Neutral Citation: [2022] UKFTT 146 (TC)

Case Number: TC08477

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/04157

Disclosure of tax avoidance schemes - Whether the arrangements were notifiable arrangements - Whether the Respondents were promoters - Finance Act 2004 ss 306, 307- The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006, SI 2006/1543 reg 8 - HMRC v Curzon Capital Ltd [2019] UKFTT 63 *& HMRC v Hyrax Resourcing Ltd & Ors [2019] UKFTT 175 considered.*

Heard on: 4 & 7 February 2022
Judgment date: 03 MAY 2022

Before

TRIBUNAL JUDGE MALEK

Between

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Applicants

and

(1) SMARTPAY LIMITED (incorporated in the UK)
(2) SMARTPAY LIMITED (incorporated in the Isle of Man)

Respondents

Representation:

For the Appellant: Ms. Murray, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Applicants

For the Respondents: Mr. Mullan QC, counsel, instructed by Reynolds Porter Chamberlain LLP for the Respondents

DECISION

INTRODUCTION

1. This is an application by the Applicants ("HMRC") seeking an order under section 314A (or in the alternative under section 306A) of the Finance Act 2004 ("FA 2004") that specified arrangements are (or, in the alternative, should be treated as) notifiable arrangements for the purposes of section 306(1) FA 2004.

2. The First Respondent is incorporated in the UK with company number 05618472 ("UKCO"). The Second Respondent is incorporated in the Isle of Man with company number 129140C ("IOMCO"). Both UKCO and IOMCO resist the application, albeit for slightly different reasons.

EVIDENCE AND FACTS

3. All parties relied upon the documents contained in the hearing bundle and the supplementary bundle. In addition, HMRC relied upon the evidence of Mr. Jones, a Taskforce Investigator, who not only produced a witness statement, but also gave oral evidence. The Respondents relied upon the evidence of Mr. Hoyler, the Managing Director of Pathfinder Tax Services Ltd, a company which has been providing advice and assistance to UKCO and other companies. He also produced a witness statement and was tendered for oral evidence and cross-examination. In the event, although Mr. Jones was cross examined Mr. Hoyler was not.

4. Before turning to my findings of fact I deal with an argument raised by HMRC in relation to the evidence. It was submitted that the evidence of Mr. Hoyler, in so far as it purported to describe any aspect of the Respondents' activities at the relevant time, was not contemporaneous, was incomplete and constituted hearsay. As such, it was submitted, HMRC's case was proved to the requisite standard. The reasons why it was said that this was the case was because the Respondents had failed to (a) rely upon their own documentary evidence and (b) produce statements made by their respective directors (and, presumably to tender these individuals for cross examination), instead choosing to rely upon a statement produced by a third party, Mr. Hoyler, who was neither an employee nor a director at the relevant time.

5. This is not, in my judgment, an argument that has merit. Where evidence is provided by someone who has no first-hand knowledge of the facts in relation to which s/he speaks (i.e. what s/he says amounts to hearsay) then, in this jurisdiction, the fact that the evidence is not first-hand goes to the weight to be given to that evidence and does not go to admissibility. It cannot, therefore, be said that the evidence of Mr. Hoyler falls to be excluded or that the Respondents have, therefore, failed to rely upon any evidence. Neither can it be said that there is any provenance in any document disclosed by HMRC. The Respondents are just as entitled as HMRC to rely upon the documents contained in the bundles. The fact that there might have been other documents in the Respondents possession (which have been neither disclosed nor made their way into the bundles) does not assist with an argument that the Respondents have failed to rely upon any evidence.

6. Nevertheless, I did not find Mr. Hoyler's evidence to be particularly helpful. It contained a mixture of submission and opinion; and was altogether light on the facts. By way of example, it can be seen that Mr. Hoyler submits at paragraph 9 of his statement that the inference that UKCO is aware of the arrangements or in a position to provide HMRC with the prescribed information is 'denied'. Likewise he denies, at paragraph 11 of his statement, that the marketing material 'relating to UKCO's umbrella company business' is 'relevant to the arrangements'.

By way of one further, and last, example he submits at paragraph 10 that HMRC should be well aware of UKCO's two operations.

7. I make the following, uncontroversial, findings of fact on the balance of probabilities:

(1) UKCO was incorporated in the United Kingdom on 10 November 2005 and is based in the UK. During the relevant tax years it was called Smartpay Limited.

(2) IOMCO was incorporated in the Isle of Man on 11 August 2014 as Smartpay Consulting Limited and is based in the Ise of Man. It changed its name to Smartpay Limited on 27 April 2015.

(3) IOMCO is the trustee of the Smartpay Consulting Trading Trust which is also based in the Ise of Man.

(4) On 14 February 2017, Officer Jones issued a notice to UKCO under section 313A FA 2004 seeking an explanation as to why there had been no disclosure of the arrangements by UKCO.

(5) There then followed an exchange of correspondence and documentation between HMRC and UKCO which culminated in the former sending to UKCO and IOMCO letters dated 11 September 2019 setting out HMRC's view that the arrangements were notifiable arrangements under s 306 of the FA 2004, that the Respondents were promoters for the purposes of s. 307 of the FA 2004, and that the Applicants intended to make the present application to this tribunal.

8. To aid understanding the more controversial findings of fact are dealt with under the heading 'Discussion' later in this judgment.

THE APPLICABLE LAW

9. The relevant extracts from the various statutory provisions are set out in the Appendix.

DISCUSSION

10. Given that this is an application by HMRC under section 314A FA 2004 for an order that an arrangement is notifiable HMRC are required to specify (a) the arrangement in respect of which the order is sought and (b) the promoter. Next HMRC must satisfy me, on the balance of probabilities, that section 306(1)(a) – (c) apply to the relevant arrangement. The starting point, then, is for me to consider the arrangements in question.

The arrangements

11. HMRC identify the arrangement as a "contractor loan scheme" and more specifically as the "Optima Employed arrangements". The arrangements essentially involve individuals who have found work through an arms-length UK agency or intermediary providing their services to the end user or client as employees of either UKCO or IOMCO in return for a wage and a loan.

12. The arrangements are said by HMRC to comprise the following steps:

(1) The individual user of the arrangement enters into a contract of employment with either UKCO or IOMCO.

(2) UKCO enters into a contract for services with the UK agency or intermediary for the provision of the individual's services to an end user or client.

(3) The UK agency enters into a contract for services with the end user or client for the provision of the individual's services.

(4) The individual enters into a facility agreement with IOMCO, acting as trustee for Smartpay Consulting Trading Trust based in the IOM (the "Lender"), whereby the individual is provided with an unsecured loan facility by the Lender.

(5) The individual performs the contracted services and the UK agency or intermediary invoices the end user for the provision of those services. UKCO invoices the agency or intermediary (on behalf of IOMCO it is said by the Respondents) and receives payment of the invoiced sum. All of this sum, minus an administrative charge, or such sum as is invoiced by IOMCO, is transferred to IOMCO by UKCO. The individual ultimately receives two payments from IOMCO – a sum representing the individual's national minimum wage and a loan pursuant to the facility agreement.

13. The Respondents take no issue with this description of the arrangements other than to make the following argument. They argue that HMRC have confused two separate sets of arrangements. This is because UKCO is involved in two separate businesses which have nothing to do with each other. The first is an "umbrella company" business which has nothing to do with the arrangements involving the Lender. The second is the business of providing "contract management" services on behalf of IOMCO.

14. This is an unattractive argument when one considers the deliberately wide definition given to "arrangements" by section 318 FA 2004 which provides that "arrangements" includes any scheme, transaction or series of transactions. The transactions, as evidenced by the movement of funds, clearly show the involvement of UKCO in the arrangement. It is, of course, entirely possible to have two very separate businesses (even when not carried on by the same legal entity) which form part of a scheme or series of transactions. Just because UKCO carries on two separate businesses does not mean that the two businesses cannot be part of the "arrangements". Even if I were to exclude from consideration the "umbrella company" part of the business I am still left with the "contract management" part. That involved, even on the Respondents case, UKCO acting, at all times, as an undisclosed agent for IOMCO in order to present, wrongly, to the UK agencies or intermediaries (and perhaps to the individual users) that they were dealing with a UK domiciled and resident company. Even acting as an agent, in these circumstances, is sufficient in my view to bring UKCO within the arrangements.

15. What the Respondents seek to do here is to artificially restrict the arrangements in question so that they exclude (or at the very least minimise) the involvement of UKCO. This is clearly misconceived.

Notifiable arrangements

16. It appeared to be common ground before me that the term 'notifiable arrangements' for the purposes of section 314A FA 2004 had the same meaning as in section 306 FA 2004.

17. Section 306(1) FA 2004 provides that '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.

18. No particular issue was taken by the Respondents in relation to 306(1)(b) and (c) so I do not dwell any further on these provisions save to say that I am satisfied, to the relevant standard and upon the evidence before me, that the arrangements enabled, or might have been expected

to enable, individual users of the arrangement to obtain a tax advantage (mainly consisting of converting what would otherwise have been income into a loan and thereby reducing the overall incidence of National Insurance Contributions ("NIC") and Income Tax) and that the main or one of the main benefits of the arrangements was the obtaining of that advantage.

Description prescribed by regulation – hallmarks

19. HMRC argued that at least one of the descriptions in the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006, SI 2006/1543 (the "Regulations") applied. In particular (i) Regulation 8, description 3: Premium Fee, (ii) Regulation 10, description 5: standardised tax products, (iii) Description 8, regulation 18: Employment income provided through third parties, and (iv) Description 9, Regulation 19: Financial Products.

Premium Fee

20. The premium fee hallmark applies to arrangements such that it might reasonably be expected that a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements of these Regulations, be able to obtain a premium fee.

21. It is argued by the Respondents that (a) UKCO is not in receipt of a premium fee and nor is it reasonable to expect UKCO as a promoter would be in a position to obtain a premium fee for the services it provides; and (b) in the case of IOMCO; given HMRC's case is that the fee received is attributable to the tax advantage and the tax advantage would be obtained regardless of whether or not the arrangement was disclosed, it cannot be the case that "but for the requirements of the Regulations" IOMCO would be able to obtain a premium fee.

22. The hallmark requires one to envisage a hypothetical promoter of an arrangement which is the same or substantially similar to the arrangement in question and then to ask oneself whether it would be reasonable to expect that such a promoter would be able to obtain a premium fee. It is, therefore, an objective test applied to a hypothetical promoter. The test does not require an examination of the subjective condition of the promoter. The fact that UKCO does not receive a premium fee is neither here nor there. It is equally irrelevant that it would be unreasonable to expect that *UKCO as promoter* would be in a position to obtain a premium fee for *the services that it provided.* Both considerations go to the subjective condition of UKCO and are, accordingly, irrelevant.

23. On any sensible reading, the purpose of the words "but for the requirements of the Regulations" is to preserve the *status quo* when one applies one's mind to the test. That is to say that one should disregard a hypothetical promoter who has the same or a similar arrangement, but is not able to obtain a premium fee because of these regulations. The hypothetical promoter's ability to obtain a premium fee is to be judged absent these regulations. The mischief that is sought to be prevented here is a promoter arguing that a hypothetical promoter would not be able to obtain a premium fee because the regulations (in particular the requirement to disclose the arrangements) would mean that it was not possible for the hypothetical promoter to obtain a premium fee.

24. There was no argument that the arrangement (essentially aimed at taking outside the scope of income tax and NIC net monies paid as a loan to the scheme user) represented an "advantage" for the purposes of section 318 FA 2004. It is clear that these arrangements were expected to give rise to a tax advantage because they were intended to reduce the burden of income tax and NIC on economic activity which might, but for the loan element of the arrangement, have attracted such a charge. Nor was there any argument that the fee was chargeable by virtue of an element of the arrangement from which the tax advantage expected to be obtained arises and is either significantly attributable to the tax advantage, or to any extent

contingent upon the obtaining of the tax advantage per Regulation 8(2). Nor, on the facts, could there be.

25. In my judgment it might reasonably be expected that a promoter of the same or substantially similar arrangements, but for the requirement of these regulations, would be able to obtain a premium fee.

Other hallmarks: standardised tax product, employment income provided through third parties, financial products

26. Having concluded that the '*premium fee*' hallmark applies it is not necessary for me to go on to consider the other hallmarks. I do not do so notwithstanding the fact that these alternative arguments were ventilated before me. Doing so would, in my view, unnecessarily add to the length of this decision, provide little or no additional benefit and possibly lead to confusion in circumstances where such consideration would, essentially, be *obiter*.

Conclusion on notifiability

27. It follows from what I have said above that I consider the arrangements to be notifiable.

The Promoter(s)

28. Section 314A FA 2004 not only requires that the arrangements be notifiable, but also that the promoter(s) be identified.

29. The relevant parts of section 307 FA 2004 provide that a person is a promoter in relation to a notifiable proposal if, in the course of a relevant business, the person makes the notifiable proposal available for implementation by any person and he is, in the course of a relevant business, to any extent responsible for the organisation or management of the arrangements.

30. HMRC's contention is that both IOMCO and UKCO are promoters. This calls for an analysis of (a) the meaning of 'relevant business' and whether either of the Respondents were engaged in such a business, (b) the meaning of 'makes the notifiable proposal available for implementation' and whether either of the Respondents did so, and (c) the meaning of 'responsible for the organisation or management of the arrangements' and whether or not either of the Respondents were so responsible.

31. I turn first to consider the position of UKCO before moving onto IOMCO.

UKCO

'Relevant business'

32. Section 307(2) FA 2004 defines a relevant business as "any trade, profession or business which -…involves the provision to other persons of services relating to taxation…".

33. The Respondents submit that UKCO is not carrying out a relevant business. It carries on an "umbrella company" and "contracts management" business. It was further submitted that, notwithstanding the wide definition of 'relevant business', the term should be construed in light of the purpose of Part 7 FA 2004 ("the DOTAS code"). The purpose of the DOTAS code is to enable HMRC to learn about new arrangements or schemes as they emerge so as to enable HMRC to respond, if they so wish, in "real time". This is achieved by placing a promoter under an obligation to provide details to HMRC of notifiable arrangements (section 308 FA 2004). A promoter who fails to comply potentially runs the risk of penalties (section 98C of the Taxes Management Act 1970). This means that the term should be construed narrowly because construing it widely might mean that a range of persons on the periphery of such arrangements might be caught. These persons might have limited knowledge of the arrangements and would not be able to provide any or any proper details to HMRC. This would effectively result in HMRC receiving ineffective and meaningless disclosure thereby hampering HMRCs' ability to respond. Parliament, it is submitted, is generally not taken to enact ineffective legislation

which is unfit to achieve its objectives and placing an obligation on a person to disclose details of which he has too little or no knowledge would do just that. In addition, it is submitted, applying a construction to legislation under which a person is subject to penalty for not providing information that s/he does not know and cannot know ought to be avoided if at all possible.

34. There is much to be said for these submissions in so far as they relate to general principles. I agree that the definition of 'relevant business' cannot be infinitely wide so as to catch any business that is tangentially related to the provision of services relating to tax. I also agree that the definition of 'relevant business' ought to be considered (and appropriately circumscribed) in light of the purpose of the DOTAS code, any inability by persons affected to comply and it's penal nature. These are natural counterweights to legislation that is drafted too widely.

35. However, the starting point is that Parliament has, deliberately, drafted section 307(2) FA 2004 in very wide terms. A 'relevant business' includes ***any*** trade or profession or business which ***involves*** the provision of services ***relating*** to taxation. The term 'relevant business' in the current context has not yet received any higher judicial scrutiny. However, I was referred in the course of this hearing to the decision of Judge Poole in ***HMRC v Curzon Capital Ltd [2019] UKFTT 63*** wherein he held at paragraph 90 & 91 that

> "Section 307(2) requires an assessment of the nature of the overall trade, profession or business through which the relevant services were provided (and whether that trade, profession or business involves the provision of services relating to taxation), rather than the nature of the specific activities which took place…
>
> …the phrase 'services relating to taxation' is in my view sufficiently broad in meaning to cover the activity of administering a tax avoidance scheme, even when doing so without any clear knowledge of the detailed way in which it is intended to work"

36. Whilst helpful I would analyse the position slightly differently. The definition starts with a very wide ambit indeed - any business, trade or profession is caught; but then seeks to restrict the initial wide ambit to those businesses, trades or professions which involve the provision of services relating to taxation. In my judgment the word 'involves' means that there must be some element of the business which provides services relating to taxation. It need not be the whole, main or dominant element of the business. 'Provision' merely means to make available – so the provision need not necessarily be for valuable consideration. When construing the term 'services relating to taxation' I think it could be argued that the term does not include actual taxation services (but only those related to taxation services), but I do not think that such a construction survives a purposive construction. 'Related', of course, connotes a degree of nexus or connectivity and, as I have already said, cannot mean any and all services that are tangentially related to taxation. It will always be a question of degree and each case will turn on its own facts.

37. In the current case, the first issue to be considered is whether UKCO is engaged in a trade, profession or business. I heard no argument on this point, but it seems to me to be self-evident that UKCO is so engaged.

38. It is said that UKCO provides two lots of services (categorised as two separate businesses by the Respondents): that of a 'umbrella company' service and that of a "contracts management" services. The question then becomes whether any of these services are related to taxation. Focussing, first, upon the "contracts management" element, given that this is the area

where arguments centred, I think much depends on the nature of the contracts being managed and the role that these contracts played in the overall arrangements.

39. The contracts being managed in this case were pivotal to the arrangements as was UKCO's role as whole[1]. The contracts in question represented the nuts and bolts of the arrangements or scheme. The arrangements simply could not exist without these contracts. What is happening, in reality, is that in "managing" the contracts UKCO was administering the avoidance scheme or arrangement. In doing so I am sure that it was providing services relating to taxation.

40. I do not think that it matters that UKCO was acting as an undisclosed agent when 'managing' the contracts. The key consideration is the services that it supplied and their nexus to taxation. Nor can the argument that absent the 'umbrella company' services (in relation to which there is strong evidence to show that individuals had a good overview of the mechanics and effect of the arrangements) UKCO had no knowledge of the arrangements. That is simply because when I consider the knowledge of UKCO I am looking at the knowledge of the entire corporate body and not just the 'contracts management' service or business. The evident knowledge of the workings and effects of the scheme or arrangements on the part of some, at least, of the employees of UKCO clearly goes to evidence corporate knowledge on the part of UKCO. Accordingly, any arguments predicated then on lack of knowledge of the scheme on the part of UKCO (i.e. defeating the purpose of the DOTAS code and inability to comply – particularly where failure to comply results in penalties) are all doomed to failure.

"makes the notifiable proposal available for implementation"

41. The Respondents submit that the term should be construed narrowly in the sense that making arrangements available for implementation requires that a person is able to ensure that a scheme user who wants to use the arrangements would be able to do so. I do not agree, and in this respect, I must part company with what Judge Mosedale says at paragraph 295 of *HMRC v Hyrax Resourcing Ltd & Ors [2019] UKFTT 175* ("Hyrax"). To my mind 'makes available', in this context, means to 'be able to be used' or 'to put at someone's disposal'. There is no requirement, in my mind, to ensure that a scheme user, if s/he wants to, is able to use it.

42. Applying this to the facts it seems to me to be clear that UKCO put the arrangements at the disposal of the scheme users. It informed scheme users about the workings of the scheme, reviewed the contract for services with UK agencies (even if in a more limited sense), sent out compliance packs to scheme users, corresponded with UK agencies about scheme users and accounts matters, corresponded with users about contracts, accounts and payments, issued payslips to users, invoiced UK agencies, and received payments from UK agencies. It matters not that some or all of this was done as an agent for IOMCO. The capacity in which UKCO acted, for these, purposes is irrelevant.

responsible for the organisation or management of the arrangements

43. It was argued on behalf of UKCO that it simply manages contracts and payments. It does not organise or manage the arrangements and nor is it "responsible" for anything. It is, only peripherally involved in the administration of the arrangements.

[1] The purpose of IOMCO using UKCO was to hide from view the involvement of IOMCO and its offshore status and to make out that those dealing with UKCO dealt with it as principal. This was readily apparent from the way in which both Respondents have identical names, the way in which individuals within UKCO referred to IOMCO as just a separate 'department' and vice versa and by the submissions made on behalf of the Respondents to the effect that UKCO was an undisclosed agent of IOMCO whose purpose was to give the impression that third parties were dealing with a UK based company. This was integral to the arrangements working.

44. Such an argument is grounded in the artificial distinction drawn in this case between the 'managing' of contracts (which contracts I have held at paragraph 39 above are central to the working of the arrangements) and the organising and management of the arrangements. There is no material distinction to be drawn. Nor it can be said that UKCO lacked awareness of the loan element of the arrangements. I have already held at paragraph 40 above that UKCO, as an entity, had knowledge of the arrangements – including the loan element.

45. In my judgment 'responsible' in this context means being credited with, blamed for or answerable for. It does not, in this context, mean having control or authority over or of the subject matter. It seems clear to me that whilst there might be an argument that because UKCO is acting as an agent it has no control or authority as to how the arrangements are organised or managed and, therefore, may not be responsible for them in that sense; it, nevertheless, can clearly be credited with the management and organisation of the arrangements - even if only as agent. Accordingly, it is responsible for the arrangements.

46. Accordingly, UKCO is a promoter for the purposes of s.307 FA 2004.

IOMCO

47. The Respondents argue, essentially, that IOMCO cannot be subject to an order under s.314A because it has been recognised by Judge Poole in *Curzon* at [75] and [76] that the purpose of the power under section 314A was that an order for disclosure should be made. It is implicit from this that the promoter identified should be the one against whom an order to disclose could be made. No such order can be made against someone who is outside the territorial ambit of the relevant legislation. This is because there is a presumption in domestic law that legislation is generally not intended to have extra-territorial effect [21] and the presumption reflects both international law and is rooted in the concept of comity [23] *R (on the application of KBR, Inc) v Director of the SFO [2021] UKSC 2* ("*KBR*").

48. I am unable to agree with the first limb of this argument. When one reads [77] in conjunction with [76] of *Curzon* it is clear that what Judge Poole had in mind was that an order under s.314A should only be made if HRMC have properly specified at least one person as the 'promoter' in their application. It is not implicit from this that an order under s.314A should only be made where s.308 can have territorial effect such that an order to disclose could be made. This tribunal is not required to consider when making an order under s.314A whether or not s.308 has extra-territorial effect (i.e. has no effect because the person concerned is not in the territory). The matters that are required to be considered in an application under s.314A are expressly set out in that section. They do not include a consideration as to whether or not the person identified as a 'promoter' in the application under s.314A is caught by s.308. Nor is there any justification for implying such a consideration. An order under s.314A seems to me to be a preliminary step. There might be a further step which requires one to consider whether the person identified as a 'promoter' is caught by s.308. If s/he is not then it is likely that s/he will escape any consequences (including potential penalties). However, at the risk of repeating myself, the considerations applicable to that second step are not the same as those that are before me today.

49. The second limb of the argument would have had, in my view, considerable merit had there been an application before me seeking that IOMCO provide prescribed information or an appeal against penalties imposed as a result of a failure to provide such information. However, that, as I have already indicated, is not the case. Even then *KBR* confirms only that there is a rebuttable presumption against the extra-territorial effect of domestic legislation ([21]-[26]). Such a presumption may be rebutted by evidence of Parliament's intent to the contrary.

50. For the sake of completeness, and absent any argument to the contrary, I accept that IOMCO made notifiable proposals available for implementation by users by (a) being a party

to employment agreements with users and (b) being a party (in its capacity as Trustee of Smartpay Consulting Trading Trust) to Facility Agreements with users.

51. Further, or in the alternative, I also accept (again absent any argument to the contrary) that IOMCO was responsible for the organisation and management of the arrangements. I come to this conclusion because I find that IOMCO, in the course of its business, undertook the following:

(1) Sending welcome/induction emails to users, including information regarding:

(a) the online portal at "https://portal.smartpaylimited.co.uk";

(b) submission of time sheets via the portal or to the email address "timesheets@smartpaylimited.co.uk";

(c) loan payments being received by the user the next working day after salary payments;

(d) Facility Agreements being posted within 24 hours of the user's first loan payment, with acknowledgement of receipt required as part of the verification process by reply email or signing a copy of the letter.

(2) Invoicing UKCO for services provided by users,

(3) Receiving payments from UKCO;

(4) Calculating and making payments to users for the salary element,

(5) Quantifying and making payments under Facility Agreements to users both in its direct capacity as an employer and as a Trustee and contributor to the Smartpay Consulting Trading Trust;

(6) Responding to users' queries regarding payments; and

(7) Responding to users' queries regarding compliance and/or enquiries from HMRC.

52. Accordingly, IOMCO is a promoter for the purposes of s.307 FA 2004.

ALTERNATIVE APPLICATION UNDER S. 306A FA 2004

53. Having come to the conclusion that the arrangements are notifiable arrangements for the purposes of s. 306, I do not need to go on and consider whether, in the alternative, HMRC have taken all reasonable steps to establish that the arrangements are notifiable and have reasonable grounds for suspecting that they are under s. 306A FA 2004. I do not do so.

CONCLUSION

54. For the reasons given I conclude that HMRC's application, for an order that the arrangements are notifiable under s. 314A FA 2004 and that the Respondents are both promoters for the purposes of s.307 FA 2004 in relation to those arrangements, must succeed. I, accordingly, make the order in the terms sought.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

55. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent

to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ASIF MALEK
TRIBUNAL JUDGE

Release date: 03 MAY 2022

APPENDIX

The relevant provisions of Part 7, Finance Act 2004 provide:

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.

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

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

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

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

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

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

Section 318: "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;

Section 307: Meaning of "promoter"

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

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

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

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

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

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

(i) the design of the arrangements, or

(ii) the organisation or management of the arrangements.

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

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

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

(b) is carried on by a bank, …

(3) …

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

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

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

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

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

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

(a) transactions of the nature developed, or

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

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

Section 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) <u>may</u> 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

The relevant provisions of The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006, SI 2006/1543 provide:

Regulation 8, description 3: Premium fee

(1) Arrangements are prescribed if they are such that it might reasonably be expected that a promoter or a person connected[2] with a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements [of] these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

But arrangements are not prescribed by this regulation if—

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

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

(2) For the purposes of paragraph (1), and in relation to any arrangements, a "premium fee" is a fee chargeable by virtue of any element of the arrangements

[2] Defined by reference to section 1122 CTA 2010: see regulation 2.

(including the way in which they are structured) from which the tax advantage expected to be obtained arises, and which is—

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

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

Regulation 10, description 5: Standardised tax products

Prior to 23 February 2016, description 5 of regulation 10 provided as follows:

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

(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.

Since 23 February 2016, description 5 of regulation 10 provides as follows:

(1) Subject to regulation 11, arrangements are prescribed if a promoter makes the arrangements available for implementation by more than one person and the conditions in paragraph (2) are met.

(2) The conditions are that an informed observer (having studied the arrangements and having regard to all relevant circumstances) could reasonably be expected to conclude that –

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

(i) the purpose of which is to enable a person to implement the arrangements;

(ii) the form of which is determined by the promoter; and

(iii) the substance of which does not need to be tailored, to any material extent, to enable a person to implement the arrangements;

(b) a person implementing the arrangements must enter into a specific transaction or series of transactions;

(c) the transaction or series of transactions is standardised, or substantially standardised, in form; and

(d) either the main purpose of the arrangements is to enable a person to obtain a tax advantage or the arrangements would be unlikely to be entered into but for the expectation of obtaining a tax advantage.

Description 8, regulation 18: Employment income provided through third parties

(1) Arrangements are prescribed if—

(a) Conditions 1 and 2 are met and Condition 3 is not met; or

(b) Conditions 1, 2 and 3 are met and at least one of Conditions 4 and 5 is met.

(2) Condition 1 is met if the arrangements involve at least one of the following—

(a) a relevant third person taking a relevant step under section 554B;

(b) any person taking a relevant step under section 554C or 554D; or

(c) B taking a step under section 554Z18 or 554Z19.

(3) Condition 2 is met if the main benefit, or one of the main benefits, of the arrangements is that an amount that would otherwise count as employment income under section 554Z2(1) is reduced or eliminated.

(4) Condition 3 is met if, by reason of at least one of sections 554E to 554X or regulations made under section 554Y, Chapter 2 of Part 7A does not apply.

...

(7) In this regulation—

(a) references to sections or Parts are to those in ITEPA unless otherwise stated;

(b) "B" has the meaning given for Part 7A by sections 554A(1)(a) and 554Z17(7) read together;

(c) "contrived or abnormal" has the same meaning as in section 207 of the Finance Act 2013; and

(d) "relevant third person" has the same meaning as in section 554A(7).

Description 9, regulation 19: Financial products

(2) Condition 1 is that the arrangements include at least one financial product specified in regulation 20(1) (a "specified financial product").

(3) Condition 2 is that the main benefit, or one of the main benefits, of including a specified financial product in the arrangements is to give rise to a tax advantage.

...

(5) Condition 4 is that the arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained….