Neutral Citation: [2022] UKFTT 218 (TC)

Case Number: TC08541

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/00777

PENALTY – Application by HMRC – section 98 TMA – notification of contractor loan arrangements – DOTAS – whether same as or similar to a previously notified scheme-no-guiding mind of appellant – whether reasonable excuse-no- period covered – to date of decision of FTT – quantum – all relevant circumstances including to deter others – quantum varied but penalty in principle upheld

Heard on: 5 to 7 July 2021
Judgment date: 13 July 2022

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER: HELEN MYERSCOUGH

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Appellant

and

HYRAX RESOURCING LIMITED **Respondents**

Representation:

For the Appellant: **Akash Nawbatt QC and Ishaani Shrivastava, Counsel, instructed by the General Counsel and solicitor to HM Revenue and Customs**

For the Respondents: **Conrad McDonnell, Counsel, and Harry Winter, Counsel, instructed by Reynolds Porter Chamberlain LLP ("RPC")**

DECISION

INTRODUCTION

1. On 18 February 2020, the applicants ("HMRC") had lodged with the Tribunal an application for a penalty under Section 98C(1)(a) and (2)(a) Taxes Management Act 1970 ("TMA") to be determined by the Tribunal pursuant to Section 100C TMA. It relates to the Disclosure of Tax Avoidance Schemes ("DOTAS") legislation in the Finance Act 2004 ("FA 2004").

2. That application relates to the respondent's ("Hyrax's") failure to comply with the requirement under Section 308(3) FA 2004 to notify notifiable arrangements ("the Hyrax arrangements") within the prescribed period after the date on which it first became aware of any transactions forming part of the Hyrax arrangements.

3. The First-tier Tribunal, in its decision ("the DOTAS Decision")[1], found that the Hyrax arrangements were notifiable arrangements for the purposes of Section 306(1) FA 2004 and an Order identifying Hyrax as a promoter in relation to the Hyrax arrangements was issued on 5 March 2019 under Section 314A FA 2004 ("the DOTAS Order").

4. The Hyrax arrangements were described by Judge Mosedale as the "current iteration" of a contractor loan scheme which was a tax planning product, or some describe it as a "structure" that had existed in earlier forms since 2004.

5. The DOTAS Order was not subject to any right of appeal and Hyrax accepts for the purposes of this appeal that it was a promoter as defined in Section 307 FA 2004 and that the Hyrax arrangements were notifiable.

6. In the first instance the burden of proof is on HMRC to show that the conditions for imposing a penalty are satisfied. Thereafter it is for Hyrax to establish that they had a reasonable excuse for not disclosing the Hyrax arrangements to HMRC throughout the relevant period, which we define later.

7. By email dated 1 July 2021, HMRC have amended their application and now no longer seek to pursue the penalty in respect of the period after Hyrax's letter, dated 14 March 2019, enclosing the two AAG1 notification forms. Hyrax argue that the latest date would, or should, be 5 March 2019.

8. It was common ground that the purpose of the DOTAS statutory provisions and regulations is to give HMRC early information about tax avoidance schemes and how they claim to work so that HMRC can find out quickly who has used a scheme. The HMRC guidance published on 4 February 2014 makes it clear in simple English that notification should be made within five days of a scheme being made available or implemented.

The Hearing

9. We were allocated a reading day in advance of the five days listed for the hearing. We heard oral evidence from Officer Martin Belli for HMRC and, for Hyrax, from David Gill, Joanne Macnamara and Karin Mountain (now Sowden). Karin Mountain was how she was described in the DOTAS Decision and in all of the documentation so we use that former nomenclature. We had the benefit of transcripts. We had two Hearing Bundles extending to 1605 pages and an Authorities Bundle extending to 866 pages. Both parties lodged Skeleton Arguments. On the last day of the hearing, HMRC lodged a Note of Evidence and Chronology and on 4 August 2021, Hyrax lodged a Note of References to the Evidence.

[1] [2019] UKFTT 175

The Litigation History

10. Apart from the appeal which led to the DOTAS Decision which was issued on 5 March 2019, Hyrax had lodged a Judicial Review Claim relating to the DOTAS Decision. That was accompanied by a very detailed Statement of Grounds prepared by Robert Venables QC and extending to some 45 pages. On 10 September 2019, the application for permission to apply for Judicial Review was refused by the High Court of Justice Queen's Bench Division Administrative Court.

11. Sir Duncan Ouseley stated:

> "The argument about tax avoidance rather than tax advantage is misconceived…There plainly were notifiable arrangements, and the contention that they did not have obtaining a tax advantage at their heart is difficult to follow: what else was the purpose of this rigmarole? The evidence deployed by HMRC proved the point beyond doubt, and the Claimant produced no evidence what so ever to suggest otherwise."

12. On 20 September 2019, Hyrax renewed their claim for permission to apply for Judicial Review but, apparently, that did not progress.

13. On 17 March 2021, HMRC lodged with the Tribunal an application for specific disclosure of, ultimately, four categories of disclosure. On 8 June 2021, that application was refused, following a hearing on 18 May 2021 (the front of the decision incorrectly states 18 May 2020). We annex at Appendix 1 a copy of that decision which includes details of the disclosure sought. That application had been predicated on the basis that Hyrax had filed no contemporaneous documentation in support of its position in this matter and had only lodged the three witness statements which do not refer to contemporaneous documentation. The primary ground on which the application was refused was that Hyrax bear the burden of proof in this matter and if they choose not to make disclosure then they stand or fall by that. They argued that there was no document upon which Hyrax relied in either its Statement of Case or witness statements that had not been disclosed.

14. In the course of that hearing, before me, but not Mrs Myerscough, I was told that there was no relevant documentary evidence and even if it existed it would be very difficult to access. On 24 June 2021, very shortly before this hearing, Hyrax's representatives wrote to HMRC stating that Hyrax's witnesses had undertaken to "endeavour to locate any relevant communications to disclose" and that that exercise had been completed. They produced a PDF comprising four documents namely:

> (1) An e-mail dated 10 March 2014 from David Gill, copied to Richard Hopkins and Joanne Macnamara, to Metro Bank explaining the background to Hyrax and why there was no disclosure under DOTAS ("the Metro email").
>
> (2) An exchange of emails dated 20 February 2014 between David Gill and Joanne Macnamara confirming their attendance at a meeting on 27 February 2014 ("the February meeting") with EDF (see paragraph 33 below).
>
> (3) Correspondence in April and May 2016 between Joanne Macnamara, David Gill, Richard Hopkins and EDF enclosing a draft letter to HMRC prepared by Mr Venables; the letter was sent by Joanne Macnamara in May 2016.
>
> (4) An email dated 6 December 2016 from David Gill to Richard Hopkins and Joanne Macnamara giving instructions for the issue to HMRC of another letter from Mr Venables which David Gill had reviewed and to which he had made some minor amendments ("the 2016 email"). The email referenced a meeting which all three had attended with EDF a few days previously.

As we point out below, it transpired that other evidence could have been made available but was not (for example, see paragraph 60). Furthermore, Karin Mountain confirmed in cross-examination that she had not been asked to carry out a review of the documents to which she had access for documents that are relevant to these proceedings. She confirmed that "I probably would have had a fair few emails …". None have been produced.

The Hyrax arrangements

15. At paragraph 3 of the DOTAS Decision, Judge Mosedale set out HMRC's brief summary of the Hyrax arrangements as follows:

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

We explain the detail of K2/Lighthouse (hereinafter "K2") at paragraphs 41 to 49 and 62 below.

16. In her conclusion, at paragraph 306, Judge Mosedale found that HMRC's application correctly specified the Hyrax arrangements. Our examination of the documentation in the Hearing Bundles leads us to agree unequivocally.

17. At paragraph 47, Judge Mosedale found that Karin Mountain of EDF (see paragraph 33 below) was the tax adviser for both K2 and Hyrax and both K2 and Hyrax outsourced its administration to Ethos Consulting Limited ("Ethos") which is an Isle of Man company.

18. At paragraphs 69 to 76, Judge Mosedale explained the purpose of the Hyrax arrangements which were promoted to accountants, who had clients with personal service companies or who contracted out their services, as well as directly to such persons. She found that the arrangements were "there for 'tax risk' and nothing else" and were "all about increasing the scheme users' financial return by reducing the scheme users' tax liability".

19. At paragraphs 77 to 84, she discussed the loans which she described as being "centre stage" in the Hyrax arrangements. She found that the position on loan repayment was represented to both the accountants and the users in exactly the same way as had been done for K2 and at paragraph 82 she quoted from a slide for a webinar for K2 which reads as follows:

> "4.3.5 FAQ – Do I have to repay the loan to the trust/RBS?
>
> - In practice, extremely unlikely
> - Nearly 25,000 businessmen and contractors have used this mechanism and no-one has yet had to repay it

- However, there needs to be the POSSIBILITY of repayment, otherwise it would not be a loan."

We observe that the words "extremely unlikely" were highlighted on the slide as were the first two words in capital letters in three of the following four bullet points that Judge Mosedale did not quote but which we consider to be relevant, namely:

"- LEGAL PROTECTION: the trustees administering the trust are obliged by both LAW and the terms of the trust deed to act solely in the interests of the beneficiary.
- When will a request to repay the loan ever be in the interest of the contractor?
- MOTIVE PROTECTION: The trustees themselves cannot use the funds for ANYTHING except giving it to the contractor, either by loan or gift.
- COMMERCIAL PROTECTION: Even if the loan were repaid, the trust would then hold an equivalent amount for the benefit of the contractor, so unlike repaying a third party, you would in effect be repaying yourself."

20. Judge Mosedale explained at paragraph 82 that:

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

21. She found at paragraph 83, and we agree, that it is "… more likely than not that the position on loan repayment would have been represented to actual and potential Hyrax scheme users …. to be exactly the same as for K2".

22. She concluded by finding that Hyrax was promoted on the basis that the loans, whilst strictly repayable, were extremely unlikely ever to be required to be repaid. In any event the loan was from Hyrax Resourcing Trust ("HRT") of which the scheme user and his/her family were beneficiaries. Lastly on that point, at paragraph 200, she found that because the loans were not expected to be repaid in the scheme users' lifetime the Hyrax arrangements were expected to give rise to a tax advantage.

23. We observe that the immediately preceding slide read as follows:-

"4.3.4 Worker Cash Flow

- They will be rewarded in two ways
  - Salary on 5th of each month
  - Employer loans – 20th of each month
- Salaries <u>are paid</u> whether or not funds are with K2
- Ensure cashflow is planned for in early months
- No emergency loans from 3PCL – would be caught by Part 7A
- Short notice loans from K2 may be possible in special circumstances".

The two methods of payment in the first bullet point are both highlighted on the slide. Exactly the same payment arrangements were put in place for Hyrax.

24. At paragraph 173 she found that "…it is clear that…almost all the steps in the Hyrax arrangements were artificial and without any commercial purpose other than to avoid tax." She went on to find at paragraphs 204 and 205 that the main benefit of the Hyrax arrangements was the obtaining of a tax advantage and at paragraph 257 that "that was its only discernible purpose".

25. In considering one of the arguments advanced for Hyrax, at paragraphs 218 to 222, she rejected the submission that Hyrax received a cut of about 18.5% for acting as an employment agency and found that Hyrax did not perform any significant services as an employment agency. She said that Hyrax had "merely inserted itself as main contractor into a contract/employment situation which had been negotiated by others". Therefore, what she described as the "Hyrax' cut", being a percentage of the gross contract value of the contract for the scheme user's services, was effectively Hyrax splitting the expected tax saving with the scheme user. She was particularly explicit at paragraph 286 when she pointed out, and we agree, that the services provided by Hyrax to contractors were "undoubtedly related to taxation" and the purpose of the arrangements was a tax advantage and tax avoidance. She had made it equally clear at paragraph 257 that there was no rationale for the Hyrax arrangements apart from the tax advantage.

26. Mr Nawbatt, QC asked us to take as our starting point the findings of facts in the DOTAS Decision. We appear to have much of the same documentation as Judge Mosedale (that documentation in this matter having been produced by HMRC but not Hyrax). Having reviewed that documentation, and indeed all of the evidence, we agree with all of Judge Mosedale's findings and incorporate her findings in our own. In addition, having also read the Statement of Grounds for Judicial Review we certainly understand why Sir Duncan Ouseley said what he did and we agree.

Overview of the legislative and factual background in the context of Hyrax

27. The intermediaries legislation contained in Sections 48-61 of Income Tax (Earnings and Pensions) Act 2003 ("ITEPA"), commonly referred to as IR35, appeared to many tax advisers to pose a major problem to contractors providing their services through a personal services company. As can be seen from the extensive case law, an industry in tax avoidance focussed on that evolved. Tax planning products were extensively marketed.

28. As the legislation changed over time, as Judge Mosedale observed at paragraph 41 in the DOTAS Decision, those planning products were "each designed to circumvent the changed tax laws". She went on to say at paragraph 53 that the schemes were all similar but with a "crucial evolution to avoid the latest legislation" (emphasis added).

The Dramatis Personae and their involvement in tax planning

29. From 2004 to 2007, Assignment Solutions (IOM) Limited ("Assignment") was the Isle of Man tax planning vehicle promoted by a wholly owned subsidiary of RSM Tenon ("RSM"), accountants, called Premier Strategies Limited ("Premier"). Premier's role was to promote tax avoidance schemes. Karin Mountain worked for Premier from 2002 and in 2005 made David Gill aware of Assignment.

30. In September 2005, David Gill, together with a Mark Sullivan, investigated Assignment further and then decided to set up a company Probiz Contracts Limited ("PCL") to place individuals provided by Assignment with end users whom PCL then invoiced. Technical information and tax analysis was provided by Premier.

31. The introduction of the Managed Service Company legislation in April 2007 (contained in Chapter 9 Part 2 ITEPA) prompted RSM and/or Premier to stop supporting and promoting Assignment and a new vehicle, Penfolds Limited ("Penfolds"), was put in place from 2007 to 2009. It was also an Isle of Man company and traded from the same address as Assignment. That is also the address for Ethos. Penfolds was succeeded by Hamilton Trust ("Hamilton").

32. We note that the DOTAS notification for Penfolds was only made on 2 October 2009, shortly before it ceased trading, and on the same day as notification was made for Hamilton. Both had been allocated a different Scheme Reference Number ("SRN") by HMRC. Judge Gillett's decision in *Hoey v HMRC*[2] ("Hoey") considered *inter alia* whether the Penfolds and Hamilton schemes constituted tax avoidance on the basis that the loans were designed to avoid tax and he found at paragraphs 152 to 153 and 156 that it was tax avoidance. We observe from *Hoey* that there was a subsequent disclosure to HMRC for Hamilton under the DOTAS legislation on 15 August 2011 and a further SRN was allocated by HMRC. However, as can be seen from paragraph 42 below that seems to be after Hamilton ceased trading.

33. Karin Mountain was employed by Premier until, in 2008, she set up EDF Tax LLP and it was incorporated in 2012 as EDF Tax Limited (both are referred to herein as "EDF"). She resigned on 28 November 2014, albeit she had some limited involvement thereafter. EDF announced on 30 January 2017 that it would cease to trade because of the "… cumulative effect of recent and forthcoming changes in the tax avoidance arena" which made their "role as a promoter of tax strategies economically unviable". It subsequently went into Creditors Voluntary Liquidation. On 23 October 2017, HMRC made an application to the Tribunal which was not defended by the liquidator and Judge Mosedale found that other tax avoidance schemes devised by EDF, which were not disclosed, were notifiable.[3] In that case EDF had also maintained, as they did in this case, that the arrangements were not notifiable because there was no tax advantage because the relevant debt/loan was repayable. The FTT found as fact that that argument was "illogical" and that there was a tax advantage.

34. EDF offered what they described as tax strategies and, as Karin Mountain explained, they obtained opinions from Queen's Counsel when there were changes in legislation or case law. She confirmed in cross-examination that EDF's business was designing and promoting tax avoidance schemes.

35. When EDF was set up, David Gill agreed to introduce accountants in what was known to EDF as the Peak Performance Tax network. The accountants then referred clients who were interested in the tax strategies to EDF.

36. In February 2008, Joanne Macnamara went to work for PCL as an administration and client manager. It subsequently changed its name to Peak Performance Contracts Limited and was known as "2PCL". David Gill was a director.

37. Individuals, many of whom were contractors, were seconded to 2PCL by their employer having told the employer the identity of the end user for whom they would then work. Joanne Macnamara's role was:

(a) to contact the end user,

(b) put in place the documentation which was in standard form as Judge Mosedale found to place the individual with them,

(c) obtain regular time sheets from the individual; and

[2] [2019] UKFFT 0489 (TC)
[3] HMRC v EDF Tax Limited (in Creditors' Voluntary Liquidation) [2019] UKFTT 0598

(d) invoice the end user to collect payment, part of which would be paid to the individual.

38. During the course of 2009, Penfolds intimated that it would discontinue trading operations with effect from 31 October 2009 and that a new employer, Hamilton, had been set up by the firm of accountants (RSM) who were advising Penfolds. Hamilton was similar to the structure involving Penfolds in most respects, in that it made use of an Employee Benefit Trust ("EBT") with the only difference being that Hamilton, the employer, was now a trust instead of a limited company.

39. The contractors were paid a basic wage for their work for Penfolds/Hamilton ("the employers") and tax was paid in full on those earnings. That was deducted at source under the PAYE Regulations and paid over to HMRC. In addition, each employer then made substantial contributions to a Trust which it had established for the benefit of its employees. The Trustees of the Trusts provided benefits to the individuals in their capacity as beneficiaries of the Trust by making interest-free loans to those individuals. The loans were stated to be repayable on demand but the individuals did not expect to be required to repay the loans at any time. The loans were treated by the individuals as employment related loans under Chapter 7, Part 3 ITEPA and were disclosed to HMRC and taxed as such in their tax returns.

40. On 9 December 2010, the new Disguised Remuneration legislation which is contained in Part 7A of ITEPA was introduced. This had a direct impact on Hamilton in that the EBT was no longer perceived to be tax efficient by those promoting it.

41. At that time David Gill was in regular dialogue with Karin Mountain who was aware of the impact of the proposed new legislation on Hamilton. Ultimately EDF offered to draft and design a scheme which was intended to avoid that legislation. They sought the opinion of Mr Venables. It became known as K2.

42. K2 commenced with effect from April 2011. On 11 April 2011, Mark Sullivan of 2PCL wrote to contractors intimating that 2PCL were "…in the throes of putting the final touches to a new solution", that Hamilton had written that morning asking for letters of resignation and had ceased to trade from 5 April 2011 but that "In the next couple of days, you will receive an invitation to join a new employer, called K2 and based in Jersey. That structure will provide similar, but enhanced benefits to the current employment you have…".

43. In fact, as we can see from another email sent to a different contractor that day, Emma Legg of 2PCL enclosed a letter from Mark Sullivan stating that everyone should have received emails from their new employer, K2. He stated by way of clarification that K2 was a Jersey based individual who acted as the employer because "new laws make using a trust more difficult". He said that K2 had outsourced administration to Ethos. He confirmed that "The structure will be very similar to the past" with an employer and a separate trust as previously. The Trustees were IFM Trust Limited ("IFM") in Jersey. Interest free loans would be available as required. Tax support was provided by EDF. We have underlined the word "would" since it was subsequently argued for both K2 and Hyrax that that was simply a possibility.

44. We note from the documentation that the Jersey based individual variously described himself as trading as K2 Solutions or K2 Contractor Solutions. A contract of employment dated 8 April 2011 described him as trading as K2 Solutions c/o IFM. However, a specimen Loan Agreement dated 2011 described him as trading as K2 Contractor Solutions c/o IFM.

45. On 5 April 2012, the Jersey based individual sold K2 Contractor Solutions to Lighthouse Trustees Limited ("Lighthouse") in its capacity as Trustees of the K2 Contractor Solutions Trust. Ethos wrote to contractors enclosing a letter from Lighthouse on 12 April 2012

intimating the change of employer because of the sale and confirmed that Lighthouse would "continue to trade" as K2 Contractor Solutions.

46. We observe from webinar slides that IFM were described as owning and managing Lighthouse Corporate Trustee Limited who were stated to be the trustees of the discretionary trust. What was described as a standard email issued by Ethos, when offering employment, described them as Lighthouse Trustees Limited as Trustee of the K2 Contractor Solutions Trust.

47. On 1 November 2012, the nomenclature changed to Lighthouse as Trustee of the Cirus Contractor Solutions Trust ("Cirus").

48. In March 2011, as an integral part of K2, David Gill had set up a new company, Peak Performance Professional Contracts Limited, which traded as "3PCL". He was a director.

49. 3PCL was a processing operation in that K2 Contractor Solutions, and later the two Lighthouse employers offered individuals to 3PCL for secondment and, if accepted, 3PCL entered into contracts (again in standard form) with end users for the services of those individuals. That was slightly different to Hamilton where 2PCL had dealt with accountants whose clients were the contractors. 2PCL ceased trading.

50. David Gill stated that 3PCL then ensured the smooth operation of those contracts and handled billing and administration in the same way as 2PCL had done for Penfolds and Hamilton. There is some dubiety about that as he also said, in relation to Hyrax, that Ethos would perform the same role as they had for K2 (ie much of the administration was outsourced to them).

51. Having been made redundant by 2PCL, Joanne Macnamara and a Richard Hopkins were appointed as team leaders in 3PCL. They reported to David Gill and to Douglas Aitken, a senior manager in another of David Gill's businesses, Peak Performance Tax Limited ("PPT").

52. By September 2012, both were reporting directly to David Gill.

53. Both were appointed as directors of 3PCL on 14 March 2013 and both resigned as directors on 31 March 2016.

54. PPT was described by David Gill as being "my company" and it educated accountants on the iterations of the various tax avoidance schemes based on technical analysis provided to it by EDF. David Gill was a director from 30 June 2005 until 23 March 2017 and then again from 26 June 2018.

55. Responsibility for advising prospective participants lay with the accountants and the participants could only access the relevant tax avoidance scheme through an accountant in what was described as the "Peak network".

56. As far as K2 was concerned, the employer paid PPT to introduce individuals to it and inform them about K2. An accountant training model comprising four modules was devised and delivered by webinar.

57. Apart from the webinars for each of the modules, PPT provided for K2 what were described as complementary webinars for potential employees. The webinars were produced by David Gill. Karin Mountain participated in module 4 and sometimes in the complementary webinars. David Gill said that throughout 2011 to 2013, every Monday, he presented two webinars of approximately two hours duration (one module and a complementary webinar).

58. In late 2012 David Gill because of the challenges from HMRC initiated "Employee Update" webinars for past and existing employees of the various iterations of the schemes. He described them as "defence webinars" which took place regularly and separately from the

educational/promotional webinars. The number increased dramatically after Premier went into administration in 2013 and as a result of the introduction by HMRC of Accelerated Payment Notices ("APNs") in 2014. He hosted the webinars with support from EDF for tax analysis.

59. David Gill states that, at that point, he decided that he would distance himself from Assignment, Penfolds, Hamilton and K2 and that he told EDF that PPT would cease to trade with effect from 31 March 2014. There is no evidence that that happened.

60. In cross-examination, David Gill stated that he has recordings of all of those webinars. Mr Nawbutt sought clarification by asking whether he had the recordings for both K2 and Hyrax and he confirmed that he did. They have not been produced to the Tribunal. David Gill stated that the recordings had been retained in order to ensure that there was a permanent record of the articulation of risk and to ensure that the information which was included on the slides could not be taken out of context. He also said that he had access to all of his emails for both K2 and Hyrax for the relevant period and that he had reviewed them after lodging his witness statement.

61. On 15 July 2011, in the name of Karin Mountain, EDF submitted to HMRC the DOTAS notification for K2.

62. The K2 disclosure referred to the Jersey based individual but in fact the mechanism described in the disclosure applied both to that individual and the two Lighthouse iterations so we refer simply to the employer. It disclosed that:

(1) The employer was a sole trader who was Jersey resident and employed a number of individuals who worked and were resident in the UK. None of the individuals who became employees were connected with the employer.

(2) Those employees may have previously worked as contractors through agencies or through their own personal service companies or as directors of their own limited companies.

(3) Where the individual had been a director of his company, he resigned his position at that company and contracted with that company to perform the statutory duties of a director only.

(4) The employees were seconded to a UK resident company which paid the employer an agreed amount each month for the secondment of each employee. In the case of K2 that was 3PCL but in fact that was not disclosed to HMRC. It was simply identified that it would be a UK resident company.

(5) 3PCL contracted with and sub-seconded the employees to agencies or end users who might in turn further sub-sub-second the employees. Where an employee performs the statutory director role in their own company, 3PCL contracted with and sub-seconded the employee to that company.

(6) 3PCL invoiced and was paid by the agencies or end users.

(7) The employer paid the employees a salary subject to UK PAYE and NIC.

(8) The employer made interest free loans to the employees which were repayable on demand.

(9) The employer contributed creditor rights to the loans to an Employer Financed Retirement Benefit Scheme ("EFRBS").

63. Hereinafter, like Judge Mosedale, unless there is a reason to distinguish between the various iterations of K2 we refer simply to K2.

64. EDF designed K2 and Karin Mountain conceded that EDF would have been a promoter of K2 because of that involvement in design. Ms Mountain was clear that it was EDF who instructed Mr Venables, who gave them a number of opinions on the tax aspects.

65. However, in a slide for a webinar for K2, it is recorded that David Gill and Mark Sullivan had met Mr Venables in April 2011 in relation to what was described as the "First Contractor Opinion". It also stated that since 9 December (presumably 2010) more than 10 separate opinions had been obtained to reflect "ongoing changes in legislation".

66. In cross-examination, David Gill stated that in June 2011 he had reviewed Mr Venable's opinions in detail. He had done so in his capacity as a director of PPT because he was going to have to explain K2 to accountants. He said that, in some instances, they were many hundreds of pages long. None have been produced.

67. In an email dated 3 August 2011, David Gill, in his role as PPT, outlined the modular education programme for accountants and the weekly education for prospective contractors/workers/company directors of "K2 Contractor Solution". He stated that PPT were still awaiting the final opinion from Mr Venables. Of course, it was EDF who was awaiting that. He said that "Anyone wishing to review the opinions… can do so" subject to certain conditions.

68. K2 was advised by EDF on the tax aspects and had other advisers who set up K2 in its various iterations and gave advice in relation to non-tax aspects. K2 paid PPT to introduce accountants, and through them their clients, and other individuals to K2 and to inform them about the strategy.

69. On 14 October 2013, David Gill wrote to K2 employees, many of whom had apparently received a letter from HMRC in the course of an HMRC enquiry into K2. He referred to the possibility of litigation. From an email from David Gill dated 30 November 2012, we note that HMRC had first written to 50 K2 employees on the previous day. In his witness statement David Gill said at paragraph 54 that HMRC wrote to 1200 individuals.

70. Karin Mountain states that in January 2014, Mr Venables approached EDF to intimate that there was an issue, or potentially an issue, with the K2 structure because of the Offshore Intermediaries Legislation.

71. On 24 January 2014, the Government having announced in the Autumn Statement 2013 that there would be a consultation on the extension of APNs, the APN consultation entitled "Tackling marketed tax avoidance", was launched. It included the proposal that the APN regime would apply to schemes that fell to be disclosed in the DOTAS regime.

72. Shortly thereafter Karin Mountain attended a consultation with Mr Venables and discussed the potential impact of APNs. She states that at the end of January 2014, Mr Venables was instructed by EDF, on their own behalf, either to suggest changes to K2 or to devise an alternative structure.

73. Although it was issued by 3PCL, on 30 January 2014, David Gill, wrote from PPT, to every current and former employee of Assignment, Penfolds, Hamilton and K2 commenting on the APN consultation and the possible impact of Follower Notices ("FNs") and APNs. He highlighted the possibility that APNs could be issued where there was an open enquiry or appeal on a DOTAS registered scheme and pointed to the risk given that there were enquiries. He expressed his concern about the proposed legislation because there was "a lot at stake".

74. He identified the risk that HMRC might try and argue that a scheme which had not been disclosed was a DOTAS scheme and would be affected by the proposed APNs. The focus was on DOTAS schemes in general.

75. It is not disputed that EDF had been the promoter of the K2 scheme because they had been involved in the design. Karin Mountain stated in her oral evidence that it was Mr Venables who designed the Hyrax arrangements and that the fees paid to him for Hyrax were significantly lower than those for K2 because in Karin Mountain's words, "There was a lot less for him to do on Hyrax than there was on K2 because they were virtually identical apart from the fact that one had an offshore employer".

76. On 29 January 2014 David Gill incorporated Peak Performance Head Office Services Limited ("PPHOS") and from and after 23 September 2015 he was the sole director.

77. In relation to PPHOS at paragraphs 98 to 100 of the DOTAS Decision, Judge Mosedale found that:

> "98. There are a large number of emails produced to me which appear to be, and in absence of any evidence to the contrary, I find were emailed to current and potential users of the scheme and their accountants and advisers. These emails were signed by 'David' with an automatic signature underneath for David Gill and the words 'This is an email from [PPHOS]'. David Gill was stated to be, as he was, a director of PPHOS.
>
> 99. There were quite a number of these emails and they were often quite long. My conclusions from these emails (in absence of anything that would indicate that I should not take them at face value) are that David Gill, acting for PPHOS:
>
> (a) Sent emails to current and prospective users of the Hyrax arrangements promoting the scheme;
>
> (b) Paid referral fees to persons who recommended a person to adopt the scheme if they went on to do so;
>
> (c) Promoted and hosted webinars which promoted the Hyrax arrangements;
>
> 100. It is clear that the relationship between Hyrax and PPHOS was close. An email of 5 September 2014 referred to PPHOS supporting 'former employees' by providing as much information as possible on the new legislation; it went on to thank 'all current Hyrax employees' for their support and (*sic)* fact employee numbers had kept up. It also said: 'now the dust has settled on the new legislation, Hyrax is now able to accept employment applications from prospective new employees.' The email gave the impression that PPHOS was intimately bound up with the arrangements."

78. We have seen those emails and we agree entirely with Judge Mosedale and specifically adopt those findings.

79. David Gill states that PPHOS commenced trading on 1 April 2014 and provided "management services to other Peak companies" including Bosley (see paragraph 91 below) in relation to the defence of the various iterations of the contractor loan schemes.

80. In early February 2014, EDF instructed Mr Venables to provide an opinion on whether the Hyrax arrangements were notifiable and that opinion was provided in writing on 28 February 2014. We have not seen the instructions or the opinion.

81. Hyrax was incorporated on 19 February 2014 and Joanne Macnamara and Richard Hopkins were appointed as directors on that day.

82. At David Gill's instigation, the February meeting was arranged in Nottingham and was attended by David Gill, Joanne Macnamara and Richard Hopkins with Karin Mountain and three others from EDF. No notes of that meeting have been produced although in oral evidence Karin Mountain conceded that it was possible that EDF would have made notes. No explanation has been offered for the failure to explore that possibility.

83. It is not in dispute that the purpose of the meeting was for EDF to advise on Hyrax.

84. On 1 March 2014, Richard Hopkins resigned as a director of Hyrax leaving Joanne Macnamara as the sole director and shareholder. However he continued as a senior manager and was certainly actively involved until at least 2016.

85. On 5 March 2014, HRT was established.

86. On 6 March 2014, Ethos issued a letter from Lighthouse, as Trustee of Cirus, writing to all of the K2 employees confirming that they proposed to transfer Cirus to Hyrax as Trustee of HRT and that it was planned that that would happen on 31 March 2014. The new employer was stated to be Hyrax itself.

87. Later that day 3PCL issued a letter from David Gill, writing as PPT, to all 3PCL secondees stating that they would have heard from Cirus, that 3PCL staff would move to Hyrax and that Hyrax would undertake the roles previously undertaken by the employer and 3PCL which would simplify the structure. Ethos would remain in place.

88. He stated that Richard Hopkins and Joanne Macnamara, his co-directors in 3PCL, would be running Hyrax. He did not say that neither he nor Richard Hopkins would be directors of Hyrax.

89. He also said that "there are no technical changes to report on the structure" and "you will not have to get to grips with understanding a completely new structure". In bold and underlined, he stated: "The executive summary is that your employment is simply being transferred to an onshore employer, Hyrax Resourcing Limited which is based in Abercynon".

90. He went on to say in standard type that "The key item will be a new loan agreement which will need to be signed and returned to the Isle of Man before any loans can be made by Hyrax".

91. On the same day Bosley Park Limited ("Bosley") trading as Peak Performance Solutions was incorporated with Douglas Aitken and Roy Lyness as directors. Both had been employees of PPT. Both were directors of Peak Performance Accountants Limited and David Gill was the company secretary. We do not have their accounts.

92. In a letter to HMRC dated 16 November 2015, responding to an Information Notice under Schedule 36 Finance Act 2008, Joanne Macnamara described Bosley as being licensed to promote the services provided by HRT to accountants and they paid a licence fee for doing so. In turn, Bosley was paid a referral fee for the individuals referred to, and employed by, HRT. Although that letter did not mention it, we note that individual contractors were also paid a referral fee of £500.

93. The whole issue of referral fees other than to individual contractors is opaque. The Hyrax arrangements were marketed on the basis of "an indicative return of between 79-82% for workers". In a slide for a webinar entitled "Where does the 18% go?" which references what Judge Mosedale referred to as the "Hyrax' cut" (see paragraph 25 above) there is a pie chart. David Gill spoke to that in cross-examination. The biggest portion, which we estimate at 45% is for "Tax support costs" and it includes "Planners, day to day support, defence of structure". "PAYE" and "Admin costs and insurances" are each approximately 20% and "Trust and trustee costs" is approximately 25%.

94. David Gill's evidence was that the Tax Support costs would have included EDF's and Mr Venables' fees and fees to what he described as his "group". Before turning to that group, we observe that Karin Mountain was clear that Mr Venable's fees would not have been included in the Tax support costs. Mr Venables was instructed by EDF and they paid him.

95. According to David Gill, apparently the employer would have paid a fee that was described as a commercial arrangement for each seconded employee, yet "it wasn't a specific percentage". In the context of K2, describing 3PCL and PPT he said that 3PCL received that amount and then paid PPT a referral fee who in turn paid a referral fee to the referring accountant (that would have been replicated with Hyrax and Bosley).

96. We observe from the unaudited financial Statements for the years to 31 March 2015, 2016 and 2017 for HRT that the relevant income and expenditure was:

Year	**Total income**	**Secondment income**	**Licence fee**	**Referral fees**
2015	£107,392,840	£107,269,815	£49,954	£6,706,384
2016	£ 71,617,208	£ 71,557,238	£50,091	£4,463,235
2017	£ 27,215,406	£ 27,155,860	£49,954	£1,593,318

97. In the first year the costs of tax advice were £4,717,475 and in the later two years £2,542,912 and £858,541. As a percentage of the secondment income the cost of tax advice was approximately 4.4% falling to 3.6% and 3.2%. The trustee fee payable to Hyrax remained constant at £48,000. Notwithstanding HMRC's application for disclosure we have no information as to the recipient of the costs of tax advice.

98. Although we were referred to these accounts, and those for Hyrax, by both parties, it was HMRC who lodged them in evidence. None of Hyrax's witnesses gave evidence about those accounts nor, in particular, the detail or breakdown of the cost of sales and administrative expenses.

99. Mr Lyness wrote to Officer Belli on 13 September 2016 stating that there was no written agreement between Bosley and Hyrax. There was a verbal agreement which was based on "high-level trust" as there was a regular dialogue between the two companies.

100. Bosley hosted webinars on Hyrax in the same way as PPT had done for K2.

101. On 10 March 2014, David Gill issued the Metro email. At the first paragraph in Section 2, he stated that:

> "QC's opinion was obtained by a UK tax boutique firm and based on that they have advised on the Hyrax structure. The opinion was reviewed by Hyrax's directors and I to ensure we were comfortable with the structure."

102. In examination-in-chief, having been asked if he could add anything to that statement, he stated "Well, clearly neither myself nor the Hyrax directors did review the opinion". He explained that that had been taken from wording provided by Nicola Stone which had been given to trustees of another scheme making a similar submission to the same bank. He averred that he had not noticed it and didn't change it and that he and the directors had simply taken oral advice from EDF.

103. We observe that, of course, neither then director of Hyrax has ever seen any opinion on Hyrax, let alone the one on notifiability which was received by EDF on 28 February 2014 and apparently never left their offices. Richard Hopkins was no longer a director by the following day. The letter implies that there is more than one director as at 10 March 2014 and there was not.

104. At the second and third paragraphs of Section 5 of the Metro email David Gill had stated:

"As the structure involves no more than an employer paying its employees a low salary and possibly offering discretionary loans, the QC has opined that there is no 'tax advantage' to be disclosed under the DOTAS provisions … Should the arrangement be disclosed unnecessarily, this would create an unacceptable PI risk for parties involved.

Please note that, if the QC's opinion regarding the disclosure of the structure was different, no new disclosure would be required; rather the existing DoTAS (*sic*) number would continue to apply to the structure – ie the one you have."

105. In fact, the slides and promotional material make it clear that there was not simply a possibility of a discretionary loan but that loans were an integral feature of the remuneration structure and that they were paid on the 20th of the month, as had been the case with K2. As can be seen from paragraph 43 above, loans were stated explicitly to be available. Furthermore, Karin Mountain was very clear in her evidence that:

"It was never part of the strategy that there was a possibility. That wasn't an integral part of it and it was never suggested that it was. I mean, I don't know why that word 'possibly' has been put in to that email but it's not a part of the opinions …possibility that loans would be made… they expected loans to be made, obviously, otherwise people wouldn't have been interested…".

106. On 14 March 2014, in his capacity as a director of PPT, David Gill wrote to the employees of K2 about the transfer to Hyrax and stated:

"Simplistically the benefits are:-

- By having an onshore employer, Hyrax, the Offshore Employment Intermediaries Legislation is not in point …
- Similarly, by having an onshore employer, Hyrax, by definition there is no prospect of HMRC applying their current preferred technical argument 'transfer of assets abroad'. As you know, this appears to be the preferred argument on Penfold and Hamilton and is also likely to be extended to K2…".

107. The email went on to explain that the contractors would have to sign a new loan agreement with Hyrax and gave details about the practical arrangements. It concluded by pointing out that new referrals for friends and colleagues could be made from 1 April 2014 and £500 would be paid for each referral.

108. Contractors were using the Hyrax arrangements from April 2014.

109. HMRC has calculated from the information provided by HRT to HMRC's Real Time Information System that approximately 1,093 contractors migrated from the disclosed K2 arrangements to the non-disclosed Hyrax arrangements in April 2014 before the beginning of the 2014/15 tax year.

110. When the Hyrax arrangements were set up, 3PCL transferred all its rights and obligations under its existing contracts to Hyrax under Deeds of Novation of Contracts which were signed by 3PCL, Hyrax and the relevant contractor. An example in the Hearing Bundle has Richard Hopkins signing as a director of 3PCL and Joanne Macnamara signing as the director of Hyrax. We observe in passing that Joanne Macnamara's signature bears no resemblance to her signature on her witness statement or on other documents in that Bundle. Since we were not referred to the Deed in the hearing we were unable to explore that. We say, in passing, because we put no reliance on that but make the observation since we noted it.

111. We see from emails that once Hyrax became operational, Hyrax, in its capacity as Trustee for the HRT, assigned the benefits of the right to be repaid loans to the Trustees of the Hyrax

Resourcing Employer Financed Retirement Benefit Scheme and that the Trustee of that EFRBS was HRL Trustees Limited. We have no information about that company.

112. On 4 April 2014, Hyrax issued an email from David Gill, stating he was PPT, promoting a webinar where Karin Mountain, "our tax adviser for K2 and Hyrax" would be presenting and he would be hosting. The objective would be to discuss the draft Finance Bill. Pertinently, the Hyrax arrangements were sold in the email on the basis that:

> "Remember also that Hyrax is not directly affected by the proposals, and the benefits which can be delivered may afford the opportunity to build up reserves in case there is a financial implication arising on earlier structures as a result of the proposals".

113. In cross-examination David Gill agreed that because it said that Hyrax was not directly affected, the implication would be that that would be because it was not notifiable whereas the previous structures had all been notified.

114. Furthermore, we observe that David Gill stated in his witness statement that PPT ceased trading on 31 March 2014 with Bosley taking over PPT's role with David Gill supporting them, when required. Clearly not.

115. On 16 April 2014, David Gill, writing as Peak Performance, emailed contractors referring to the webinar with Karin Mountain that he had hosted the previous night stating that during the webinar "we specifically addressed the risks for each structure, Penfolds, Hamilton, K2, Cirus and Hyrax….".

116. We know nothing about Peak Performance beyond observing from the email that it was a company and the directors were David Gill and a Jim Anderson. All we know about the latter is that he was a chartered accountant. He was company secretary of Bosley from 6 March 2014 until 23 September 2015, company secretary of 3PCL from 1 March 2012 until 23 September 2015, company secretary of PPT from 20 May 2009 to 23 September 2015, a director of PPHOS until 23 September 2015, and a director of PPT for an unknown period.

117. On 5 September 2014, having recorded a webinar on the developments with APNs and FNs, David Gill wrote to all past and present contractors arguing that all current employees of Hyrax and former employees of K2, Penfolds and Hamilton should view the webinar and went on to say that the focus of the previous six months had been to support former employees. The webinar was accessible through PPHOS. That is the email to which Judge Mosedale referred at her paragraph 100 and to which we refer at paragraph 77 above.

118. He thanked current Hyrax employees and said "Hyrax is now able to accept employment applications from prospective new employees". In that context he reminded his readers that once any new workers referred by contractors had been employed for three months, a referral fee would be paid of £500. He agreed in cross-examination that he was therefore personally promoting and encouraging workers to introduce others to the Hyrax arrangements. He told the Tribunal that "I was trying to distance myself from the promotion of the structures" and that it was exceptional for him to promote Hyrax.

119. His ingenuous explanation was that he had been a bit careless and got carried away. He said that he was simply trying to support Peak Performance Tax Services ("PPTS"). He went on to infer that PPTS was Bosley (but that conflicts with evidence that Bosley traded as Peak Performance Solutions - see paragraph 91 above). We have very little information on PPTS.

120. Ethos wrote to contractors on 24 September 2014 stating that since six months had elapsed since Hyrax, as Trustee for HRT, had started operating, they were writing to all employees drawing a number of important things to their attention since there had been a

number of changes; one of those was the appointment of PPTS to assist with some human resource issues.

121. The only substantive reference to PPTS in the Bundle is on the slides for one undated webinar entitled "Hyrax Risk Management Employment Structure (Hyrax)". It is described as an education webinar for accountants.

122. Another slide has a diagram that is identical to one that David Gill used for promoting K2, other than, of course the references to 3PCL and K2, and it states that the money in the trust is ring fenced and cannot be claimed by the employer or its creditors. David Gill told the Tribunal that this webinar was produced by Bosley and disclaimed all knowledge of it.

123. We note that in September 2016, HMRC received information from third parties confirming that, in one case, a participant had received the information about the Hyrax arrangements from "Peak Performance Tax Services" (from the same address as Hyrax) and in the other from David Gill and Douglas Aitken of "Peak Performance".

124. In the same way as the Bosley webinars carried their logo, Peak Performance Solutions and the PPT webinars carried their logo. PPTS carried the logo Peak Performance Tax Services. The logos all look very similar. We note that in cross-examination Karin Mountain stated that it was only very recently that she had become aware that Bosley had even called themselves Peak Performance Tax Services.

125. On 14 October 2014, HMRC had made contact with Hyrax indicating that they intended to instigate enquiries into the arrangements and employment structures of Hyrax and their employees. On 10 December 2014, HMRC wrote to Hyrax pointing out that there were concerns that Hyrax was operating in a similar fashion "to earlier arrangements which are under investigation by officers of Counter-Avoidance" and asking detailed questions starting with DOTAS and referencing Cirus.

126. Correspondence ensued and Joanne Macnamara sent each letter to EDF who, in turn, either themselves or using Mr Venables, drafted a reply which Joanne Macnamara then printed on Hyrax headed paper, signed and issued.

127. On 19 April 2016, Officer Belli wrote to Joanne Macnamara asking why the Hyrax arrangements had not been disclosed and she sent a detailed response on Hyrax headed paper on 16 May 2016 (see paragraph 14(3) above). That stated that Hyrax knew nothing about a "Hyrax Resourcing Employment Scheme". She went on to explain:-

> "This company [Hyrax] acts as trustee of a trust. In that capacity, it carries on the trade of exploiting the services of employees by seconding their services to third parties. The employees are paid a salary. We account under P.A.Y.E. for income tax and Class I primary and secondary national insurance contributions in respect of their salaries.
>
> In addition, the company makes loans to its employees. Where the employee does not pay interest on a loan at the 'official rate', income tax on an amount of income equal to the shortfall is duly accounted for.
>
> The company also makes, wholly and exclusively for the purpose of the trade, voluntary contributions to an employer-financed retirement benefits scheme for the benefit of its employees and persons related to or connected with them. The contributions take the form partly of cash and partly of debts owed to the company."

128. On 24 October 2016 Officer Belli wrote to Joanne Macnamara explaining why HMRC intended to apply to the Tribunal on the basis that the Hyrax arrangements were notifiable. Correspondence again ensued culminating in the application to the Tribunal on 2 June 2017. On 7 June 2017, HMRC intimated that they would consider penalty proceedings.

129. On 14 March 2019, Joanne Macnamara submitted two disclosures followed by another two on 19 March 2019 and a final two on 4 April 2019 (there was a debate with HMRC about the validity of the disclosures but the Tribunal is not concerned with that). The last two disclosures said that "There are some similarities between this structure and other planning…" and gave the SRN for what we know to be K2.

130. Joanne Macnamara's income in the years 2014/15, 2015/16 and 2016/17 was £295,000, £418,632.18 and £294,318.92 respectively amounting in total to £1,007,951 over three years. Those figures are derived from her self-assessment tax returns and no information has been provided specifying how those figures were arrived at. HMRC had given notice in their Skeleton Argument that her tax returns had recorded that income as being derived from Hyrax but it was not reported in its accounts. It was not. The oral evidence was to the effect that all PAYE was reported through HRT. That appears to be the case. HRT appears to have been the employer for everyone and not Hyrax although the slides repeatedly refer to Hyrax as being the employer.

131. We do not know what Richard Hopkins earned but we know from the unaudited Financial Statements for Hyrax that in the year to 31 March 2016, both Joanne Macnamara and Richard Hopkins were paid dividends of £18,000 of which £5,400 of each was retained by Hyrax.

The issues

132. It is common ground in relation to the period 1 April 2014 to 14 March 2019 that the only issues are:-

(a) Whether Hyrax had a reasonable excuse for non-compliance within the meaning of section 118(2) TMA, and

(b) If they did not, the quantum of any penalty.

133. In regard to quantum, at the outset of the hearing, Mr Nawbutt argued that in their Skeleton Argument, Hyrax were seeking to raise a new argument. That argument was that from the date it received HMRC's Section 314 application with the supporting documentation which included the K2 DOTAS disclosure, Hyrax ceased to have an obligation to notify. That was on the basis that the Hyrax arrangements were the same, or substantially the same, as the K2 arrangements.

134. Mr Nawbutt argued that it was not open to Hyrax to raise that argument at such a late juncture, not having raised it in the Statement of Case or indeed in the DOTAS Decision proceedings. It was inconsistent with the findings in the DOTAS Decision and their own witness evidence. Mr McDonnell resisted that argument on the basis that it was simply part of their argument on quantum. Given the reading day, we had extensively read into the appeal and were aware of those findings and the witness evidence. We reserved that issue, when first raised, and returned to it after we had heard all of the evidence.

135. Mr McDonnell then reiterated his argument that it was not a new ground because it was part of the quantum ground of appeal. That was predicated on looking at the date of effective compliance with the notification obligation or indeed arguing that there had not been a failure in compliance. It did not depend on any new evidence because the whole basis underpinning that argument can be found in the documents and in HMRC's application for penalties. Reference was made to various documents and we again reserved judgment on that, albeit we indicated that we would probably be minded to allow the argument having had regard to Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) ("the Rules"). Given that it depended on the facts, we saw no point in Hyrax, if unsuccessful in the FTT, raising the argument on appeal and for the issue to be referred back to the FTT. At the end of the second day Mr Nawbutt withdrew his objection.

Overview of Hyrax's arguments

136. The "new" argument adduced by Hyrax is that they now rely on Section 308(4B)(a) FA 2004 on the basis that the K2 arrangements are:

> "….arrangements which are substantially the same as the notifiable arrangements (whether they relate to the same or different parties)."

137. Therefore, Section 308(4B) FA 2004 has the effect that Section 308(4C) FA 2004 deems Hyrax to have complied with its disclosure obligation on 2 June 2017. That is the date that HMRC filed the application for an Order together with supporting evidence including the SRN for K2 and a copy of the Form AAG1 notification submitted in relation to K2. The relevant text of Section 308 is annexed at Appendix 3.

138. Prior to the issue of the DOTAS Decision, Hyrax's understanding, which they argue was based on consistent professional advice, was that the Hyrax arrangements were not notifiable arrangements. They took advice from EDF and EDF's advice was informed by advice that EDF had commissioned from counsel. Hyrax had a reasonable excuse throughout the period, whatever that period might be since it was only when the Order was issued by the Tribunal that they had to accept that the Hyrax arrangements were notifiable. They still do not believe that to be the case albeit they accept the DOTAS Decision.

139. The test of reasonable excuse must be applied in relation to Joanne Macnamara's knowledge and beliefs. Joanne Macnamara was effectively on "ingénue" who dealt only with day to day administration including the authorisation of the loans and she had no tax knowledge. She had relied on EDF and Mr Venables and she was entitled to do so.

140. Hyrax relies on *Mercury Tax Group Ltd v HMRC*[4] ("Mercury") arguing that the Special Commissioner had found that "The fact that Mercury took counsel's opinion is clearly relevant". Hyrax relied on Mr Venable's opinion. Therefore there was a reasonable excuse for failure to notify.

141. Hyrax argue that their notification obligation in terms of Section 308(4C) FA 2004 was discharged on 2 June 2017 which failing on or after 14 March 2019. In any event given the complexity of the DOTAS Decision it should be 5 March 2019.

142. Quite apart from the argument about 2017, in any event, alternatively the quantum of the penalty sought by HMRC is disproportionate and excessive. HMRC had known that the Hyrax arrangements existed since they first wrote to Hyrax questioning them on 10 December 2014. Hyrax was a company with limited income.

Overview of HMRC's arguments

143. HMRC do not accept that the Hyrax arrangements are substantially the same as the K2 arrangements and argue that, whilst undoubtedly there are similarities, there are material differences.

144. HMRC now accept that the notification was made on 14 March 2019 but not before that and they are not seeking a penalty in respect of the period thereafter.

145. Joanne Macnamara, in her capacity as the sole director of Hyrax, from and after April 2014, had not discharged her statutory duties to exercise independent judgement and act with reasonable care and skill.

146. When seeking, and relying on, professional advice, the advisers need to be selected with appropriate care and on receipt of the advice the director must exercise independent judgement

[4] SPC 00737

on the matter at hand. Patently, she did not. That which EDF said to do, she did, without question.

147. As far as quantum is concerned, Section 98C(2ZB) TMA provides that the amount of a penalty is to be arrived at after taking into account all relevant considerations. In particular, the Tribunal must take into account the desirability of the penalty being set at a level which is appropriate for deterring, not just Hyrax, but also others. The HRT accounts disclose the very substantial sums of money diverted into this tax avoidance scheme.

DOTAS penalties

148. The relevant legislation is to be found in Sections 98C, 100C and 118 TMA. The first sets out the penalty provisions. The effect of Section 100 TMA is that an HMRC officer is not permitted to make a determination to impose a penalty for non-compliance with a promoter's obligations under Section 308(3) FA 2004. The officer must commence penalty proceedings before the FTT. Section 118 is the reasonable excuse provision.

149. We have set out the full text of the relevant legislation at Appendix 2 but it suffices to say that this Tribunal's jurisdiction, once HMRC have established that the conditions for a penalty are satisfied, is to either set aside, confirm, reduce or increase the penalty as it appears to be appropriate to the Tribunal.

150. We have had due regard to *Michael Burgess & Brimheath Developments Limited v HMRC*[5] and HMRC have the burden of showing that the conditions for a penalty are satisfied.

151. The burden is satisfied where HMRC demonstrate that:

- there has been a failure to comply with Section 308(3) FA 2004; and
- the period until which the failure to comply has continued.

152. For the reasons set out below, we find that HMRC have done so, so we must consider the question as to whether there was a reasonable excuse for the failure in compliance. If not, then as far as quantum is concerned, both parties are agreed that the guidance provided in *Tager v HMRC*[6] ("Tager") is in point and, in particular, paragraph 88 where Lord Justice Henderson said:

> "In agreement with the Upper Tribunal, I consider that this condition makes it clear that the Upper Tribunal should have regard to the usual considerations which apply when the imposition of a tax penalty is in question, including such matters as the reasons for non-compliance, the extent to which the position has been remedied, the gravity and duration of the non-compliance, the presence of aggravating or mitigating factors, the availability of other methods for HMRC to recover the tax at risk (most obviously by making an assessment, if necessary on a best of judgment basis), and generally the need to achieve a fair and proportionate outcome, having regard to the interests of the public purse and the general body of taxpayers as well as the circumstances of the non-compliant taxpayer himself."

The law on reasonable excuse

153. The burden of proof in establishing a reasonable excuse is on Hyrax to establish, with evidence, on the balance of probabilities that there was a reasonable excuse for its non-compliance.

[5] [2015] UKUT 0578 (TCC)
[6] 2018 EWCA Civ 1727

154. It is common ground that the Upper Tribunal decision in *Perrin v HMRC*[7] ("Perrin") sets out the relevant approach to reasonable excuse.

155. At paragraph 71 of *Perrin* the Upper Tribunal observed that:

> "In deciding whether the excuse put forward, viewed objectively, is sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the time or times…." (emphasis added)

156. In its Statement of Case and Skeleton Argument, Hyrax relies entirely on the alleged actions and beliefs of Joanne Macnamara in her capacity as its sole director. It is common ground that in that capacity she owed directors' duties to the company (Section 170(1) Companies Act 2006). Those duties included:

(a) A duty to promote the success of the company (Section 172);

(b) A duty to exercise independent judgement (Section 173); and

(c) A duty to exercise reasonable care, skill and diligence (Section 174).

157. Under Section 174 a director must exercise the care, skill and diligence which would be exercised by a reasonably diligent person with both:

(1) The general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as the director in relation to that company ("the objective test").

(2) The general knowledge, skill and experience that the director actually has ("subjective test").

158. For the reasons set out below we do not accept that Joanne Macnamara was the controlling mind of Hyrax.

Discussion

Were Hyrax and K2 substantially the same?

159. Mr McDonnell argued that the primary issue for the Tribunal is to decide whether the Hyrax arrangements were substantially the same as those for K2 because in that event no penalty could be exigible. It is certainly the starting point.

160. We agree with Judge Mosedale at paragraphs 50 and 51 of the DOTAS Decision that each of the tax avoidance schemes / structures / tax strategies, including these two, was a phoenix and the iterations were introduced to avoid the evolving legislation. At paragraph 66 of the DOTAS Decision she finds as fact that the evidence was clear that Hyrax was simply the latest iteration. She stated:

> "Hyrax was promoted as being the same as the previous iterations, bar being tweaked, to avoid being caught by HMRC's latest round of anti-avoidance legislation."

That is true but it is not the whole story and certainly not how Hyrax have previously argued the position in discussion with HMRC. The issues are:

(a) what were the differences between the two, and

(b) whether they were material.

[7] [2018] UKUT 156

161. We observe that in a letter dated 16 November 2015, Joanne Macnamara, having been provided with the draft by EDF, and if she is correct, that had been drafted by Mr Venables, wrote to HMRC stating:

> "5a. We do not agree the businesses are 'the same', even subject to the points you mention. In our view the businesses are fundamentally different. Cirus had only two clients whereas Hyrax has hundreds and has to manage day to day dealing with those clients. In addition, there is the basic difference that Cirus was offshore (and had employees working in various countries around the world) whereas Hyrax is based in the UK and only places its staff in the UK."

162. The current argument is quite a *volte face* but understandable given the implications of being "substantially the same" both before and after the application for penalties.

163. Mr McDonnell cautioned us to discount the impact of the proposed APN legislation at that time. We do not. Even David Gill (see paragraph 120) considered it to be a paramount consideration. Whether to notify Hyrax for DOTAS was by all parties' accounts at the heart of the February meeting. Indeed it appears that that is the only significant issue that Joanne Macnamara recalls. She was unable to say if the Hyrax arrangements would have gone ahead, had it been notifiable, she only surmised that there might have been a lesser take-up. By contrast, Karin Mountain was of the view that it would not have proceeded. We agree. It was key to the efficacy of the Hyrax arrangements that it was not notifiable.

164. K2 had been notified. We have no credible evidence as to whether that was a matter of choice or not. The only evidence on that is from David Gill. In his witness statement he stated that Mr Venables had said that neither structure was notifiable for similar reasons and he was told by EDF that K2 had been notified in an excess of caution. There is nothing to back that up. In his oral evidence he had to concede that he had no personal knowledge as to why K2 had been disclosed and had simply taken the view that the "excess of caution" was the most plausible reason. He had subsequently discovered that no opinion had been obtained as to whether or not K2 should have been disclosed in 2011 before it was disclosed. It is clear to us from the terms of the DOTAS Decision that it was notifiable.

165. Mr McDonnell initially argued that "the only real difference was…the residence of the trust" and that that was basically similar to the situation in K2 where the employer changed from an individual to a trust and then to another trust and that had all been largely irrelevant to the contractors (and he argued to HMRC).

166. Firstly, it is not relevant what the subjective thinking of the contractors might have been and, in any event, that is unknown. That is speculation on his part. What we do know is that although all of the iterations had similarities, there were different SRNs, for each of Penfolds, Hamilton and K2. Furthermore, when there was a change in the loan structure in Hamilton there was a new SRN.

167. Mr McDonnell then argued that the only real difference was that the employer was brought onshore and the arrangements simplified administratively. It simply came down to the detail as to the party with the PAYE obligations.

168. There are obvious similarities between the schemes and those do not need to be narrated since Judge Mosedale and we have both made that very clear.

169. We find that the key differences between K2 and Hyrax are that:

(a) the employment was transferred onshore,

(b) the roles previously undertaken by K2 and by 3PCL were both to be carried on by Hyrax (as Trustee for HRT),

(c) Hyrax was combining the functions of employer and processing operations,

(d) there was a small reduction in the illustrative net financial return,

(e) there were new loans from HRT,

(f) the Hyrax arrangements were promoted on the basis that the Offshore Employment Intermediary Legislation was not in point as opposed to the situation with K2, and

(g) HMRC's argument on "transfer of assets abroad" which HMRC applied in Penfolds and Hamilton and seemed likely to be extended to K2 could be averted.

170. In summary there were both factual and legal differences between K2 and in the Hyrax arrangements as they were marketed to the potential users. Are they material?

171. In paragraph 28 above, we underlined the word "crucial" in the quotation from Judge Mosedale because she considered the differences between the various iterations to be crucial and we agree.

172. Furthermore, of course they are material since very large amounts of money were spent on the tax planning.

173. It is not disputed that K2's "shelf-life" had come to an end in the face of the proposed APN legislation. The fact that that only received the Royal Assent in the summer of 2014 is not relevant. It was clearly going to happen and it rendered K2 ineffective for the tax avoidance purpose for which it had been created. Hence Hyrax which could only work in the way that was planned if it was not caught by K2's SRN.

174. Both parties referred us to *Walapu v HMRC*[8] *(*"Walapu") with Mr McDonnell arguing that Mr Nawbutts's analogy with the situation described in paragraph 151 where the key point was that, in that case, legally the two schemes were fundamentally different was flawed. K2 and Hyrax were the same because of the loan arrangements which were at the heart of both.

175. Whilst we accept that the loan arrangements were a key feature of both K2 and Hyrax, we disagree with the rest of his argument which blithely ignores paragraph 152 of *Walapu* which makes it clear that one must not look at only a portion of the arrangements. As Mr Nawbutt pointed out, Mr McDonnell focussed only on one part of the tax planning whereas *Walapu* requires one to look at the whole context and whether there is, a difference that does, or might, change the legal analysis of the effectiveness of the arrangement.

176. We take the view that the very relevant paragraph of *Walapu* is at 167 where Mr Justice Green made it explicit that:

(a) The term "substantially the same" must be considered in context, including the tax avoidance legislation.
(b) In that context it can only be substantially the same if the differences are immaterial to the analysis as to whether it is tax avoidance.
(c) A change or difference because it renders an ineffective scheme effective will be material because that would defeat the "obvious" purpose of the legislation.

177. Like the Court in *Walapu* at paragraph 168 we find, as did Judge Mosedale in the DOTAS Decision, that the two schemes and, in the case of the DOTAS Decision, the previous schemes also, were very similar economically and financially but they are fundamentally different in both their factual and legal consequences.

[8] [2016] EWHC 658 (Admin)

178. Patently, the sole point of the Hyrax arrangements, as Judge Mosedale, and we, have found, was to render the ineffective K2 arrangements effective.

179. As Sir Duncan Ouseley pointed out, and Judge Mosedale and we have found, the whole purpose of the Hyrax arrangements was to obtain a tax advantage. The very obvious purpose of the legislation is to prevent that.

180. We find that, for all of these reasons, K2 and the Hyrax arrangements are not "substantially the same" and therefore Hyrax's argument on deemed disclosure by no later than 2 June 2017 fails.

The penalties

181. Since we have found that HMRC have established that a penalty is due then the question is whether, and to what extent, a penalty is payable.

182. Before turning to the question of reasonable excuse we consider it appropriate to look at an overview of the witness evidence and the role of EDF at the February meeting. In many ways these are linked issues.

Overview of the witness evidence

183. In summary, in a situation where the burden of proof lies with Hyrax in relation to reasonable excuse, there are major gaps in the evidence and very little evidence lodged by Hyrax of any substance. Like Judge Mosedale, HMRC, and we in turn, have been forced to rely in large part on the documentation lodged by HMRC.

184. Another issue was that, as Mr Nawbutt pointed out, on a number of occasions, under the guise of making submissions, Mr McDonnell adduced what purported to be evidence. We do not object to that *per se* or criticise him given the paucity of material available to him. He did well in the circumstances but submissions are not evidence.

185. We are bound by, and wholly agree with, the Upper Tribunal in *Edwards v HMRC*[9] where it quoted with approval the FTT's findings in *Qureshi v HMRC*[10] and the relevant paragraphs read:

> "50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:
>
> > 'In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it.'
>
> 51. The FTT also made the following observations at [15] with which we would agree:
>
> > '15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate.'"

[9] [2019] UKUT 131 (TCC)
[10] [2018] UKFTT 0115 (TC)

HMRC's witness

186. Mr Belli was the HMRC officer who dealt with the investigation into whether the Hyrax arrangements were notifiable. Like Judge Mosedale we found that his evidence was clear and consistent and he happily corrected what Mr McDonnell referred to as "three minor errors" in his witness statement. Mr McDonnell adopted the same stance as Mr Venables had done in the hearing for the DOTAS Decision and sought to get him to express opinions. Like Judge Mosedale, this Tribunal was not interested in Mr Belli's opinions (paragraph 31 of the DOTAS Decision). We agree with Judge Mosedale that the reality is that Mr Belli's evidence was not particularly significant. HMRC's case relies on the documentation and the documentation is revealing. That is one reason why we have found relatively extensive facts and quoted from the documentation.

Overview of Hyrax's three witnesses

187. We do not propose to address the witness evidence in detail in this section but simply to give a flavour of some of the problems that we faced with the evidence furnished by Hyrax and also the deficiencies because of the lack of evidence on other aspects.

188. Hyrax's solicitors stated, and all three witnesses confirmed, that the witness statements were based on the witness' own recollection of events and that the witness did not review or read any documents in preparing the witness statement.

189. David Gill's confirmation of that was without any caveat, as was that of Joanne Macnamara. However, David Gill said that after the witness statement was filed he had looked again at some emails.

190. We therefore find it odd that at paragraph 51 of his witness statement in describing Mr Venables' opinion that Hyrax was not notifiable, David Gill stated that:

> "Mr Venables QC took the view, and I adopt here the words attributed to him, that Hyrax 'involved no more than an employer paying its employees a low salary and the possibility of offering discretionary loans'".

We find that it is inherently unlikely that he would be able to quote from an opinion that he has allegedly never seen. At Section 5 of the Metro email he also used very similar wording, namely:-

> "As the structure involves no more than the employer paying its employees a low salary and possibly offering discretionary loans …".

When that was put to him, David Gill told the Tribunal that that email was simply "lifted" from another email provided by Nicola Stone for another scheme using the same bank and he had used those words in a seminar on 11 March 2014. Having delivered so very many seminars over numerous years, in our view, it is very unlikely that he would be able to quote *verbatim* from a specific webinar.

191. When it was put to Karin Mountain that it was never simply a possibility that discretionary loans would be offered, she agreed and she could not explain why that wording had appeared. She very honestly stated that no one would have embarked on the Hyrax arrangements unless the loans were guaranteed to be made. That is exactly what we, Judge Mosedale and Judge Gillett have explicitly found.

192. We do not find David Gill's explanation to be credible. The Metro email is two pages long and gives details of Hyrax, HRT, the numbers of contractors and the mechanics for the payroll.

193. In that regard, we note that the number of loans is stated to be the same number as the number of contractors. That does not sit well with the statement that the loans were a mere possibility.

194. Furthermore, David Gill confirmed that he had all of his emails and had reviewed them prior to giving evidence. Although he initially said that he had given that email from Nicola Stone to his solicitors, he then pulled back from that and said that only those noted at paragraph 14 above were delivered to the solicitors. The simple fact is that he failed to produce the alleged email from Nicola Stone or the recording of the webinar.

195. There is much else in his evidence where we did not find David Gill to be credible, such as his assertion that PPT ceased trading when Hyrax started to trade in April 2014. Patently, it did not as the email traffic discloses. His assertion that he was trying to distance himself from the promotion of the Hyrax arrangements does not withstand scrutiny as both we, and Judge Mosedale, have pointed out.

196. As we point out at paragraph 122 above, David Gill disclaimed all knowledge of slides for a webinar where at least one slide was identical to one he admits to having produced. That is inherently unlikely given his involvement in the webinars. We find that his failure to produce any of the recordings of the webinars, or any of his emails other than those referred to in paragraph 14 above, does not assist his credibility.

197. As far as her witness statement was concerned, Karin Mountain very properly said that the question of penalties had been talked about for quite a long time before she wrote it. In particular, she stated that both David Gill and RPC had asked her numerous questions before they asked whether or not she would be willing to be a witness. In that context she had looked at various documents including emails and the Trust Deed. It was for that reason that she knew that Mr Venables had issued his opinion on 28 February 2014 and she knew the date that the trust had been established. In particular, she had seen an email from Nicola Stone, who is the current owner of EDF, to RPC which stated that the opinion from Mr Venables had been received on 28 February 2014.

198. In their Skeleton Argument, HMRC had referred the Tribunal to *Guestmin SGPS SA v Credit Suisse (UK) Limited and Another*[11]. In fact, we find that the Tribunal's function in assessing the probative value of oral evidence, which purports to be a recollection of events which occurred, in the circumstances of this case, more than seven years ago, should be informed by the guidance of the High Court in *Kimathi & Others v The Foreign and Commonwealth Office*[12] (recently affirmed in *R (oao Dutta) v GMC* [2020] EWHC 1974 (Admin) in which the importance of the *Guestmin* principles was re-emphasised. In summary:-

> (1) The best approach for a Tribunal is to base factual findings on inferences drawn from documentary evidence and known or probable facts (*Kimathi* at 96(i)).
>
> (2) The value of cross-examination lies largely in the opportunity which affords to subject the documentary record to critical scrutiny and to gauge the personality and motivations of a witness, rather than in testimony of what the witness recalls of particular conversations and events (*Kimathi* at 96(i)).
>
> (3) It is important to avoid the fallacy of supposing that because a witness has confidence in their recollection, evidence based on that recollection provides any reliable guide to the truth. This is because memories are fluid and malleable, being constantly rewritten whenever they are retrieved (*Kimathi* at 96(i)).

[11] [2013] EWHC 3560 (Comm)
[12] [2018] EWHC 2066 (QB)

(4) Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by lawyers who are conscious of the significance for the issues in the case of what the witness does or does not say (*Kimathi* at 96(i)).

(5) For these reasons, a witness, however honest, rarely persuades the judge that their present recollection is preferable to that which was contemporaneously evidenced. Therefore contemporary documents are always of the upmost importance (*Kimathi* at 96(ii)).

(6) There are three main tests which in general give a useful pointer as to where the truth lies, although their relative importance will vary from case to case:-

(a) The consistency of the witness evidence with what is agreed, or clearly shown by other evidence, to have occurred;

(b) The internal consistency of the witness evidence, and

(c) The consistency with what the witness has said on other occasions (*Kimathi* at 98*).*

199. We have borne these principles very much in mind.

200. One of the very contentious areas was the February meeting.

201. At paragraph 19 of her witness statement, having confirmed that she had made no written notes of what she was told at the meeting on 27 February 2014, Joanne Macnamara went on to say:

> "I certainly recall that the sequence of events was as I have described. There was been focus more recently on the notifiability question, including in particular the First-tier Tribunal case in 2018, and as a result I still have a recollection of what happened in 2014."

202. That is a clear example of where the *Guestmin* principles should be applied in regard to the fallibility of human memory and the need for contemporaneous evidence. Sadly, for Hyrax, as HMRC have repeatedly pointed out, that is sadly lacking.

203. Mr Nawbutt argued that Joanne Macnamara materially overstated her personal knowledge of EDF. We agree. She had a bland statement in her witness statement that she was on good personal terms with Nicola Stone who had provided unspecified support to 3PCL in relation to the processing operation (but not the tax implications of K2). In oral evidence she said that 3PCL simply provided an administrative role as 2PCL had done in relation to the previous structures. It is not clear what role EDF might have had in that given that, as David Gill described them in the Metro email they were a "tax boutique firm".

204. In her witness statement she also stated that whilst a director of 3PCL she would not have continued the involvement with K2 if she had not been able to rely on the advice and assistance of EDF, as informed by Counsel.

205. In her oral evidence, she professed to not being aware that EDF's "structures" were tax avoidance structures yet she had to concede not only that in 2014 she was aware that HMRC had opened enquiries into both Penfolds and Hamilton which had not yet progressed to a hearing but also that she knew that EDF and David Gill believed that HMRC would challenge K2.

206. When she was asked what tax advice she had received from EDF, when a director of 3PCL, she could not recall any single occasion. Furthermore, when stressing her reliance on EDF in relation to Hyrax in early 2014, she had been a director of 3PCL for less than a year.

207. In summary, whilst David Gill had had a long relationship with EDF, we find it is disingenuous for her to state as she did in her witness statement that "We trusted …EDF. Our and David's relationship with EDF was good and had developed over a number of years." That was misleading as was her statement that EDF were "transparent" with both HMRC and clients. In cross-examination she had to concede that was not within her own knowledge and EDF had simply told her that.

208. Secondly, the very clear import of her limited oral evidence was that if EDF told her something then she did it, whether before April 2014 or thereafter. She acted as a post office for the letters to HMRC, simply cutting and pasting the letters from EDF and or Mr Venables. She did say that she read them but since she also said that she only understood the basics it seems unlikely that she ever had any input on any strategic matter.

209. HMRC drew attention to the fact that neither Richard Hopkins nor Nicola Stone were called to give evidence. As far as the former was concerned he was patently deeply involved in the running of Hyrax and indeed the few emails we have that are addressed to him, put his name ahead of that of Joanne Macnamara.

210. In David Gill's promotion for a webinar on 11 March 2014, included in his email of 6 March 2014, he stated that attendees would have the opportunity to hear from "Richard and Joanne". Since Richard Hopkins was by then no longer a director, it is significant that he is given greater prominence than the only director. He was an equal shareholder with her and as can be seen from paragraph 128 above he was paid a dividend by Hyrax. We do not know whether his remuneration was greater than, equal to or less than that of Joanne Macnamara.

211. It was Nicola Stone, not Karin Mountain who advised Richard Hopkins and Joanne Macnamara about Hyrax.

212. Joanne Macnamara said that "Very often Richard was in the telephone conversation with Nicola and me…If we had something to discuss Richard would be with me". Clearly, his role was not insignificant.

213. David Gill stated at paragraph 73 of his witness statement that monthly management meetings were held with <u>all</u> of the individuals involved in the various services provided by "Peak". The eight regular attendees included Joanne Macnamara. He does not disclose whether or not Richard Hopkins was present. He also states in that paragraph that he also met regularly with Joanne Macnamara to discuss the Hyrax accounts but again he does not mention Richard Hopkins. Given that he emailed them both it seems probable that Richard Hopkins would have been involved to the same extent as Joanne Macnamara.

214. Joanne Macnamara repeatedly told the Tribunal that her primary contact at EDF was Nicola Stone. She said that she was in contact with her daily if not more often. David Gill stated that at the February meeting, he had insisted that Joanne Macnamara and Richard Hopkins met separately with Nicola Stone whilst he met with Karin Mountain and the others. It is indeed curious that she was not cited as a witness.

215. Karin Mountain referred to her in her witness statement as being a senior manager at EDF and explained to the Tribunal that Nicola Stone had not wished to be identified by name in her witness statement. We do not know the reason for that.

216. Even if she, or indeed Richard Hopkins, did not wish to give evidence an application could have been made to the Tribunal in terms of Rule 16 of the Rules both to cite either or both of these witnesses and/or to produce documentation. No such application was made.

217. Both would indeed have been relevant witnesses. HMRC relied on *Hannah and Hodgson v HMRC*[13] for the proposition that we should draw an adverse inference from the fact that they were not cited as witnesses. We agree.

218. We would never have expected Mr Venables to have been a witness. In the transcript there are seven references to red herrings in Mr McDonnell's Closing Submissions, almost all of which related to Mr Venables and the intellectual property rights in the Hyrax arrangements. We were not hugely interested in what amounted to speculation about intellectual property rights. We accept that Mr Venables was instructed by EDF on their behalf and not on behalf of Hyrax. We also accept that EDF paid his fees. We know that he attended a Peak Performance webinar and delivered a presentation. We are not in a position to go further than that since we know no more.

EDF's role at the February meeting

219. Mr McDonnell argued that one red herring was the question as to EDF's role in January and February 2014. Whilst we accept that the primary purpose of the February meeting was for EDF to explain the detail of the Hyrax arrangements to Joanne Macnamara and Richard Hopkins, the question is whether that was done as tax advisers or as promoters of the Hyrax arrangements.

220. In a letter of 28 June 2019 to HMRC RPC said:

> "We do not dispute that EDF Tax Ltd had a major role in the creation and promotion of the arrangements…
>
> Importantly, and as we indicate above, HRL was informed that Counsel's opinion was that, even if the arrangements were disclosable under the DOTAS regime, HRL would not be considered to be the promotor of those arrangements in any event."

221. In their Statement of Case, at paragraph 8, Hyrax stated

> "The Arrangement had been designed by EDF with the benefit of advice from leading tax counsel …EDF (including Ms Mountain) had, in advance of the Meeting attended a consultation with Mr Venables QC where he had advised them he considered the Arrangement was not notifiable under the DOTAS legislation".

That most certainly was not consistent with the oral evidence.

222. Both the Statement of Case and that letter gave us problems.

223. Karin Mountain's oral evidence was that it was Mr Venables who created the Hyrax arrangements and not EDF, but EDF had created K2, albeit with advice from Mr Venables. That does not sit well with her evidence that his fees for Hyrax were lower than for K2 because there was less for him to do.

224. David Gill prevaricated. His starting point was that EDF were the creators and promoters of tax avoidance schemes and that his companies then introduced those to accountants. He said that his understanding was that Mr Venables had created both K2 and Hyrax and owned the intellectual property. However, he subsequently stated that that had only come to his attention "recently" and that in 2014 he would have assumed that EDF had ownership.

[13] [2021] UKUT 0022 at paragraphs 171 and 172

225. He also said that it was EDF's role to set up the employer, trustees and supporting services (both for K2 and Hyrax). As far as Hyrax was concerned he said that:

> "EDF was in complete control of the process and was responsible for setting up the new employer and all the relevant documentation".

Karin Mountain flatly denied that in relation to both K2 and Hyrax. EDF's involvement was restricted to outlining what was needed in order to implement the schemes, as devised. As far as K2 was concerned, EDF's role was restricted to advising the Jersey based individual on the tax aspects and he had his own advisers who set it up and gave him advice in relation to non-tax aspects.

226. In relation to Hyrax she said that she assumed that it would have been David Gill who had decided what was done thereafter, such as the appointment of Joanne Macnamara and Richard Hopkins as directors of Hyrax which happened before the February meeting. EDF had not advised on anything beyond the need for a company. Joanne Macnamara was vague and implied that EDF had said that she should be a director.

227. There was no doubt in anyone's mind in 2014 that EDF were the promoter of K2 (indeed RPC confirmed that to HMRC in their letter to them of 28 June 2019). By January 2014, EDF knew that, because of the issue of APNs, K2 would no longer be effective. Leaving to one side the difference of opinion as to whether EDF had said that Joanne Macnamara and Richard Hopkins should be directors, it was on EDF's advice that Hyrax had been incorporated. More to the point, Joanne Macnamara states at paragraph 25 in her witness statement that Hyrax had been incorporated "….in the event that it was decided that it would be the trustee of the employer entity".

228. Clearly, the advice that a company was required in the proposed new structure was given by EDF and adopted by David Gill who states that "In early February 2014, I informed Joanne and Richard of the guidance provided by EDF…". He was clear that from January 2014 onwards he had had regular discussions with Ms Mountain about the cessation of K2 and the potential new structure. That advice was not to Hyrax which did not exist then.

229. HMRC's application for disclosure specifically sought details of the contractual relationship between EDF and Hyrax. Karin Mountain was clear that EDF would have agreed an engagement letter with Hyrax and Joanne Macnamara confirmed that, but could not remember when EDF had been appointed. She did not negotiate the terms of that. It has not been produced.

230. Interestingly, Mr McDonnell argued, cogently, that EDF was the promoter for Hyrax in April 2014 and the "natural promoter" at that.

231. At paragraph 61 of his witness statement (not quite what he said in oral evidence) David Gill argued that EDF was the promoter and that was why they had obtained Mr Venable's opinion on notification. We agree with that view. That was not an opinion obtained for the benefit of Hyrax.

232. On the balance of probability, we find that EDF's advice in early 2014, including the February meeting, was not as tax adviser to Hyrax. They were marketing a product, whether their own, or that of Mr Venables, is not material. That is borne out by paragraph 5 of Hyrax's Statement of Case which reads:

> "The Meeting was to discuss details of implementation of a tax planning arrangement ("the Arrangement") which EDF intended to market to individuals".

It then narrates the Hyrax arrangements. We observe that it clearly suggests that EDF were promoting the Hyrax arrangements.

233. Patently, EDF were not independent advisers and they had a significant financial interest in "selling" the Hyrax arrangements to those at the February meeting. That is what they did.

The February meeting and the opinion

234. In his Closing Submissions, Mr McDonnell said that the three witnesses who had attended the February meeting gave evidence "that is perfectly consistent about what took place at that meeting. It is also consistent with every prior statement about it".

235. We disagree.

236. David Gill's account of that meeting was that the meeting broke into two groups with Joanne Macnamara and Richard Hopkins meeting with Nicola Stone and another senior manager to explain what David Gill described as:

> "… the structure, whether it was notifiable to HMRC under the DOTAS regime, the role of the employer, their potential involvement as directors of the company which would potentially act as trustee of the employer, and any risks relating thereto".

He said that he had met separately with Karin Mountain and another director of EDF. He confirmed that the main focus of his discussion was in relation to Hyrax but there was also a discussion about other structures promoted by EDF and developments in relation to HMRC enquiries.

237. By contrast Karin Mountain stated in her witness statement that

> "I have been told by David Gill that there was a meeting in Nottingham on 27 February 2014 and that the attendees included … I do not specifically recall the meeting nor what we discussed but have no doubt that David Gill is correct that it happened."

In her oral evidence, she confirmed that she neither remembered the timing of the meeting nor what was discussed.

238. Hyrax lodged "References to the Evidence" which suggest at paragraph 13 that Joanne Macnamara was given an overview description of how the Hyrax arrangements would operate by Nicola Stone and the implication is that that was at that meeting. However, when one looks at the transcript and at her witness statement, Joanne Macnamara's references to Nicola Stone cover "regular ongoing discussions" and not specifically that meeting.

239. Joanne Macnamara's witness statement said that there was a "significant meeting" on that date and she stated that they were given advice about the structure, the role of the employer and Hyrax's potential involvement as trustee. She stated that she was told that Hyrax would only be acting as trustee and that all legal and financial responsibilities lay with HRT and not Hyrax. She said that one important aspect that was covered at the meeting was whether the Hyrax arrangements were notifiable. She said that EDF said that they had discussed it with counsel, expected that it would not be, but they awaited a written opinion. In the witness statement she did not say who gave the advice.

240. In her witness statement, Joanne Macnamara said that after discussions in February and March 2014, she decided that Hyrax would act as trustee in the Hyrax arrangements. We have difficulty with that since it does not accord with her oral evidence which was that she was informed at the February meeting that Hyrax would be the trustee for HRT.

241. Her oral evidence was decidedly vague and she said that she had only understood the basics of how the Hyrax arrangements would work. She said that she could not recall what was said at the meeting about why she and Richard Hopkins would, or should, act as directors of the trustee of a trust employer which was being set up as a tax structure for over 1,000

individuals. She said that it was at that meeting that she was told that Hyrax was going to fulfil the role of trustee in the new structure but that she did not know, at that time, what the duties of a trustee might be. At the hearing she still did not. Essentially, the purpose of that meeting was to explain how the new structure would work so that she and Richard Hopkins could decide whether or not they wished to participate in the structure. She could not remember even whether her, very substantial, remuneration was discussed at that meeting. All she recalled in any detail was that the decision whether or not to disclose was to be made by EDF on the basis of advice from Mr Venables.

242. She decided that she would continue. Richard Hopkins did not continue as a director, allegedly for personal reasons. However, he was a senior manager of Hyrax with effect from 1 March 2014 until they both resigned in March 2016.

243. Since we do not have evidence from Nicola Stone or Richard Hopkins and although, no doubt, Joanne Macnamara means well, we simply do not accept that she has a clear recollection of what she was told at that time. Karin Mountain is patently honest in saying that she has no recollection of that meeting. We are unable to make clear Findings in Fact as to what was said at that meeting other than to acknowledge that it happened and that the Hyrax arrangements were discussed.

244. The fact that we have such a lack of clarity about that meeting does not assist Hyrax since it is one of the cornerstones of their case. On the one hand it is argued by Joanne Macnamara, in particular, that EDF simply told her what would happen but on the other hand it is argued that the meeting was simply for information and that decisions were taken later. That does not add to the credibility of the witnesses.

245. What was the advice from EDF on 27 February 2014? It is worthy of note that Hyrax's Statement of Case at paragraph 31 reads:-

> "Throughout the Pre-Order Period between 9 April 2014 and 4 March 2019, the Respondent was relying on the understanding of the directors gained at the Meeting".

246. That does not sit well with Karin Mountain's evidence. In her witness statement Karin Mountain had said at paragraph 16 that she would not have been able to go into any technical detail as to whether the Hyrax arrangements might not be notifiable at any meeting before 28 February 2014. She went on to say:

> "Despite not having Mr Venables' opinion, he had, at a consultation with EDF at the end of January 2014, given an indication that he may conclude that the strategy was not notifiable …".

However, in her oral evidence, she said that Mr Venables had only "hinted" that it probably would not be subject to DOTAS. Her explanation was that the word "hinted" was not particularly appropriate for a witness statement, so she had changed it. She was very clear in her oral evidence and, since it seems inherently unlikely that senior counsel would have offered an opinion, before receiving instructions, and the consultation predated those instructions, we accept that explanation. There is the possibility that Nicola Stone overstated the position but we do not have the benefit of her evidence.

247. Turning to the opinion which was received on 28 February 2014, another problem area is that we observe that in a letter from RPC to Officer Belli dated 28 June 2019, they state:

> "It is significant to note that the issues you refer to in relation to disclosability were in fact addressed by EDF Tax Limited and Robert Venables QC <u>before</u> HRL was incorporated or approached to act as the employer entity".

As can be seen from paragraph 80 above, Hyrax was incorporated on 19 February 2014 and Joanne Macnamara and Richard Hopkins were already directors before the February meeting. Certainly HRT was only established after the meeting. Again the evidence is not consistent.

248. The opinion on disclosability was undoubtedly only received after the February meeting.

249. The whole question of the opinion from Mr Venables is opaque.

250. Karin Mountain was very clear that the instructions to Mr Venables on whether the Hyrax arrangements were notifiable was that the instructions were:

> "very, very short and basically just asking if it was notifiable … the opinion was more general … It was looking at whether the scheme was notifiable, not at who was the promoter if it was notifiable".

251. Interestingly, at paragraph 9 of the Statement of Case, Hyrax stated that Hyrax decided that, based on what EDF had told them, they considered that Hyrax would not be a promoter with a duty to notify and therefore they decided to proceed. At paragraph 10 the written opinion was referenced but only to the effect that Hyrax understood from EDF that it was "not materially different" from what was described at the meeting.

252. Although the pre-action correspondence with HMRC repeatedly stated that counsel had specifically advised about whether or not Hyrax was a promoter, there is absolutely no evidence that any questions were posed about Hyrax being, or not being, a promoter. Indeed Karin Mountain recognised that it was very likely that HMRC would see EDF as being a promoter (although, of course, there can be more than one).

253. Since Karin Mountain is the only witness who we know has actually read the opinion, we accept her version that there was nothing in it about who might be a promoter and the only issue was whether it was notifiable.

254. As far as the opinion is concerned HMRC relied on *Ball v Hughes*[14] where the Registrar stated:

> "If the Respondents wish to persuade the court that they reasonably relied upon the advice of their in house accountant (or any other accountant or professional adviser for that matter), it is for them to adduce clear evidence of what advice they were given and when."

255. On 5 January 2015 in an email, David Gill said: "It is not the name of the QC which is important, but his or her instructions, the qualification of the provider who instructed the opinion and scope of the opinions." We have underlined those words because the only evidence we have on what instructions were given is the oral evidence from Karin Mountain. Furthermore, there is a lack of clarity in the correspondence between Hyrax and HMRC, Hyrax's advisers and HMRC, and the Statement of Case as to what precisely happened when, let alone what instructions were given or even when.

256. As Mr Nawbutt pointed out there is no evidence of the source of the statements in the correspondence, nor indeed, the basis for the Statement of Case. In both cases we assume that Hyrax will have instructed and approved the documentation. In preparation for this hearing they would have had the opportunity to explore these multiple conflicts and produce relevant evidence and/or explanations. All we have in addition to Karin Mountain's oral evidence, which only creates greater conflict, is Mr McDonnell's assertions about unsuccessful attempts to obtain a copy of the opinion on whether the Hyrax arrangements were notifiable.

[14] [2017] EWHC 3228

257. We find it very curious that there are such big discrepancies between the evidence of David Gill and Karin Mountain, particularly since they worked very closely together for a number of years.

258. Another area where there was no meeting of minds was that David Gill said that Mr Venables would have received part of the 18% Tax support costs; Karin Mountain said not and that they had instructed him on their own behalf and they had paid his fees.

259. Since Karin Mountain made a point of saying what she did not recall, where there is a discrepancy we prefer her evidence (other than her attempts to distance EDF from being a promoter of the Hyrax arrangements).

Reasonable excuse

260. At paragraph 32 of their Statement of Case, Hyrax stated "Throughout this period, the sole director of the respondent was Mrs Macnamara. She was the sole directing mind and will of the Respondent".

261. As we have indicated at paragraph 158 above, we do not accept that Joanne Macnamara was the controlling mind of Hyrax at any point, although undoubtedly, she was the sole director from 1 March 2014.

262. We entirely agree with Judge Mosedale at paragraph 45 of the DOTAS Decision. When referring to David Gill's involvement over the years, including specifically in that regard not only Hyrax and K2 but also the previous iterations, she said "He appeared to be the principle (*sic*) 'face' of the schemes through the years".

263. We would not have been surprised if HMRC had argued that he was a shadow director. We find that he was. Paragraph 73 of his witness statement is telling. He patently considered that Hyrax was part of his group of companies (see paragraph 213).

264. We find that he was the, very visible, face of Hyrax. In addition to the emails to which we have referred above, there are other examples.

265. We note that in an email from PPHOS dated 30 March 2015, following up on a webinar explaining about APNs and FNs for Penfold, Hamilton and K2 employees, David Gill wrote, saying:-

> "We've had quite a number of requests for information on how the Hyrax structure works and how the risks are addressed.
>
> As a result, there will a regular twice monthly live webinars for anyone who wishes to update their knowledge or invite friends or colleagues. We will be sending out invitations…".

266. In an earlier email dated 5 January 2015, also from him at PPHOS, he had highlighted, in relation to roadshows for all of those employees, that "**You will also be given the opportunity to invite colleagues."** (his emphasis) He said that the sessions would be hosted by the Peak Performance Tax Team led by Douglas Aitken with input from EDF. Throughout that email, as in many others, he either spoke in the first person or said "we".

267. That January email also stated that APNs and FNs "had dominated 2014 in terms of our support for all clients".

268. We simply do not accept his assertion that he distanced himself from the promotion of Hyrax and the emails are evidence to the effect that he actively promoted the Hyrax arrangements. These are emails produced by HMRC and there will have been very many more. He has chosen not to produce any that paint a different picture. We do not accept his argument that they are exceptional.

269. Not only was he visible in respect of the webinars and promotion of Hyrax, we note from the Metro email that he was involved in the minutiae such as organising the banking arrangements.

270. Joanne Macnamara made what may have been a Freudian slip when she said to Mr Nawbutt that she had not sought any independent advice because "David was an adviser". When asked what she meant, she back-tracked and said that that was perhaps incorrect but that she was touch with him weekly, if not daily.

271. Although she said that she had provided emails to RPC very few have been exhibited. Joanne Macnamara only has external visibility in the documentation that we have seen in relation to correspondence with HMRC, signing Loan Agreements and employment contracts and corresponding and meeting with EDF.

272. We are less than certain what Joanne Macnamara actually did for her very substantial salary. Judge Mosedale makes it explicit that the approval of the loans and the documentation relating to that were simply a process. There was standardised documentation.

273. In an email to contractors dated 24 September 2014, Ethos stated "Hyrax outsources its employment related administration to Ethos…". Contractors had to send what were described as "notifications" and sick notes etc to Ethos, not Hyrax or HRT. They had to "book" their holidays with Ethos. Their contracts of employment, although signed by Joanne Macnamara, had to be returned to Ethos

274. At paragraph 63 of his witness statement David Gill said that Ethos processed both wages and loans.

275. The Metro email states that payroll services and other administration tasks were outsourced to Ethos. In addition, it states that Ethos would also undertake "the majority of the banking activity" and were the authorised signatories on the bank accounts. Ethos is a mystery to us. We have very limited information as to what it is and who was involved.

276. Mr McDonnell referenced the Hyrax accounts and an invoice to an end user arguing that Hyrax was doing things "on a huge scale". One of the issues with that, quite apart from the fact that we had no witness evidence as to what Hyrax actually did, is that although we do not know how many contractors were involved in K2, we know from *Hoey* that Penfolds had 3,014 users and Hamilton had 3,152. 2PCL managed to deal with those numbers. It seems likely that K2 had more users than Hyrax since it seems that many transferred to K2 from Hamilton. Mr McDonnell argued that "the majority" of K2's users transferred to Hyrax. There is no evidence about that. The only evidence we have is that HMRC knew that 1,093 had transferred by the beginning of 2014/15.

277. In summary, we have very little evidence as to what Hyrax did let alone what Joanne Macnamara did.

278. By her own admission, Richard Hopkins seems to have been involved in all important telephone conversations and meetings. She sought advice from David Gill throughout the years on a very regular basis. Joanne Macnamara confirmed that she asked him a lot of questions and in the period after the Hyrax Arrangements were put in place she continued to speak to him "frequently, daily, if not more". That was throughout the period including the litigation before Judge Mosedale and thereafter.

279. It was put to her that HMRC had produced an email from David Gill, writing as PPHOS, and sent to a contractor by Hyrax on 11 July 2014 which showed that David Gill was very closely allied with Hyrax. Her response was that she spoke to David regularly and Hyrax did issue such emails.

280. That email advised on APNs etc, said that Hyrax worked and specifically said "You should not infer from this any lack of confidence on my part in either Hyrax or any previous structure…" . Clearly Hyrax acted as a post box for David Gill whether as Peak Performance of PPHOS or any other of his companies.

281. As can be seen from the factual background and our commentary on the witness evidence, one of the threads running through the various iterations was, what could be best described as, a loose use of nomenclature be it whether Hyrax or HRT was the employer, the actual name of K2 at various stages or which "Peak" company or trading name was appropriate.

282. Whilst that made it difficult to obtain a clear picture, ultimately that did not matter, because a consistent thread was David Gill writing in his own name, saying I or we and opining not only on the previous tax avoidance schemes including K2 but specifically talking about Hyrax both to accountants and users of the Hyrax arrangements. He was not just the face of Hyrax but effectively he was Hyrax.

283. Turning to Joanne Macnamara herself, she was asked whether she understood what her statutory duties as a director amounted to. She could say only that her duty was to work in the best interests of the company. We have narrated the duties of a company director at paragraphs 152 and 153 above.

284. HMRC rely on Mr Justice Briggs who explained the subjective and objective elements of the test to be applied in assessing performance of those duties in *Lexi Holdings plc (in administration) v Luqman and others*[15]:-

> "The objective test sets the basic standard. It is no excuse for a director to say that, in fact, she did not have the general knowledge, skill or experience reasonably to be expected of a person carrying out her appointed functions. The subjective test potentially raises the standard by reference to any greater general knowledge, skill or experience which the particular director actually has."

285. Joanne Macnamara made great play of her lack of understanding of financial matters. Quite apart from the generality of that, she was very evasive when asked whether she understood that K2 and Hyrax were tax avoidance schemes.

286. We find that incredible. This is a specialist Tribunal but it does not require specialist knowledge to be aware that in June 2012 a very well-known comedian was excoriated in all of the media because of his involvement in K2. The Prime Minister issued a statement saying that the use of the scheme by him was morally wrong. The comedian, who does not need to be named here, said publicly that he had made a terrible error of judgement. We observe that in David Gill's email of 23 November 2012 he references that publicity, and the comedian by name, and the Times' campaign about tax avoidance. As a senior manager of K2 at the time it must have come to Joanne Macnamara's attention. We simply do not believe her assertion that she did not know that K2 was a tax avoidance scheme.

287. Furthermore, before the Hyrax arrangements were put in place, as we explain at paragraph 228 above, she knew of HMRC's interest in Penfolds, Hamilton and K2 because they were believed to be tax avoidance schemes.

288. She conceded in cross examination that she did know that EDF received a proportion of the 18% that was retained by K2 and Hyrax. She therefore should have been aware that EDF had a significant interest in both K2 and Hyrax being successful.

[15] [2008] 2 BCLC 725:

289. The Metro email estimated that "Hyrax will generate annualised sales of £160 million plus VAT". Despite HMRC's application for disclosure we do not know what portion of the 18% went to EDF. However, even if it was only a small percentage it would still be a very significant amount of money. She appears never to have questioned anything that she was told by EDF.

290. Joanne Macnamara had been told that if she wished to read Counsel's opinions at EDF's offices, she could do so but David Gill did not encourage her to do so. The fact that she said that it would have been pointless for her to have read the various opinions of counsel and that she accepted what she was told by EDF does not point to the exercise of any independence of mind. Even although she was aware that she had very little financial knowledge she has made no notes of any meetings. We do not consider that to be a prudent approach. We are certainly not persuaded by Mr McDonnell's ingenious explanation that that was unnecessary since she could phone Nicola Stone at any time to check on anything about which she was uncertain. Every such phone call would have cost money and that would not have been in the best interests of the company!

291. Not only did she not challenge the fact that EDF would be making very substantial sums out of the Hyrax arrangements, she knew that the "Peak group", for lack of a better phrase would also be earning large sums. David Gill said that he discussed the accounts with Joanne Macnamara so she knew what sums of money were passing through HRT.

292. Joanne Macnamara did not even negotiate or approve the engagement letter with EDF.

293. She simply states that she relied on EDF's advice to her that Mr Venables had concluded that the Hyrax arrangements did not require to be notified.

294. We reject entirely Mr McDonnell's reliance on *Mercury*. That case turns on its own specific facts and in that case the taxpayer obtained the opinion of counsel for its benefit. Further, both the FTT and counsel in that case were agreed that that scheme was not notifiable. The Special Commissioner merely considered the question of the commissioning of counsel's opinion, in the context of a penalty in the event that he was wrong in finding that it was not notifiable. His key finding was that Mercury had done so to check whether its opinion was correct. Hyrax did not obtain counsel's opinion to check if their view was correct; they simply relied on EDF telling them that it was not notifiable. The very fact that there was such confusion about whether counsel had been asked whether Hyrax was the promoter points very clearly to there having been no thought given by Hyrax to its own position.

295. In this instance, it is clear that EDF obtained the opinion for its benefit and no relevant question about it was posed by Joanne Macnamara or, it would appear, anyone else.

296. Reliance on that opinion cannot amount to reasonable excuse for Hyrax.

297. We agree with Mr Nawbutt that those behind Hyrax deliberately arranged matters so that the sole director was someone with insufficient knowledge, skill or experience to fulfil that role.

298. We find David Gill supported by Karin Mountain, with Richard Hopkins and Nicola Stone in the background, was the controlling mind of Hyrax. It was no accident that 3PCL had three directors and Hyrax was reduced to one and that one constantly consulted David Gill and Richard Hopkins who had previously been her co-directors.

299. Hyrax does not have a reasonable excuse for failure to notify.

Quantum of the penalty

300. Mr McDonnell argued that the quantum of penalty should be relatively modest and that the penalty sought by HMRC was excessive not least because Hyrax was a relatively small

company with a low income. That did not sit well with his arguments on the scale of the business in HRT. In our view the two must be considered conjunctly when looking at the question of penalty. It was those involved in Hyrax who decided to put almost all the income and expenditure through HRT.

301. As we have explained at paragraph 25, Judge Mosedale found that Hyrax retained 18.5% which was effectively them splitting the tax saving with the scheme user. HMRC have calculated that the gross receipts in the period were £37,608,000 which is approximately 18.26% which is broadly consistent with that finding. That means that the tax saving was a very significant figure.

302. We are not persuaded by Mr McDonnell's unsupported assertion that HMRC should have been able to recover the tax that was at risk. Yes, they might be able to impose loan charges assessments etc on individual taxpayers but that would be time consuming, labour intensive and expensive. Although HMRC were aware, in very general terms, from the end of 2014 that Hyrax were involved in what they suspected was a tax avoidance scheme, because it was not notified and because HMRC had to have recourse to the Tribunal there was a considerable elapse of time. It would be disproportionate to have to pursue more than a thousand taxpayers (We note that at one point Joanne Macnamara misled HMRC by suggesting that there were only hundreds of taxpayers involved (see paragraph 161 above)).

303. We accept HMRC's argument that the penalty imposed should act as a deterrent. It should certainly do so to deter others from deliberately setting up a company with a sole director who can at best be described as displaying Nelsonian acuity in regard to the company's affairs. It should also act to deter those who rely only on the advice of the promoter of the tax avoidance scheme and a promoter who makes large sums of money from it.

304. We do not accept that the question as to whether the Hyrax arrangements were notifiable was extremely complex and therefore that was a reason for non-compliance. Sir Duncan Ouseley rightly described it as being a "rigmarole".

305. The Hyrax arrangements had ceased to operate before the matter reached the Tribunal so no remedial action was possible.

306. We have considered all of the factors identified in *Tager* and weighed all relevant circumstances in the balance. We are particularly mindful of the fact that David Gill sought to hide behind Joanne Macnamara whilst at all times being actively involved.

307. We find that this was a very serious matter and the statutory maximum penalty is appropriate. The statutory maximum penalty for the period 9 April 2014 to 5 March 2019, being 1,791 days at £600 per day totals £1,074,600.

308. Having found that a penalty is exigible, we must find the relevant period which ends on the last day before the failure ceases. HMRC now argue that that is 13 March 2019 being the day before the forms AAG1 were submitted. We are not distracted by the argument that Mr Belli thought that it should be 5 March 2019, being the date of the Order. It is not for him to decide that.

309. However, Judge Mosedale's decision is 321 paragraphs long, complex and closely reasoned. Obviously, Hyrax will have required time to read it and take professional advice, which they did. We find that the period finishes on the date of the decision namely 5 March 2019 because Hyrax had a reasonable excuse covering the period 5 to 13 March 2019.

Decision

310. The penalty in this matter is determined in the sum of £1,074,600.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

311. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date:

Appendix 1

[2021] UKFTT 0212 (TC)

TC08162

PROCEDURE – Disclosure –application for specific disclosure

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2020/00777

BETWEEN

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Applicants

and

HYRAX RESOURCING LIMITED

Respondents

TRIBUNAL: JUDGE ANNE SCOTT

The hearing took place on Tuesday 18 May 2020. With the consent of the parties, the form of the hearing was on the Tribunal's video platform.

Having heard Akash Nawbatt QC for the Applicant, and Conrad McDonnell, of counsel for the Respondents

DECISION

INTRODUCTION

1. This is was a hearing in respect of HMRC's application for specific disclosure dated 17 March 2021. There are four categories of disclosure and the disclosure sought is:

(a) Category One

All communications (including any notes or other record of communications) that Ms Macnamara and/or Mr Hopkins had between 1 December 2013 and 6 April 2014 with

(i) David Gill;

(ii) Nicola Stone;

(iii) Karin Sowden (nee Montain);

(iv) Iain McLeod; and/or

(v) Paul Merill

regarding the introduction and implementation of the Hyrax scheme, their proposed appointment as directors of the Respondent and the notifiability of the Hyrax scheme arrangements.

(b) Category Two

All communications that Ms Macnamara had with

(i) Mr Gill;

(ii) Ms Stone;

(iii) Ms Sowden;

(iv) any other EDF personnel; and/or

(v) any other persons

regarding or relating to HMRC's correspondence with the Respondent between 13 March 2015 and 2 June 17.

(c) Category Three

The contractual documentation pursuant to which EDF Tax Limited ("EDF") provided its services to the Respondent.

(d) Category Four

Identify each and every individual or entity that received a proportion of the difference between the gross contract value paid by the end user and the net amount paid to the Hyrax scheme user and identify the proportions they received; and provide any documents evidencing the same.

2. On 26 April 2021, the respondents ("Hyrax") lodged with the Tribunal a response requesting that the Tribunal dismiss HMRC's application.

The Background

3. On 5 March 2019, Judge Mosedale, found that the arrangements that arise when a person becomes employed by Hyrax Resourcing Trust ("the Hyrax arrangements) were notifiable arrangements within the meaning of Section 306 Finance Act 2004 ("FA 2004")[16] and accordingly issued an Order ("the Order") under Section 314A FA 2004. Judge Mosedale also found that, further or alternatively:

(a) The arrangements were to be treated as notifiable arrangements pursuant to Section 306A FA 2004; and

(b) She would have made an order pursuant to that section had she not made the Order.

4. On 2 April 2019, Officer Belli wrote to Hyrax referring to the Order, pointing out

(a) that in issuing the Order the Tribunal had identified Hyrax as a promoter in relation to arrangements within Section 307 FA 2004,

(b) there had been an apparent failure to meet the promoter obligations under Section 308 FA2004, and

(c) HMRC were considering whether and when to commence penalty proceedings and in respect of which period.

5. He asked for a response by no later than 2 May 2019.

6. On 1 May 2019, the appellant's representatives, RPC, responded at some length. They set out their view that:

(a) Following receipt of the Order, Hyrax had complied with its obligations imposed under Section 308(1) and (3) FA 2004, and

(b) Hyrax had a reasonable excuse for not disclosing the Hyrax arrangements to HMRC prior to receipt of the Order, and accordingly no penalty should be imposed on Hyrax under Section 98C TMA.

The key argument was that it was reasonable for Hyrax to have relied on the advice of EDF which was supported by the advice of leading tax counsel to the effect that the arrangements were not notifiable.

7. On 28 June 2019, RPC responded to a further enquiry from HMRC dated 11 June 2019 confirming in particular that:

(a) Advice was given orally by counsel to EDF in a meeting on 27 February 2014.

(b) Hyrax was not given a copy of counsel's written opinion following that meeting although a copy was provided to EDF.

(c) Hyrax was advised orally by EDF that the arrangements were not notifiable.

(d) Ms Macnamara, the director of Hyrax, did not have a role in precursor arrangements to the Hyrax arrangements known as K2/Lighthouse and had no knowledge of the directors of Peak Performance Professional Contracts Limited ("3 PCL") which the Tribunal had found had been part of the K2 structure.

[16] [2019] UKFTT 175] ("The Hyrax Decision")

8. On 18 February 2020, HMRC lodged with the Tribunal an application for penalties under Section 98C of Taxes Management Act 1970 ("TMA") supported by a witness statement with exhibits from Officer Belli which was also dated 18 February 2020.

9. Paragraph 43 of that application reads:

> "The Respondent is, therefore, put to strict proof to establish, with evidence, that it had a reasonable excuse. In particular, the Respondent is put to strict proof to establish, with relevant witness and contemporaneous documentary evidence, any facts it asserts gave rise to a reasonable excuse."

10. The application went on to put Hyrax on notice that its Statement of Case and evidence should address the points and requests for information raised in HMRC's letters dated 1 April, 11 June and 2 December 2019.

11. On 21 August 2020, Hyrax filed its Statement of Case averring that:

(a) It had complied with its relevant notification obligations earlier than 4 April 2019;

(b) It had a reasonable excuse not to comply with said obligations throughout the period between April 2014 until the date when it did comply; and

(c) Alternatively and on any view the quantum of the penalty was disproportionate and excessive.

12. On 5 February 2021, HMRC wrote to Hyrax setting out six categories of documents for which they sought disclosure and why HMRC considered that it was relevant to make such disclosure.

13. On 25 February 2021, RPC responded stating that:

(a) They should only disclose that which they considered necessary and had no need to disclose anything else. They cited paragraph 57 of *Addo v HMRC*[17] ("Addo") in support of that.

(b) Hyrax was confident that the evidence to be provided by the three witnesses would be sufficient to establish a reasonable excuse and that the witnesses would speak to oral discussions "… which are not reflected in any contemporaneous documents".

(c) It was argued that Hyrax had not knowingly withheld disclosure of any relevant material that might assist the Tribunal.

(d) In relation to the, now, Category one application, on a without prejudice basis since they believed they were not required to disclose documents, Hyrax would attempt to locate any relevant communications and if any were found they hoped to produce them within 28 days. Nothing has been produced.

(e) In relation to the, now, Category two application, they stated that there were no notes of any communications.

(f) In relation to the, now, Category three application they stated that Hyrax did not rely on any specific terms of engagement with EDF so it was simply not relevant.

[17] [2018] UKFTT 492 (TCC)

(g) In relation to the, now, Category four application, to the extent that it might be relevant, Mr Gill's witness statement and the Hyrax Decision provided all of the relevant information. There was no need for further disclosure.

14. In light of that response HMRC removed two of the categories of documents.

Discussion

15. This was not an easy decision in that on the one hand I understood that HMRC were very frustrated at the lack of contemporaneous documentation but, on the other hand, equally Hyrax know that they have the burden of proof to establish reasonable excuse and, in popular parlance, they believe that they have done enough. I cannot judge that at this juncture since that is the subject matter of the substantive appeal and the evidence has not been tested.

16. However, the point is that Hyrax's appeal could stand or fall by their decisions on what they choose to disclose.

17. Hyrax rightly point out that HMRC have not identified any specific document by date or description and there is no specific document upon which Hyrax relies in either its Statement of Case or the witness statements that has not been disclosed.

18. HMRC argue that this is a very unusual situation where Hyrax filed no contemporaneous documentation in support of its position. They have lodged the three witness statements of David Gill, Joanne Macnamara and Karin Sowden but those witness statements do not refer to any contemporaneous documentation.

19. By contrast Hyrax acknowledge that that is the case but point out that there is no document vacuum as 128 documents have been lodged thus far.

20. Rule 5 gives the Tribunal, as part of its general case management powers, the power to direct a party to provide documents and information to another party. The Tribunal also has a specific power, under Rule 16, to order a person to "produce any documents in that person's possession or control which relate to any issue in the proceedings". When exercising a case management discretion or power, the Tribunal must have due regard to the overriding objective set out in Rule 2.

21. In their Skeleton Arguments, both parties cited *McCabe v HMRC*[18] ("McCabe") as authority for the proposition that "the starting point" in a high-value complex cases is that a document which is relevant should be disclosed unless there are good reasons to the contrary.

22. Where the parties differed was HMRC argued that this is a high-value complex dispute whereas Hyrax disagrees.

23. Hyrax's argument is that there is only one principal issue which is whether or not Hyrax had a reasonable excuse for not notifying the arrangements under the disclosure of tax avoidance schemes ("DOTAS") legislation. If there is a reasonable excuse then no penalty would be exigible. They are correct in that.

24. HMRC's argument was that the appeal had been categorised as complex and involved a statutory maximum penalty of £1,153,000.

[18] [2020] UKUT 255 (TCC)

25. By contrast Hyrax argue that their case is straightforward and that it has only been categorised as complex because of Rule 23(4) of the Tribunal Rules. That Rule reads:

> "(4) The Tribunal may allocate a case as a Complex case under paragraph (1) or (3) only if the Tribunal considers that the case—
>
> (a) will require lengthy or complex evidence or a lengthy hearing;
> (b) involves a complex or important principle or issue; or
> (c) (c) involves a large financial sum."

26. In this case it had clearly been allocated as complex because it involved a large financial sum. However, I accept that that sum was simply a product of the accumulation of the daily penalties at a maximum of £600 per day over a long period, and in the post Order period a maximum of £5,000 per day. I agree with Hyrax that that is mechanistic and is not *per se* high value.

27. The case has been listed for hearing for five days. HMRC's argument was that five days was a long hearing. In my view, the duration of the hearing is a neutral matter. This was listed for a video hearing and at the time it was listed, a longer time was allocated to video hearings than would have been anticipated for conventional hearings. In any event five days in the Tax Tribunal is not particularly long!

28. It is undoubtedly the case that the question of what amounts to a reasonable excuse is a relatively routine matter that comes to the Tribunal frequently so it does not involve a complex or important principle or issue.

29. I agree that, almost certainly, the case was categorised as complex because of Rule 23(4)(c).

30. Although there is a large sum of money involved, I do not think that this is a high-value complex dispute.

31. Therefore the starting point is Rule 27(2) which provides for what is loosely known as "standard disclosure". That reads:

> **"27.— Further steps in a Standard or Complex case**
>
> (1) …
>
> (2) Subject to any direction to the contrary, within 42 days after the date the respondent sent the statement of case (or, where there is more than one respondent, the date of the final statement of case) each party must send or deliver to the Tribunal and to each other party a list of documents—
>
> (a) of which the party providing the list has possession, the right to possession, or the right to take copies; and
>
> (b) which the party providing the list intends to rely upon or produce in the proceedings.
>
> …".

32. As Judge Walters made clear in *Ebuyer v HMRC*[19] ("Ebuyer"), and he was upheld by the Court of Appeal,[20]*:*

> *"*Litigation in this tribunal is intended to conform to a different model from litigation in the High Court and the Rules establish the framework within which litigation in this tribunal is to be carried on. Rule 27 provides for the normal disclosure in a standard or complex case and I consider it would not be appropriate for me, at this stage in this litigation, to require wider disclosure than that required by rule 27."

33. In what circumstances could I consider departing from Rule 27?

34. Firstly, there was no dispute that, as the Upper Tribunal pointed out at paragraph 24 in *McCabe* the Civil Procedure Rules ("CPR") have no application to the approach of the Tribunal to disclosure.

35. Secondly, it is Rule 16 that permits the Tribunal to make an order for disclosure that goes beyond Rule 27. However, that Rule must be read in the context of Rule 2 and in particular Rule 2(3)(a) so any decision on disclosure must be proportionate.

36. If I were to make an order for disclosure of the magnitude sought by HMRC, I would have to have very good reasons for doing so.

37. The Upper Tribunal in *McCabe* cited the decision of the Court of Appeal in *HMRC v Smart Price and others*[21] at paragraph 40 which reads:

> "Disclosure of documents is not an end in itself but a means to an end, namely to ensure that the tribunal has before it all the information which the parties reasonably require the tribunal to consider in determining the appeal. It is only one step in the overall management of the case which should, as the appeal progresses towards a substantive hearing, identify and if possible narrow the issues between the parties. The scope of the issues in contention at the trial depends in part on the legal test to be applied by the tribunal and in part on the parties' respective positions as to which elements of that test are in contention."

38. I think that that is particularly relevant in this case in that I should ask myself two questions:

(1) If I made the order sought by HMRC, and by their own admission it is very wide, would that disclosure identify and narrow the issues between the parties?

(2) Is disclosure required for a fair determination of the issues?

39. Hyrax argues that it could not identify or narrow the issues because the issue is discrete, namely whether there was a reasonable excuse for failure to notify and that the witnesses speak to that. They would be believed or not. I agree.

40. I heard argument from both parties as to the relevance or not of the documents sought to be disclosed. I find that the documents are "relevant" in the very narrow sense that they relate to the Hyrax arrangements.

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[19] [2014] UKFTT 921 (TC)
[20] Paragraph 94
[21] [2019]1WLR 5070

41. However, I regard the degree of relevance as very low in regard to the question of reasonable excuse. I noted that in the *Hyrax Decision*, Judge Mosedale stated at paragraph 39 that:

> "…in the absence of any explanation at all for the failure of the directors of the respondents to give evidence it is appropriate to draw the inference that the evidence they could have given would not have assisted their case…".

I agree.

42. Hyrax must be aware that in failing to produce any contemporaneous evidence they are running a risk, but that is their entitlement.

43. Even if this were a high-value complex case, and it is not, I would not grant the application in relation to Categories three and four. I can see no basis on which any documentation for either of those would have probative value in relation to the only issue that is in dispute, namely Hyrax's reasonable excuse or not. EDF gave advice, their terms of engagement are irrelevant.

44. Further as far as Category Four is concerned, unless HRMC can persuade me to the contrary which they have not thus far, and they are at liberty to apply, I find that Judge Mosedale, in the *Hyrax Decision* at paragraphs 218 to 222 makes explicit the "fee" situation which Category Four addresses. That is at a high level but I do not accept, that in the context of penalties and reasonable excuse, the Tribunal requires any further information.

45. As far as the first two categories are concerned, since I do not accept that this is a high value complex transaction I see no reason to depart from Rule 27. Hyrax argue that their position is that the correspondence reflects the advice received. They either prove that or not.

46. Mr Nawbatt very sapiently stated that if the application were not to be granted then neither the Tribunal not HMRC would be able to test the witnesses' evidence. Whilst I understand that, the issue is rather that the burden of proof lies with Hyrax.

47. The content of the *Hyrax Decision* itself sets out a good foundation for cross examination as does HMRC's letter of 2 December 2019 and Hyrax's failure to address the issues raised therein.

48. In summary, I agree with Judge Greenbank in *Addo* where he states:

> "57. Under FTR rule 27, it is open to a party to decide the documents on which it intends to rely or to produce at the hearing whether to support its own case or to disprove the case as put by the other party. If the relevant party chooses not to produce a particular document to which a witness refers that may well reduce the value of the evidence given by the witness and affect the strength of that party's case overall. That is a matter for the Tribunal to assess and is a risk that the relevant party takes. While I accept Mr Ramsden's point that, if it is read in this way, the effect of the rule is that the level of disclosure under rule 27 is left largely in the hands of the disclosing party, in my view, on its terms, rule 27 does not require a party to disclose any other documents."

49. I also agree with Judge Walters in *Ebuyer* that given that this is not a high-value complex case, it would not be appropriate to require wider disclosure than that required by Rule 27. This disclosure is not required for a fair determination of the issues.

50. For all these reasons I refuse the application.

Right to apply for permission to appeal

51. 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.

ANNE SCOTT
TRIBUNAL JUDGE

RELEASE DATE: 13 JULY 2022

Appendix 2

Section 98C TMA provides (so far as relevant):

"**98C Notification under Part 7 of Finance Act 2004**

(1) A person who fails to comply with any of the provisions of Part 7 of the Finance Act 2004 (disclosure of tax avoidance schemes) mentioned in subsection
(2) below shall be liable—
(a) to a penalty not exceeding—

(i) in the case of a provision mentioned in paragraph (a), (b), (c) or (ca) of that subsection, £600 for each day during the initial period (but see also subsections (2A), (2B) and (2ZC) below), and
(ii) in any other case, £5,000, and

…

(2) Those provisions are—
(a) section 308(1) and (3) (duty of promoter in relation to notifiable proposals and notifiable arrangements),
…

(2ZA)In this section "the initial period" means the period—

(a) beginning with the relevant day, and

(b) ending with the earlier of the day on which the penalty under subsection(1)(*a*)(i) is determined and the last day before the failure ceases;

and for this purpose "the relevant day" is the day specified in relation to the failure in the following table.

Failure	*Relevant day*
… Any other failure to comply with subsection (3) of section 308	The first day after the end of the period prescribed under that subsection …

(2ZB) The amount of a penalty under subsection (1)(a)(i) is to be arrived at after taking account of all relevant considerations, including the desirability of its beingset at a level which appears appropriate for deterring the person, or other persons,from similar failures to comply on future occasions having regard (in particular)—

(a) in the case of a penalty for a promoter's failure to comply with section 308(1) or (3) or section 310A, to the amount of any fees received, or likely to have been received, by the promoter in connection with the notifiable proposal (or arrangements implementing the notifiable proposal), or with the notifiable arrangements, and

…
(2ZBA) In subsection (2ZB)—

(a) "promoter" has the same meaning as in Part 7 of the Finance Act 2004, and

…

(2ZC) If the maximum penalty under subsection (1)(a)(i) above appears inappropriately low after taking account of those considerations, the penalty is tobe of

such amount not exceeding £1 million as appears appropriate having regardto those considerations.
…

(2B) Where a failure to comply with a provision mentioned in subsection (2) concerns a proposal or arrangements in respect of which an order has been made under section 314A of the Finance Act 2004 (order to disclose), the amounts specified in subsection (1)(a)(i) and (b) above shall be increased to the prescribedsum in relation to days falling after the prescribed period.

(2C) In subsection (2A) and (2B)—

(a) "the prescribed sum" means a sum prescribed by the Treasury by regulations,and
(b) "the prescribed period" means a period beginning with the date of the orderunder section 306A or 314A and prescribed by the Commissioners by regulations.

(2D) The making of an order under section 306A or 314A of that Act does not ofitself mean that, for the purposes of section 118(2) of this Act, a person either didor did not have a reasonable excuse for non-compliance before the order was made.

(2E) Where an order is made under section 306A or 314A of that Act then forthe purposes of section 118(2) of this Act—

(a) the person identified in the order as the promoter of the proposal or arrangements cannot, in respect of any time after the end of the period mentionedin subsection (2B), rely on doubt as to notifiability as an excuse for failure to comply with section 308 of that Act, and
(b) any delay in compliance with that section after the end of that period is unreasonable unless attributable to something other than doubt as to notifiability.

…" (emphasis added)

Section 100C provides (so far as relevant):

"**100C Penalty proceedings before First-tier Tribunal**

(1) An officer of the Board authorised by the Board for the purposes of this section may commence proceedings before the First-tier Tribunal for any penalty to which subsection (1) of section 100 above does not apply by virtue of subsection (2) of that section.

…

(2) The person liable to the penalty shall be a party to the proceedings.

(3) Any penalty determined by the First-tier Tribunal in proceedings under this section shall for all purposes be treated as if it were tax charged in an assessment and due and payable.

(4) In addition to any right of appeal on a point of law under section 11(2) of the TCEA 2007, the person liable to the penalty may appeal to the Upper Tribunalagainst the determination of a penalty in proceedings under subsection (1), but notagainst any decision which falls under section 11(5)(d) and (e) of the TCEA 2007and was made in connection with the determination of the amount of the penalty.

(4A) Section 11(3) and (4) of the TCEA 2007 applies to the right of appeal under subsection (4) as it applies to the right of appeal under section 11(2) of the TCEA2007.

(5) On any such appeal the Upper Tribunal may—

(a) if it appears that no penalty has been incurred, set the determination aside,

(b) if the amount determined appears to be appropriate, confirm the determination,
(c) if the amount determined appears to be excessive, reduce it to such other amount (including nil) as the Upper Tribunal considers appropriate, or
(d) if the amount determined appears to be insufficient, increase it to such amount not exceeding the permitted maximum as the Upper Tribunal considers appropriate.

Section 118 Interpretation

(2) For the purposes of this Act, a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Board or the [F30tribunal] or officer concerned may have allowed; and where a person had a reasonable excuse for not doing anything required to be done he shall be deemed F31[not to have failed to do it unless the excuse ceased and, after the excuse ceased, he shall be deemed] not to have failed to do it if he did it without unreasonable delay after the excuse had ceased: F32 . . . . . .

Finance Act 2004 c. 12
Part 7 DISCLOSURE OF TAX AVOIDANCE SCHEMES

This version in force from: **July 17, 2012** to **present**
(version 4 of 4)

308 Duties of promoter

(1) [A person who is a promoter in relation to a notifiable proposal]
[1]
must, within the prescribed period after the relevant date, provide the Board with prescribed information relating to [the]
[2]
notifiable proposal.

(2) In subsection (1) *"the relevant date"* means the [earliest]
[3]
of the following— [

(za) the date on which the promoter first makes a firm approach to another person in relation to a notifiable proposal,

]
[4]
(a) the date on which the promoter makes [the]
[5]
notifiable proposal available for implementation by any other person, or

(b) the date on which the promoter first becomes aware of any transaction forming partof notifiable arrangements implementing the notifiable proposal.

(3) [A person who is a promoter in relation to notifiable arrangements]
[6]
must, within the prescribed period after the date on which he first becomes aware of any transaction forming part of [the notifiable]
[7]
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).

[
(4) Subsection (4A) applies where a person complies with subsection (1) in relation to a notifiable proposal for arrangements and another person is–

(a) also a promoter in relation to the notifiable proposal or is a promoter in relation to anotifiable proposal for arrangements which are substantially the same as the proposed arrangements (whether they relate to the same or different parties), or

(b) a promoter in relation to notifiable arrangements implementing the notifiable proposalor notifiable arrangements which are substantially the same as notifiable arrangements implementing the notifiable proposal (whether they relate to the same or different parties).

(4A) Any duty of the other person under subsection (1) or (3) in relation to the notifiable proposal or notifiable arrangements is discharged if–

(a) the person who complied with subsection (1) has notified the identity and address of the other person to HMRC or the other person holds the reference number allocated to the proposed notifiable arrangements under section 311, and

(b) the other person holds the information provided to HMRC in compliance with subsection (1).

(4B) Subsection (4C) applies where a person complies with subsection (3) in relation to notifiable arrangements and another person is–

(a) a promoter in relation to a notifiable proposal for arrangements which are substantially the same as the notifiable arrangements (whether they relate to the same or different parties), or

(b) also a promoter in relation to the notifiable arrangements or notifiable arrangements which are substantially the same (whether they relate to the same or different parties).

(4C) Any duty of the other person under subsection (1) or (3) in relation to the notifiable proposal or notifiable arrangements is discharged if–

(a) the person who complied with subsection (3) has notified the identity and address of the other person to HMRC or the other person holds the reference number allocated to the notifiable arrangements under section 311, and

(b) the other person holds the information provided to HMRC in compliance with subsection (3).

]

[8]

(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.

[

(6) The Treasury may by regulations provide for this section to apply with modifications in relation to proposals or arrangements that—

(a) enable, or might be expected to enable, a person to obtain an advantage in relation to stamp duty land tax, and

(b) are of a description specified in the regulations.

]

[9]

Notes

1. Words substituted by Finance Act 2008 c. 9 Sch.38 para.2(2)(a) (November 1, 2008 as specified in SI 2008/1935 except in relation to Stamp Duty Land Tax; April 1, 2010 otherwise)

2. Word substituted by Finance Act 2008 c. 9 Sch.38 para.2(2)(b) (November 1, 2008 as specified in SI 2008/1935 except in relation to Stamp Duty Land Tax; April 1, 2010 otherwise)

3. Word substituted by Finance Act 2010 c. 13 Sch.17 para.3(2) (January 1, 2011 as SI 2010/3019)

4. Added by Finance Act 2010 c. 13 Sch.17 para.3(3) (January 1, 2011 as SI 2010/3019)

5. Word substituted by Finance Act 2008 c. 9 Sch.38 para.2(3) (November 1, 2008 as specified in SI 2008/1935 except in relation to Stamp Duty Land Tax; April 1, 2010 otherwise)

6 .

Words substituted by Finance Act 2008 c. 9 Sch.38 para.2(4)(a) (November 1, 2008 as specified in SI 2008/1935 except in relation to Stamp Duty Land Tax; April 1, 2010 otherwise)

7 .

Words substituted by Finance Act 2008 c. 9 Sch.38 para.2(4)(b) (November 1, 2008 as specified in SI 2008/1935 except in relation to Stamp Duty Land Tax; April 1, 2010 otherwise)

8 .

S.308(4)-(4C) substituted for s.308(4) by Finance Act 2008 c. 9 Sch.38 para.2(5) (November 1, 2008 as specified in SI 2008/1935 except in relation to Stamp Duty Land Tax; April 1, 2010 otherwise)

9 .

Added by Finance Act 2012 c. 14 Pt 8 s.215 (July 17, 2012)

Modifications

Pt 7 s. 308	Modified in relation to the duties of the promoter by Stamp Duty Land Tax