax advantages to be obtained;

(3) although Nugee J in *Seven Individuals* had rejected the proposition that the test was wholly subjective in nature, this did not mean that the test was wholly objective in nature, as Mr Southern was contending. The motives of the participants in entering into the arrangements remained highly relevant to the outcome. It was just that those motives had to be considered in "the wider context of why the arrangements took the form they did, how those who devised the arrangements hoped they would work, and the way in which they were promoted to potential participants";

(4) the marketing materials were therefore a significant guide to the answer, as Judge Mosedale had noted in *EDF* (see *EDF* at paragraph [108]);

(5) taking the above into account in this case, there was considerable evidence to suggest that the main purpose of the relevant arrangements was to enable the tax advantages to be obtained. Those included the terms of the information memoranda, the quantum and basis of the fees, the lack of profitability of the GPs and the LLPs as compared to the significant tax-related returns derived by way of sideways loss relief and the implausibility of Mr Rogers's explanation that the reason for the two-tier loan structure in the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme was because GBFL was not prepared to lend to companies but only to individuals; and

(6) finally, the question of whether or not the participants could be said to be engaging in tax avoidance in participating in the arrangements or to be engaging in the arrangements for good commercial reasons was ultimately irrelevant – see *Hyrax* at paragraphs [142] to [161] and *R (Carlton and others) v The Commissioners for Her Majesty's Revenue and Customs* [2018] EWHC 130 (Admin) ("*Carlton*") at paragraph [69].

79. My findings of fact in relation to whether or not an informed observer would have considered the main purpose of the arrangements arising pursuant to the implementation of each scheme was to enable the participants to obtain a tax advantage are as follows:

(1) I have no difficulty in accepting the propositions that:

(a) each member of a GP or LLP, in entering into the arrangements, hoped that the GP or LLP in which that participant was a member would one day realise a profit from one or more of the sets of film rights which were the subject of the acquisitions and disposals by the GP or LLP;

(b) great care was taken by the Respondent to choose the film rights which were going to be acquired by the GPs and LLPs in order to maximise the chances that those rights would give rise to profits; and

(c) the valuations obtained by the Respondent from Atlantic were genuine and set out the value of the revenue streams which might, admittedly with some good fortune, arise from the film rights which were the subject of that acquisition and disposal, in the unlikely event that the film in question proved to be successful;

(2) however, the hope referred to in paragraph 79(1)(a) above was no different from the hope of profit held by a person placing a bet on a rank outsider in a horse race. In other words, it was a benefit which the relevant participant hoped, but did not expect, to obtain. There was, in fact, no realistic expectation of any non-tax-related commercial

profit from participation in the arrangements, as has been shown to be the case with hindsight in that none of the GPs and only 2 of the LLPs made any profits in any accounting period and that the 2 LLPs which did make a profit in an accounting period did not make a profit overall;

(3) what is also clear is that the expected revenue from the films was certainly insufficient, in and of itself, to persuade the participants to participate in the arrangements;

(4) the only reason why each participant was persuaded to participate in the arrangements and was prepared to pay the fees which were paid to the Respondent and its affiliates and to PAL was that:

(a) where the participant was a member of a GP or LLP, the participant expected to receive sideways loss relief and thereby secure a tax benefit; and

(b) where the participant was the individual owner of a corporate member of an LLP, the participant would be able to benefit from the tax-free distribution of profits from the corporate member;

(5) I have reached the above conclusions of fact on the basis of the evidence summarised in paragraphs 21 to 25 above and, in particular, on the evidence highlighted by Mr Stone, as set out in paragraph 78(5) above. I think that the Respondent has implicitly accepted that this was the case by conceding that it was imperative to offer tax reliefs to potential participants if it hoped to persuade them to participate in the arrangements, as it did in its statement of case and as Mr Rogers did in giving his evidence;

(6) in that regard, I am afraid that I do not accept that the statement which was made in each information memorandum as set out in paragraph 22(5)(g) above did accurately summarise either the purpose of the participants in entering into the relevant arrangements or the purpose of the arrangements;

(7) I also do not accept as a fact Mr Rogers's (somewhat disingenuous) explanation that the reason why GBFL lent to the individual owner of the corporate member in the LLP and not directly to the corporate member itself was because GBFL was not prepared to lend to companies and was prepared to lend only to individuals. GBFL was an affiliate of the Respondent and could easily have lent directly to the corporate member had there been no tax benefit inherent in using the individual owner as an intermediary. The fact that a direct covenant by the corporate member to repay the financing provided by GBFL would have been acceptable to GBFL is clearly demonstrated by the existence of the guarantee which was given by the corporate member of the loan from GBFL to the individual and the fact that, under the deed of priorities referred to in paragraph 22(3)(g)(iii) above, that guarantee obligation took precedence over the covenant by the individual to repay the loan made to him or her by GBFL. Had there been a genuine commercial reason why GBFL would not have been prepared to lend to companies in general, the same impediment would have applied to that guarantee. I can therefore see no reason for the existence of the two-tier loan structure other than the tax advantage arising out of it; and

(8) I consider that these conclusions are the same as those which an informed observer would have reached at the time when each set of arrangements was implemented. Indeed, I consider that it would not have been reasonable for that informed observer to have reached any other conclusion in relation to the significance of the tax benefits to each participant at the time of entering into the arrangements.

80. My conclusions of law in relation to this question are as follows:

(1) I agree with Mr Stone that the only reasonable conclusion which an informed observer, having studied the arrangements, would have reached is that the main purpose of the relevant arrangements was to enable the participants to obtain the tax advantages identified above;

(2) the starting point is the fact that is incorrect to say that, just because the main purpose test is not wholly subjective, as Nugee J held in *Seven Individuals*, the motives of the participants in the arrangements were wholly irrelevant in determining the purposes of the arrangements. In *Seven Individuals*, the taxpayer was advancing the proposition that the relevant test was wholly subjective in nature – that is to say, that the purpose of the arrangements was to be found exclusively in the subjective purpose of the taxpayer. In contrast, the Applicants in that case submitted that the test was more nuanced than that. They submitted that the purpose of the arrangements was to be derived both from the motives of the taxpayer and "the wider context of why the arrangements took the form they did, how those who devised the arrangements hoped they would work, and the way in which they were promoted to potential participants";

(3) in accepting the Applicants' submission in that case, Nugee J was saying that, although the subjective motives of the relevant taxpayer were not determinative, those motives had considerable relevance to the answer and that therefore it was not a wholly objective question (see *Seven Individuals* at paragraphs to [97] to [106]);

(4) the wider context referred to above included things like the existence of limited recourse loans to inflate the expenditure which gave rise to the relief and the way that the schemes giving rise to the arrangements were marketed (see *Seven Individuals* at paragraphs [105] and [106]). The terms of marketing material were also taken into account by Judge Mosedale in reaching the conclusion in *EDF* that the main benefit of the arrangements in that case was the obtaining of the tax advantage (see *EDF* at paragraph [108]);

(5) taking the above principles into account, there is in this case overwhelming evidence to suggest that the main purpose of the arrangements was to enable the tax benefits to be obtained by the participants. Those include the fact that:

(a) the financial returns specified by the information memoranda were calculated virtually exclusively by reference to the tax benefits arising from the sideways loss relief and those returns, when expressed as a percentage of capital invested in the GP or LLP which was not funded by way of limited recourse loan from GBFL, were significant. The arrangements achieved their commercial purpose for the participants even if the films produced no revenue at all;

(b) those information memoranda contained detailed information on the sideways loss relief - such as the availability of the relief, how it would be claimed and the timing of the tax benefit arising from it – and hardly any information at all about the non-tax-related commercial benefits of entering into the arrangements;

(c) although the information memorandum in relation to the Sovereign Corporate Scheme did not refer to the tax benefit arising out of the loan to the corporate member of the LLP, much was made of that benefit on the Respondent's website and Mr Rogers testified at the hearing to the fact that presentations in relation to that tax benefit had been made to prospective participants at the marketing stage;

(d) the participants agreed to pay significant fees both to the Respondents and its affiliates and also to PAL in return for the benefit of being able to enter into the arrangements in the first place;

(e) a participant also became obliged to pay significant additional fees to the Respondent if:

(i) the benefit of the sideways loss relief which the participant obtained from the arrangements exceeded a specified percentage of the capital contributed to the GP or LLP other than capital funded by way of limited recourse loan from GBFL; and

(ii) in the case of arrangements implemented pursuant to the Sovereign Corporate Scheme, loans were repaid out of profits derived other than from the LLP;

(f) I have found as a fact (see paragraph 79(2) above) that there was, at the outset, no realistic expectation of any non-tax-related commercial profit from participation in the arrangements, as has been shown to be the case with hindsight in that none of the GPs and only 2 of the LLPs made any profits in any accounting period and that the 2 LLPs which did make a profit in an accounting period did not make a profit overall;

(g) whilst the Valuation C and, to a lesser extent, the Valuation B, in relation to each set of film rights showed that meaningful amounts of income could conceivably arise to the member of the GP or LLP by virtue of that member's participation in the arrangements, those valuations said nothing about the likelihood that those revenue streams would arise. The facts in this respect are similar to those in *Seven Individuals* – see paragraph [95] in that case, referring to the conclusion of the First-tier Tribunal in that case to the effect that, even if the GPs and LLPs were engaged in a trade with a view to profit "none of the individual referrers could rationally have joined a partnership believing that it was a serious conventional investment, whatever their hopes that profits might in fact result. Their motives for doing so must, therefore, have been other than an investment purpose"; and

(h) the existence of the limited recourse funding meant that the value of the sideways loss relief to each member of the GP or LLP which derived that funding (whether directly or indirectly) from GBFL considerably exceeded the real capital put at risk by that member in the GP or LLP. Similarly, the fact that, in the two-tier loan structure which was a feature of the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme, there was a limited recourse loan from GBFL to the individual owner of the corporate member, followed by a full recourse loan from that individual owner to the corporate member, meant that the individual owner was able to obtain the tax benefit deriving from the tax-free loan repayment without increasing the amount which was really at risk in the LLP; and

(6) as noted in paragraph 79(7) above, I am afraid that I cannot accept Mr Rogers's explanation that the reason why GBFL lent to the individual owner of the corporate member in the LLP and not directly to the corporate member itself was because GBFL was not prepared to lend to companies and was prepared to lend only to individuals.

81. Mr Southern made two related points in arguing that the main purpose of the arrangements in this case was not to enable the participants to obtain a tax advantage. First, he said that the arrangements clearly had a commercial purpose because so much work had

gone into identifying the film rights which were to be the subject of the acquisitions and disposals and, secondly, he said that that commercial purpose meant that the arrangements did not involve tax avoidance.

82. As regards the first of these points, I would observe that the mere fact that arrangements may have a commercial purpose as one of their purposes does not mean that the arrangements cannot also have the securing of a tax advantage as one of their main purposes – see Lightman J in *Inland Revenue Commissioners v The Trustees of the Sema Group Pension Scheme* [2002] STC 276 ("*Sema HC*") at paragraph [48] and Rimer LJ in *Lloyds TSB Equipment Leasing (No 1) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2014] STC 2770 at paragraph [65]. In each case, if there is more than one purpose, it is a question of weighing up the relative significance of the various purposes to determine which of them amount to a main purpose. In this case, it is true that the members of each GP and each LLP were hoping that the film rights which were the subject of the acquisitions and disposals might give rise to a lucrative revenue stream. But, as I have pointed out in paragraph 79(2) above, that was a benefit which the relevant member hoped but did not expect to obtain and would not have led the member to participate in the arrangements in the absence of the tax benefit. As such, in my view, it was not in any meaningful sense a purpose of the arrangements. Any such profit, in the unlikely event that it arose, would have been mere "icing on the cake", to borrow, and reverse, the analogy used by Lightman J in *Sema HC* at paragraph [53].

83. As regards the second of these points, whether or not the participants could be said to be engaging in tax avoidance in participating in the arrangements is ultimately irrelevant in determining whether the arrangements satisfied the condition in paragraph 10(3) of the Arrangements Regulations – see *Hyrax* at paragraphs [142] to [161]. Those paragraphs referred to the warning given by Whipple J in *R (Carlton and others) v The Commissioners for Her Majesty's Revenue and Customs* [2018] EWHC 130 (Admin) ("*Carlton*") at paragraph [69] – admittedly in analysing the conditions in paragraph 12 of the Arrangements Regulations and not paragraph 10(3) of the Arrangements Regulations – of the dangers involved in replacing an examination of the precise language in the statute with the more nebulous concept of whether or not the relevant arrangements amounted to tax avoidance.

84. It follows from paragraphs 65 to 83 above that I consider that the condition in paragraph 10(3) of the Arrangements Regulations is met in the case of each set of arrangements arising from the implementation of each scheme.

<u>Issue 2D</u>

85. Paragraph 10(4) of the Arrangements Regulations provides that, "for the purposes of paragraph (1) arrangements are standardised if a promoter makes the arrangements available for implementation by more than one other person."

86. It is common ground in this case that the Respondent satisfied this condition in relation to the arrangements arising pursuant to the implementation of each scheme.

87. It follows from paragraphs 85 and 86 above that, in my view, the arrangements arising pursuant to the implementation of each scheme satisfied each of the conditions in paragraph 10 of the Arrangements Regulations and therefore amounted to a standardised tax product for the purposes of that provision.

<u>Issue 2E</u>

88. However, paragraph 10(1) of the Arrangements Regulations provides that, even if arrangements would otherwise fall within paragraph 10 of the Arrangements Regulations, they are prevented from falling within that paragraph if they are specified in paragraph 11 of

the Arrangements Regulations. Paragraph 11(1)(b) of the Arrangements Regulations then provides that arrangements "which are of the same, or substantially the same, description as arrangements which were first made available for implementation before 1st August 2006" are specified in that regulation.

89. It is common ground that arrangements arising pursuant to the implementation of the Trader Scheme were first made available prior to 1 August 2006. It therefore follows that, if the arrangements which arose pursuant to the implementation of either scheme can be said to be of the same or substantially the same description as arrangements which arose pursuant to the implementation of the Trader Scheme, then those arrangements fall outside paragraph 10 of the Arrangements Regulations.

90. In that regard, Mr Southern submitted that the arrangements arising pursuant to the implementation of each of the schemes were substantially the same as the arrangements arising pursuant to the implementation of the Trader Scheme because:

(1) as a matter of tax law, both general partnerships and limited liability partnerships were transparent for tax purposes – so that the transactions implemented by each GP or LLP in this case were treated as being implemented by its members and the tax consequences of those transactions were treated as the tax consequences for its members; and

(2) the essence of the tax benefit resulting from the arrangements arising pursuant to the implementation of each of the schemes was that, in the accounting period in which the film rights were the subject of acquisition and disposal, there was a significant trading loss as a result of the writing down of the rights pursuant to the application of GAAP and that was precisely the essence of the tax benefit resulting from the arrangements arising pursuant to the implementation of the Trader Scheme.

91. In response, Mr Stone submitted that the arrangements arising pursuant to the implementation of each scheme were not of the same, or substantially the same, description as the arrangements arising pursuant to the implementation of the Trader Scheme, noting that the burden of proof in relation to this issue was on the Respondent (see *Curzon* at paragraph [71] and *Hyrax* at paragraph [265]).

92. In relation to the Sovereign Individual Scheme, he accepted that the Respondent saw that as being identical to the Trader Scheme in that the only difference between the two schemes was that the Sovereign Individual Scheme involved multiple individual investors acting together through a GP. However, he said that the existence of the GP gave rise to fundamentally different legal rights and obligations from those to which the Trader Scheme gave rise. In support of that submission, he pointed out that, in the advice given by Mr Peacock QC on 19 October 2005 in relation to the Trader Scheme, Mr Peacock QC had expressly warned against the purchase of film rights jointly by the sole traders who participated in the arrangements in order to avoid the creation of a partnership – see paragraph 22(8) above. Mr Stone said that the fact that Mr Peacock QC saw fit to mention that point showed the significance of the different legal rights and obligations to which acting through a GP, as opposed to acting alone, gave rise. Those differences were material and outweighed the fact that the GPs in the Sovereign Individual Scheme were transparent.

93. In addition, Mr Stone referred me to the analysis of a similar point in *Walapu* at paragraphs [123], [124], [151] to [171]. In *Walapu*, the taxpayer sought to rely on the equivalent language in Section 308(5) by arguing that the syndicate schemes which were the subject of that decision were not notifiable because they were substantially the same as certain partnership schemes which had preceded them and had been notified. In rejecting that submission, Green J relied on the fact that, although the losses under the two categories of

scheme were economically and financially the same, legally they were fundamentally different. By parity of reasoning in this case, the arrangements arising pursuant to the Sovereign Individual Scheme could not be regarded as being substantially the same as the arrangements arising pursuant to the Trader Scheme. The two gave rise to fundamentally different legal rights and obligations.

94. Mr Stone said that precisely the same point could be made in relation to the Sovereign Corporate Scheme. Limited liability partnerships were separate bodies corporate as a matter of general law and, again, the LLPs existence gave rise to fundamentally different legal rights and obligations from those to which the arrangements arising pursuant to the Trader Scheme gave rise.

95. However, he added that, in any event, there was a further reason why the arrangements arising pursuant to the Sovereign Corporate Scheme could not be regarded as being substantially the same as the arrangements arising pursuant to the Trader Scheme and that was that, in addition to the tax benefit of the accounting-based loss which arose under both types of arrangements, the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme gave rise to a further tax benefit. That benefit was that, by creating the loan between the individual owner of the company which became the member of the LLP and the company, the individual was able to extract profits out of the company on a tax-free basis as a loan repayment when, ordinarily, the extraction of those profits would have given rise to income tax.

96. My conclusions of law in relation to this issue are as follows.

97. It is my view that, despite the fact that the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme gave rise to different legal rights and obligations from the arrangements arising pursuant to the implementation of the Trader Scheme, the former type of arrangements were substantially the same as the latter type of arrangements. I say that for the following reasons:

(1) first, I agree with Mr Southern that both types of arrangement made use of exactly the same device in order to generate sideways loss relief for the participants – namely the writing down of the film rights which occurred in the accounts of the sole trader or the GP;

(2) secondly, from the tax perspective, there are limited differences between participation in a business as a sole trader and participation in a business through a GP. There are clearly significant differences between the two scenarios in terms of the legal rights and obligations which arise under the general law, which is why Mr Peacock QC was keen to point out to the sole traders in the arrangements arising pursuant to the implementation of the Trader Scheme the dangers of creating a partnership. However, for tax purposes, a GP is transparent and therefore, in tax terms, a participant who acted through a GP was in a more or less identical position to a participant who acted alone;

(3) thirdly, I consider that the position in this case is readily and easily distinguishable from the position in *Walapu*. In *Walapu*, the promoter had deliberately chosen to devise a scheme which used syndicates instead of partnerships because the scheme would not have succeeded if partnerships had been used. Thus, the use of syndicates was a difference which was highly material to the tax analysis of the scheme. In the words of Green J in Walapu at paragraph [167]:

> "The expression 'substantially the same' in s 308(5) must be interpreted by reference to its context which concerns (i) administrative obligations relating to notification of tax avoidance schemes and payments on account of sums said to represent understated tax; and (ii) tax

avoidance legislation. It is designed (as is s 308(3)) to streamline the notification procedure and to reduce the administrative burden on both promoters and HMRC: there is simply no point in the repetitive notification of proposals and arrangements in order to bring to the attention of HMRC insubstantial changes which do not matter. Viewed thus a scheme or proposal is substantially the same if the differences that exist are immaterial to the analysis of whether it is tax avoidance. But, a fortiori, a change or difference in a scheme which is considered to be material, for instance because it renders an ineffective scheme into an effective scheme must be substantially different to its notified predecessors. To conclude otherwise would defeat the obvious purpose of the provision. This conclusion is consistent with normal rules of construction. I have already cited (at para [106], above) the famous dictum of Lord Dunedin in Whitney that 'a statute is designed to be workable'. Another, perhaps more modern way of expressing the same sentiment is that statutes should be construed purposively"; and

(4) in the present case, the difference between an individual acting alone and an individual acting with other individuals through a GP was not material to the efficacy of the scheme and cannot therefore logically be regarded as something of which the Applicants would wish to be apprised under the disclosure regime assuming that they were already aware of arrangements under the Trader Scheme. It is therefore nothing to the point that acting through a GP gave rise to different legal rights and obligations as a matter of general law.

98. I do not reach the same conclusion in relation to the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme even though precisely the same points as those set out in paragraph 97 above could be made in relation to those arrangements so far as they give rise to the accounting-based loss. The reason why I reach a different conclusion in relation to those arrangements is quite simply that the accounting-based loss was only one of the tax benefits to which those arrangements gave rise. Quite separately, those arrangements gave rise to the tax benefit generated by the loan between the individual owner of the company which was the member of the LLP and the company. That tax benefit – the ability to extract profits from the company on a tax-free basis - was clearly a significant feature of the arrangements arising pursuant to the Sovereign Corporate Scheme, for reasons which I have already rehearsed in detail in paragraphs 65 to 84 above. Since:

(1) the arrangements arising pursuant to the implementation of the Trader Scheme – and, for that matter, the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme – did not give rise to that tax benefit; and

(2) adopting the logic of Green J set out in the extract from *Walapu* quoted in paragraph 97(3) above, the device by which that tax benefit arose would have been of considerable interest to the Applicants and is therefore exactly the kind of information to which the disclosure regime has been introduced to monitor,

the Respondent has not satisfied me that the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme were substantially the same as the arrangements arising pursuant to the implementation of the Trader Scheme.

99. Further support for this view may be found in *R (on the application of Cartref Care Home Ltd and others) v The Commissioners for Her Majesty's Revenue and Customs* [2020] STC 516 at paragraph[14],where Cockerill J noted that arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme involved "two different forms of tax avoidance (one relating to income tax and one to do with corporation tax) that just happen to be combined (or 'bolted together') into the same arrangement".

100. For completeness, I should just note in this regard that, notwithstanding the conclusion which I have reached in paragraph 97 above in relation to the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme, the relief from the disclosure

regime which is set out in Section 308(5) has no application to those arrangements, even though that provision also refers to arrangements which are substantially the same as earlier arrangements. This is because the relief in Section 308(5) is available only if the later arrangements are substantially the same as earlier arrangements which have previously been notified and it is common ground that no arrangements which arose pursuant to any implementation of the Trader Scheme have previously been notified.

101. The conclusion arising from the analysis set out in paragraphs 51 to 100 above is that:

(1) the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme fall outside paragraph 10 of the Arrangements Regulations (by virtue only of the application to those arrangements of paragraph 11(1)(b) of the Arrangements Regulations); but

(2) the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme fall within paragraph 10 of the Arrangements Regulations.

Issue 2F

102. Paragraph 12 of the Arrangements Regulations provides that arrangements fall within that provision if

"(a) the promoter expects more than one individual to implement the same, or substantially the same, arrangements; and

(b) the arrangements are such that an informed observer (having studied them) could reasonably conclude—

(i) that the main benefit of those arrangements which could be expected to accrue to some or all of the individuals participating in them is the provision of losses, and

(ii) that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax."

103. Paragraph 12 is relevant only in relation to arrangements arising pursuant to the implementation of the Sovereign Individual Scheme. Issue 2F relates to the limb of paragraph 12 which is set out in paragraph (a). As it is common ground that, in relation to the arrangements arising pursuant to the implementation of each scheme, the Respondent expected more than one individual to implement the relevant scheme, this limb of the paragraph is satisfied in relation the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme.

Issue 2G

104. Turning to paragraph 12(b) of the Arrangements Regulations, it is common ground that, if an informed observer, having studied the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme, were reasonably to conclude that the main benefit of the arrangements, which could be expected to accrue to some or all of the individuals participating in the arrangements, was the provision of losses, then that same informed observer could reasonably have concluded that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax. Thus, Issue 2G depends only the answer to the limb of paragraph 12(b) which is set out in paragraph 12(b)(i).

105. Since I have already concluded that the losses arising as a result of the accounting-based write down were what led to the avoidance or reduction of tax by, or the repayment of tax to, the participant, this limb is effectively asking whether the informed observer could reasonably have concluded that the main benefit which could be expected to accrue to some or all of the individuals participating in the arrangements arising pursuant to the

implementation of the Sovereign Individual Scheme was the tax advantage which arose by virtue of those losses. It is therefore the identical test to the one in paragraph 10(3) of the Arrangements Regulations except that, instead of considering the main purpose of the arrangements, one is here considering the main benefit of the arrangements.

106. At the hearing, neither party's counsel spent very much ammunition on drawing out the differences between main benefit and main purpose.

107. Mr Southern did however seek to explain the difference by reference to Columbus, whose purpose was to discover the Indies but whose benefit was to discover America. He said that, in the present context, that meant that the main benefit of the arrangements was to be determined by weighing up the benefits (both tax and non-tax) which, at inception, the informed observer could reasonably conclude were expected to be obtained, whereas the main purpose of the arrangements was to be determined by weighing up the benefits (both tax and non-tax) which, at inception, the informed observer could reasonably conclude were desired to be obtained.

108. In that regard, Mr Southern and Mr Avient drew my attention to the fact that, in his letters of 17 October 2017 setting out his conclusion that each scheme should have been notified, Mr Jones had not sought to draw any comparison between the quantum of the tax benefit which, at inception, was expected to arise out of the arrangements and the quantum of the potential film revenue which, at inception, was expected to arise out of the arrangements. Mr Avient pointed out that Mr Jones had been supplied before the date of those letters with the Atlantic valuations and should have taken the potential revenue streams reflected in Valuation B and Valuation C into account and weighed them against the tax benefit before reaching his conclusion. They submitted that this is how both the Applicants and Whipple J approached the question of main benefit in *Carlton* (see *Carlton* at paragraphs [71] to [73]). In that case, reference was made to the approach by the First-tier Tribunal in *Brain Disorders Research Ltd Partnership v The Commissioners for Her Majesty's Revenue and Customs* [2015] SFTD 1043 ("*Brain Disorders*") at paragraph [138] of putting "onto scales the tax benefit on one side of the scales and the other benefits on the other side, and seeing which were the greater benefits".

109. In giving his testimony, Mr Jones said that he had not taken the potential revenue streams reflected in Valuation B and Valuation C into account in reaching his conclusion on main benefit because the likelihood that those revenue streams would arise was so remote. This was why, in his letters, he had referred to there being "little realistic prospect of profits for many years". Mr Stone adopted the same approach as Mr Jones in his submissions, noting that the real value of the potential revenue streams reflected in Valuation B and Valuation C depended entirely on the likelihood that the circumstances leading to the relevant revenue streams would actually arise. Those valuations simply informed the relevant participant of the quantum of income which would arise if the relevant film proved to be successful. They did not inform the relevant participant that the film would be successful or provide any probabilities as to the likelihood of success. Thus, there was no realistic value which could be attributed to those revenue streams and placed in the scales to be weighed against the tax benefits.

110. My conclusions of law in relation to this issue are as follows.

111. I agree that the main benefit test is more objective in nature than the main purpose test and that it involves a comparison between the tax-related benefits which are expected to be obtained and the non-tax-related benefits which are expected to be obtained – see *Carlton* at paragraphs [71] to [73] and *Brain Disorders* at paragraph [138]. However, in conducting that exercise, it would be facile to accord a value to any of the benefits that are being weighed

which does not take into account the likelihood that the relevant benefit will arise. In this case, it was all very well for Valuation B and Valuation C to show the quantum of revenue which might arise from a film in the unlikely event that the film proved to be successful. What was needed in addition to that was to take into account the probability that the relevant revenue stream would actually materialise. I can understand why that might prove nearly impossible to produce in this context, given the highly speculative nature of the film industry, but that rather demonstrates the point. On the basis of my findings of fact in paragraph 79 above, I think that, at the time when the hypothetical informed observer would have been considering the benefits arising out of each set of arrangements – which is to say, at the inception of the relevant arrangements - very little, if any, value would have been accorded by that observer to the future revenue streams which were reflected in Valuation B and Valuation C. The inevitable conclusion to be drawn from that is that the hypothetical informed observer could reasonably reach only one conclusion in relation to this issue, which was that the main benefit which could be expected to accrue to the members of each GP from their participation in the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme was the losses for tax purposes which were expected to arise from the accounting-based write down.

112. The outcome of the main benefit test is thus, on the facts of this case, identical to the outcome of the main purpose test.

113. The conclusion arising from the analysis set out in paragraphs 102 to 112 above is that the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme fall within paragraph 12 of the Arrangements Regulations.

Issue 3

114. Section 306(1)(b) is satisfied in relation to arrangements if the arrangements enable or might be expected to enable any person to obtain an advantage in relation to any tax that is prescribed in relation to arrangements of that description.

115. I have already concluded that the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme fall within paragraph 12 of the Arrangements Regulations and that the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme fall within paragraph 10 of the Arrangements Regulations.

116. Paragraph 5(1) of the Arrangements Regulations provides that arrangements falling with paragraph 10 or paragraph 12 of the Arrangements Regulations are prescribed "in relation to income tax, corporation tax and capital gains tax".

117. The tax advantages to which the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme were expected to give rise were advantages in relation to income tax and capital gains tax and the tax advantages to which the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme were expected to give rise were, inter alia, advantages in relation to corporation tax and income tax.

118. It follows that the arrangements arising pursuant to the implementation of each scheme satisfy the requirements of Section 306(1)(b).

Issue 4

119. Section 306(1)(c) is satisfied in relation to arrangements if the arrangements are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of the tax advantage or tax advantages to which the arrangements give rise.

120. It can be seen that this test is effectively identical to the test which I have discussed in my analysis in relation to Issue 2G. The only differences between the two are:

(1) whereas the test in paragraph 12(b)(i) of the Arrangements Regulations is based on the conclusion which I consider the hypothetical informed observer would have reached, the test in Section 306(1)(c) is based on the conclusion which I am required to reach myself; and

(2) whereas the test in paragraph 12(b)(i) of the Arrangements Regulations:

(a) applied only to any income tax advantage and/or capital gains tax advantage arising from the use of the losses realised by the individuals who participated in the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme; and

(b) was to be applied solely to those arrangements,

the test in Section 306(1)(c)

(c) can also apply to income tax advantages and capital gains tax advantages arising other than from the use of losses and to corporation tax advantages; and

(d) applies both to arrangements which arose pursuant to the implementation of the Sovereign Individual Scheme and arrangements which arose pursuant to the implementation of the Sovereign Corporate Scheme.

121. However, none of the differences described in paragraph 120 above makes any difference to the outcome of the relevant test. In my view:

(1) the main benefit that might have been expected to arise from the arrangements which arose pursuant to the implementation of the Sovereign Individual Scheme was the income tax advantage and/or capital gains tax advantage that each participant derived from the accounting-based loss; and

(2) the main benefit that might have been expected to arise from the arrangements which arose pursuant to the implementation of the Sovereign Corporate Scheme was the corporation tax advantage that each corporate member of the LLP derived from the accounting-based loss and the income tax advantage that the individual owner of that corporate member derived from the tax-free loan repayments.

122. For completeness, I should just add in relation to Section 306(1)(c) (and paragraph 10(3) of the Arrangements Regulations) that nothing turns on the fact that the arrangements arising pursuant to the implementation of each scheme gave rise to an advantage in relation to more than one type of tax because, in any enactment, the singular includes the plural (pursuant to Sections 6(c) and 23(1) of the Interpretation Act 1978) and therefore it is merely necessary to consider whether obtaining the tax advantages which were expected to arise from the relevant arrangements, taken together, was the main benefit (or, as the case be, main purpose) of the arrangements.

123. It follows that the arrangements arising pursuant to the implementation of each scheme satisfy the requirements of Section 306(1)(c).

Issue 5

124. The result of the analysis in paragraphs 44 to 123 above is that each set of arrangements arising pursuant to the implementation of each scheme satisfied all of the conditions in Section 306. In consequence, it necessary for me to address the question of:

(1) whether, even though that was the case, the language used in Section 314A(3) means that I am not obliged to make the order sought by the Applicants under Section 314A in relation to each scheme but instead have a discretion not to do so; and

(2) if so, whether the circumstances in relation to the arrangements arising pursuant to the implementation of either or both schemes means that I should decline to make the order in relation to that scheme or those schemes.

125. Mr Southern submitted that I did have that discretion and should exercise it in relation to both schemes in the manner described in paragraph 124(2) above.

126. As regards the existence of the discretion, he pointed out that Section 314A used the word "may" and not "must", which was a clear indication that there must be circumstances in which, even though a set of arrangements satisfied all of the conditions in Section 306, the First-tier Tribunal could nevertheless decline to make the order sought. The fact that such discretion existed had been accepted by both Judge Poole in *Curzon* at paragraph [45] and Judge Mosedale in *Hyrax* at paragraph [308] and in *EDF* at paragraph [180].

127. He went on to say that this was a case in which I should exercise my discretion not to make the order. The reasons for this were twofold:

(1) first, the DB showed that there had been extensive correspondence between the parties between 2007 and 2012, which had included a meeting, in relation to the potential application of the disclosure rules to this generic structure. That correspondence had petered out inconclusively. That being the case, it was wholly unreasonable for the Applicants to have waited for some four years before re-raising the issue of the potential application of the disclosure legislation to the structure. Adopting the language used in the context of the discovery rules, Mr Southern submitted that the information held by the Applicants was "stale" by the time that they re-started the process; and

(2) secondly, the DB showed that the Respondent had taken every step that it reasonably could have done to obtain advice in relation to the notifiability of the arrangements. It had obtained the views of numerous advisers on the subject, including two counsel, Mr Peacock QC and Mr Baldry. Thus, this was not a case where the taxpayer hadn't cared whether or not the legislation applied and had simply proceeded to implement the schemes regardless. Between 2012 and 2016, the Respondent could reasonably have believed that it did not need to make any disclosure.

128. Mr Stone accepted that the language used in Section 314A(3) was apt to confer on the First-tier Tribunal a discretion to decline to make an order under Section 314A in relation to arrangements even if the arrangements in question satisfied all of the conditions in Section 306(1). However, he said that once the conditions in Section 306 were satisfied in relation to arrangements, the onus was on the relevant promoter to show why the order should not be made. In that regard, both Judge Poole in *Curzon* at paragraph [45] and Judge Mosedale in *Hyrax* at paragraph [308] and in *EDF* at paragraph [180] had expressed the view that that discretion should be exercised sparingly. Both of them referred to the fact that, once the relevant conditions were satisfied, the order should be made unless there were compelling reasons not to do so.

129. In this case, he said, there were no such compelling reasons.

130. In particular:

(1) the prior correspondence with the Applicants had been in relation to the proposal comprising the Trader Scheme and not the arrangements arising pursuant to the

implementation of the two schemes which were the subject of these applications. The Trader Scheme was very different from those two schemes, and particularly different from the Sovereign Corporate Scheme, with its additional tax advantage stemming from the double loan structure;

(2) moreover, it was incorrect to say that that correspondence had petered out inconclusively. The DB showed that, at the end of the process, the Respondent had agreed with the Applicants that it would make a notification of the proposal comprising the Trader Scheme provided that the Applicants provided certain assurances, in particular as regards the imposition of potential penalties. The Applicants had accepted the terms of that offer and provided the requested assurances and then asked for the disclosure to be made. In response, the Respondent had initially asked for more time to reply to that request, and then had to be chased. Following that chasing letter, the Respondent had written to say that it was "taking further advice on the matter and will respond more fully as soon as possible". Thus, the correspondence had hardly been inconclusive. There had been a conclusion, which was that both parties agreed that the proposal comprising the Trader Scheme would be notified. It was just that the Respondent had failed to make the notification and the Applicants had failed to follow things up. It was true that the Applicants had some responsibility for that failure but the Respondent was at least equally responsible for the way that the correspondence ended without a disclosure's being made; and

(3) the mere fact that the Respondent had taken advice in relation to the requirement to notify the proposals comprising the various schemes was not a reason to decline to make the orders.

131. Mr Stone submitted that the factors described in paragraph 130 above were all things which might fall to be taken into account when the quantum of any penalties for the failure to notify was being addressed, but they were not reasons for declining to make the orders.

132. My conclusions of law in relation to this issue are as follows.

133. Despite its being common ground, I am not entirely convinced that the language in Section 314A does confer on the First-tier Tribunal a discretion to refuse to make an order under Section 314A in relation to arrangements in circumstances where those arrangements satisfy all of the conditions in Section 306(1). My reading of the relevant language is that it is merely making it clear that the First-tier Tribunal has no power to make an order under Section 314A in relation to arrangements unless the relevant arrangements satisfy the conditions in Section 306(1). It is doing no more than that. It is therefore merely saying that the First-tier Tribunal cannot accede to an application under the section by determining that arrangements which don't meet those conditions are nevertheless notifiable.

134. However, very little turns on this point because, even if I am wrong in my reading of the relevant provision, I agree with Judge Poole and Judge Mosedale that it would require quite exceptional circumstances to justify a refusal by the First-tier Tribunal to make an order under Section 314A in relation to arrangements which satisfied all of the conditions in Section 306(1). Parliament has legislated to the effect that arrangements which meet those conditions should be notified and it would therefore be odd if a promoter of arrangements which met those conditions who chose not to make a notification should be in a better position that a promoter who did.

135. No such exceptional circumstances exist in this case. For the reasons given by Mr Stone as set out in paragraph 130 above, I agree with Mr Stone that neither the previous correspondence between the parties in relation to the proposal comprising the Trader Scheme nor the fact that the Respondent took advice in relation to the potential application of the

disclosure regime to the two schemes which are the subject of the present applications constitutes such exceptional circumstances. If anything, such matters may be relevant to the consideration of the penalties for the failure to disclose, as opposed to whether or not the orders should be made.

CONCLUSION

136. For the reasons set out above, I hereby make the requested orders under Section 314A to the effect that:

(1) the arrangements arising pursuant to the implementation of the Sovereign Individual Scheme are notifiable arrangements; and

(2) the arrangements arising pursuant to the implementation of the Sovereign Corporate Scheme are notifiable arrangements.

137. In the light of the above orders, it is unnecessary for me to address the applications for orders under Section 306A, which were made in the alternative to the applications under Section 314A. I therefore do not propose to address Issues 6 to 8 described in paragraph 33 above.

NO RIGHT TO APPEAL

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

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 09 MARCH 2021

APPENDIX
Excerpts from the applications

1. The application in relation to the Sovereign Individual Scheme starts by explaining that the Applicants are applying for an order to the effect that "the arrangements that arise when an individual becomes a Partner of a general Partnership engaged in film rights that creates sideways losses for individuals via the partnerships by writing down film rights to create large losses in the first year of trading, are (or, in the alternative, are to be treated as) "notifiable arrangements" within the meaning of s306(1) FA 2004 ("the Premiere Sovereign arrangements")".

2. It then goes on to make it clear that the Sovereign Individual Scheme is just one of three sets of arrangements which involve sideways loss relief – the other two being the Trader Scheme and the Sovereign Corporate Scheme – and then describes the way in which the Sovereign Individual Scheme works generically as follows:

"HOW THE PREMIERE SOVEREIGN ARRANGEMENTS WORKS

….

5 It is HMRC's understanding that the Premiere Sovereign arrangements work as follows:

a The Sovereign Information Pack dated November 2007 …provides the opportunity to join the "Sovereign" sole trader scheme. The March 2009 supplementary addendum ….then qualifies the information pack so as to apply it to individuals that have formed a general partnership (the arrangements relevant to this application). The Information Pack indicates that individuals who wish to join the arrangements ("scheme users") must make a minimum commitment. The commitment may be made up of cash from "[the individual's] own resources and/or by full recourse loans and/or limited recourse loans". The March 2009 supplementary addendum then specifies that "Should any Partner require loan facilities, it should be noted that any borrowings made by a Partner should be used to make a capital contribution to the Partnership, which then enables the Partnership to carry out the Trade of acquiring and disposing of Film Rights." It is also noted that there is the possibility of interest relief on the loans for Partners.

b The Information Pack sets out "a ready-made business structure allowing high net worth individuals acting as sole traders to trade film rights for profits". The key features (on Page 4) are stated to be "unlimited upside potential subject to film performance, downside protection provided by a built in risk mitigation strategy and a forecast minimum net returns of 135% of cash committed". The March 2009 supplementary addendum means that these "key features" will be equally applicable to the Premiere partnership arrangements.

c The transactions normally take place in the last few days of the financial year. All individual partners received e-mails from the Respondent which made reference to their previous discussion with Price Mann & Co, whilst requesting return of the signed documentation. A hard copy of the documentation to sign was provided to the individual partners along with letters …which included application forms and loan agreements.

d The Sovereign Application form …provides personal details along with amounts of initial commitment and loan provisions. All loans are provided to the borrowers by GBF Capital Ltd, who operate from the same business address as Premiere Picture. An application for loan …is completed by all partners with GBF Capital Ltd. The sole purpose of the loan is to fund a capital contribution to the partnership.

e A Partnership Agreement … is entered into and provides details of the profit share and capital contribution for each partner.

f A Service Agreement …sets out the business services, support and the fees payable between Premiere Picture Service Ltd ("PPSL"), the Respondent, the partnership and individual partners. PPSL is a wholly owned subsidiary of the Respondent and under the terms of this agreement, the partnership will grant a power of attorney to PPSL to enable them to enter into certain agreements on behalf of the partnership in furtherance of the provision of the Services by PPSL. The partnership will pay a project fee to PPSL along with an annual fee. An invoice from the Respondent for the business and support services was provided to the partnership …, Schedule 1 provides a breakdown of the Business Services to be provided by PPSL and Schedule 2 dictates the support services.

g The two distribution rights to films purchased are provided under a Rights Acquisition Agreement … and provides the territories over which the rights are purchased.

h The partnership then enters into distribution agreements … which assign all of their rights, titles and interests in and to the Rights in the territory to distributor in return for shares of exploitation receipts. The partnership thereby irrevocably directs the distributor to pay its entitlement to gross receipts into the Coutts account for PPSL.

i The Distribution Agreement is underpinned by a Deed of Security Assignment …and a Clarification Agreement ...

j The Information Pack ….notes that "losses arising in your trade may be offset against any income and/or capital gains tax charge you may have incurred. The resulting reduction in your current or historic tax liabilities could be claimed as either a credit against your future tax liability or paid out to you as a rebate from HMRC. The Tax saving should significantly reduce the downside in the event that the Film Rights traded do not perform according to expectations."

3. The application then proceeds to set out the Applicants arguments as to why the order under Section 314A or Section 306A, as the case may be, should be made in relation to the relevant scheme.

4. The application relating to the Sovereign Corporate Scheme proceeds in exactly the same format.

5. It starts by explaining that the Applicants are applying for an order to the effect that "the arrangements that arise when a corporate company becomes a Partner of a Limited Liability Partnership ("LLP") engaged in film rights that creates sideways losses for Companies by writing down film rights to create large losses in the first year of trading are (or, in the alternative, are to be treated as) "notifiable arrangements" within the meaning of s306(1) FA 2004 ("the Premiere Corporate arrangements"). There is, additionally, a profit extraction element to these arrangements as each director loans monies to their respective company for the purposes of investing in an LLP. The loans by directors are funded by loans received by directors on limited recourse terms. This allows the directors to extract money from their company tax-free."

6. Then, in the section headed "HOW THE PREMIERE CORPORATE ARRANGEMENTS WORK", the Applicants say as follows:

"5 It is HMRC's understanding that the Premiere Corporate arrangements work as follows:

a An Information Memorandum …Business Model for Private Companies and the Directors dated October 2010 is provided to corporate companies and the directors of those companies ("scheme users") by the Respondent. This memorandum made reference to an opportunity to join the "Premiere Corporate" scheme. The information memorandum at page 3 states:

"*In order to take advantage of this Proposal, the Applicant will need to make a minimum Initial Commitment of £150,000 to the Partnership and the Trade. If there is more than one Applicant to join the Partnership, the minimum Initial Commitment for each one is £37,500 and the total must be at least £150,000 in aggregate. The total Minimum Commitment to the Partnership is £1,030,000 and this may include the Initial Commitment and any borrowing by the Members to fund the Commitment. There is no upper limit to how much a Participant can commit, subject to the availability of Film Rights*."

The IM purports to offer an investment opportunity, in an LLP, which will trade in the buying and selling of film rights. It details that any losses made by the LLP can be offset against company profits.

b The LLP then enters into a Limited Liability Partnership Agreement …with Premiere Sovereign Business Ltd ("PSBL") and PC Nominees No 1 Ltd. The business of the LLP is described in the agreement as "The trade of buying, selling and otherwise exploiting film distribution rights."

c A Service Agreement …sets out the business services and support between Premiere Picture Service Ltd ("PPSL"), Premiere Picture Ltd ("PPL") and the LLP. The agreement sets out the services provided by PPSL and the fees payable.

d A Premiere Corporate Application Form and Undertaking …is then completed by all scheme users. This form provides details of the initial commitment and remaining loan and also provides details of where contributions should be paid.

e The application refers to a 'corporate guarantee' under which repayment of the loan is guaranteed on limited recourse terms ….but only from revenues and distributions received from the LLP. Interest is repayable on the loan in arrears at a rate of 3% above LIBOR. 'Film receipts' are defined as being a scheme member's proportionate share of 50% of net income from LLP from the exploitation of film rights, and the 'repayment amount' means a sum equal to the 'film receipts'.

f Having regard to financing the investment in the LLP, individual directors of the scheme users then make an Application for loan and borrow money from GBF Capital Ltd (who operate from the same business address as the promoter) …,

g The company completes a deed of adherence, admitting them as a new member of the LLP. The company undertakes to comply with the terms of the partnership agreement and provides their capital contributions. An agreement is signed by the directors of the scheme users and the scheme users to irrevocably instruct that 50% of their share of partnership income is paid to GBF Capital Ltd to repay the loan.

h The individual directors of the scheme users lend the money that they have borrowed to their respective company …on full recourse terms. The loan can only be used to fund a capital contribution to the partnership. This allows for an overdrawn Director's Loan Account to be said to be repaid or, alternatively, for future payments from the company to the director to be tax-free. The scheme user tops up the loan received with cash and uses this as its capital contribution to become a member of an LLP, a typical split is 85% loan to 15% cash.

i A Rights Acquisition Agreement was made between Pavilion Acquisitions Ltd (Guernsey) ("PAL") and the LLPs to obtain film rights exploitable in defined territories …and invoices were provided …. Typically, two to three films are purchased in the first accounting period, with purchases in subsequent periods depending on the members of the LLP contributing further funds (under the same mechanism as above).

j The fees paid for the films were supported by valuations undertaken by a valuer. The example provided refers to Alan Harris of Atlantic Film Group on 30 November 2011.

k The LLP then entered into Distribution Agreements …from which it sold the purchased rights to a third party distributor in exchange for future film receipts. These agreements assign all of the LLP's rights, titles and interests in and to the rights in the territory to the distributor in return for shares of exploitation receipts. The LLP thereby irrevocably directs the Distributor to pay its entitlement to receipts into the Coutts account for PPSL.

l The rights are then re-valued at a later date, usually just days after their purchase, under UK Generally Accepted Accounting Principles "GAAP". These valuations are significantly lower than the previous valuations and, as such, produce a significant loss in the accounting period. This loss is attributable to the scheme members and can be offset against company profits, thus producing a tax advantage. The film rights are re-valued in subsequent periods producing, usually, a relatively similar valuation."

7. Once again, the application then proceeds to set out the Applicants' arguments as to why the order under Section 314A or Section 306A, as the case may be, should be made in relation to the relevant scheme.