[2020] UKFTT 0408 (TC)

TC07885

Appeal number: TC/2017/05530

DOTAS – Application for order that certain arrangements are notifiable (or alternatively that they are to be treated as notifiable) – sections 306A & 314A Finance Act 2004 – whether arrangements "notifiable arrangements" – yes – application approved

FIRST-TIER TRIBUNAL
TAX CHAMBER

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

- and -

OPUS BESTPAY LIMITED — **Respondent**

TRIBUNAL: JUDGE HARRIET MORGAN

Sitting in public at Taylor House, 88 Rosebery Avenue, London on 15 and 16 November 2018

Mr Mark Fell, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Applicants ("HMRC")

Mr Setu Kamal, counsel for the Respondent

DECISION

1. The hearing was to consider HMRC's application for the tribunal to make an order under s 314A or, in the alternative, under s 306A, of part 7 of the Finance Act 2004 ("**FA 2004**") that the arrangements summarised at [3] below (the "**arrangements**") are, or are to be treated as, "notifiable arrangements" within the meaning of s 306(1) FA 2004. All references in this decision to sections or parts of legislation are to sections or parts of FA 2004 unless expressly stated otherwise.

2. In summary, under the relevant provisions:

(1) HMRC may apply to the tribunal for an order that arrangements are notifiable or are to be treated as notifiable (under s 314A(1) and s 306A(1) respectively) in each case provided that the application must specify the arrangements in respect of which the order is sought and the promoter of the arrangements (as a promoter is defined in s 307) (under s 314A(2) and s 306A(2) respectively). In their application, HMRC sought an order in respect of the arrangements set out in [6] below and specified Opus Bestpay Limited ("**OBL**") to be the promoter.

(2) On an application to the tribunal made under s 314A, the tribunal may make the requested order only if satisfied that ss 306(1)(a) to (c) apply to the relevant arrangements (under s 314A(3)).

(3) On an application to the tribunal under s 306A the tribunal may make the requested order only if satisfied that HMRC "(a) have taken all reasonable steps to establish whether the proposal or arrangements are notifiable, and (b) have reasonable grounds for suspecting that the proposal or arrangements may be notifiable" (under s 306A(3).

Arrangements

3. The arrangements specified by HMRC in respect of which they sought an order under Part 7 operated as follows:

(1) Individual participants in the structure ("**participants**") each entered into a contract (a "**services contract**") under which:

(a) they agreed to supply their services to Focused Managed Service Trust ("**FMST**"), or to such clients as FMST should direct;

(b) they were entitled to (i) a fee from FMST, a large proportion of which (in the region of 85%) was due only upon FMST being satisfied that the participants had fulfilled all contractual obligations under the services contracts (the "**Fee**") and (ii) a fee of £1,000 per month as a retainer for their services (as referred to in the services contract as "**the Basic Retainer**").

(2) The participants entered into a "credit facility" with Retentia Limited, an entity established in Anguilla in the British West Indies, under which it provided an interest free loan generally over a five-year period and, by way of security, took rights over the participants' receipts from the provision of their services under the services contracts (the "**loan**").

(3) Both the Basic Retainer due from FMST and the loan from Retentia Limited were paid to participants on a monthly basis together with any reimbursed expenses incurred by the participants in performing services under the services contracts.

(4) It appears that the loan provided by Retentia Limited matched the amount of the Fee provided for under the services contracts and that the size of the loan was linked to the size of the fee received by FMST from the clients to whom the participants provided their services.

(5) In their relevant self-assessment tax returns, the participants declared the Basic Retainer as taxable income but they did not include sums received under the loan from Retentia Limited on the basis that these were not taxable.

Requirements of s 306

4. Section 306 provides as follows:

> "306 Meaning of "notifiable arrangements" and "notifiable proposal"
>
> (1) In this Part "notifiable arrangements" means any arrangements which -
>
> (a) fall within any description prescribed by the Treasury by regulations,
>
> (b) enable, or might be expected to enable, any person to obtain an advantage in relation to any tax that is so prescribed in relation to arrangements of that description, and
>
> (c) are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage.
>
> (2) In this Part "notifiable proposal" means a proposal for arrangements which, if entered into, would be notifiable arrangements (whether the proposal relates to a particular person or to any person who may seek to take advantage of it)."

5. HMRC contended that, for the purposes of s 306(1)(a) the arrangements fall within at least one of the descriptions prescribed by the Treasury in the relevant regulations, the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 SI 2006/1543, namely, regulation 10 ("**regulation 10**"). Regulation 10 provides as follows:

> "Description 5: standardised tax products
>
> 10. (1) Arrangements are prescribed if the arrangements are a standardised tax product. But arrangements are excepted from being prescribed under this regulation if they are specified in regulation 11.
>
> (2) For the purposes of paragraph (1) arrangements are a <u>product</u> if—
>
> (a) the arrangements have standardised, or substantially standardised, documentation -
>
> (i) the purpose of which is to enable the implementation, by the client, of the arrangements; and
>
> (ii) the form of which is determined by the promoter, and not tailored, to any material extent, to reflect the circumstances of the client;
>
> (b) a client must enter into a specific transaction or series of transactions; and
>
> (c) that transaction or that series of transactions are standardised, or substantially standardised in form.
>
> (3) For the purpose of paragraph (1) arrangements are a <u>tax product</u> if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage.
>
> (4) For the purpose of paragraph (1) arrangements are <u>standardised</u> if a promoter makes the arrangements available for implementation by more than one other person." (emphasis supplied)."

6. For the purposes of regulation 10, under s 318 an advantage in relation to any tax (as defined to include income tax) means:

> "(a) relief or increased relief from, or repayment or increased repayment of, that tax, or the avoidance or reduction of a charge to that tax or an assessment to that tax or the avoidance of a possible assessment to that tax,
> (b) the deferral of any payment of tax or the advancement of any repayment of tax, or
> (c) the avoidance of any obligation to deduct or account for any tax."

7. For the purposes of Part 7, "arrangements" includes any scheme, transaction or series of transactions" (under s 318(1)).

Meaning of promoter

8. Under s 307, the circumstances when a person is to be regarded as a promoter include the following:

> "307 Meaning of "promoter"
>
> (1) For the purposes of this Part a person is a promoter -
>
> (a) in relation to a notifiable proposal, if, in the course of a relevant business, the person ("P") -
>
> (i) is to any extent responsible for the design of the proposed arrangements,
>
> (ii) makes a firm approach to another person ("C") in relation to the notifiable proposal with a view to P making the notifiable proposal available for implementation by C or any other person, or
>
> (iii) makes the notifiable proposal available for implementation by other persons, and
>
> (b) in relation to notifiable arrangements, if he is by virtue of paragraph (a)(ii) or (iii) a promoter in relation to a notifiable proposal which is implemented by those arrangements or if, in the course of a relevant business, he is to any extent responsible for –
>
> (i) the design of the arrangements, or
>
> (ii) the organisation or management of the arrangements.
>
> (2) In this section "relevant business" means any trade, profession or business which -
>
> (a) involves the provision to other persons of services relating to taxation, or
>
> (b) …
>
> (5) A person is not to be treated as a promoter [or introducer] for the purposes of this Part by reason of anything done in prescribed circumstances." [The prescribed circumstances are not in point in this case.]

Evidence and facts

Evidence of Mr Wood

9. An officer of HMRC, Mr Wood, set out in a witness statement (and documents produced with that statement) information which demonstrates that the arrangements worked as set out at [3] above. This information was obtained by HMRC from participants in the arrangements whose tax returns HMRC had enquired into. Mr Wood had worked at HMRC since 1983 and since April 2015 was a Taskforce Investigator in the DOTAS Enforcement and Upstream Intervention Team in HMRC's Counter-Avoidance Directorate.

10. Mr Wood set out the following in his witness statement:

(1) The arrangements are a form of “contractor loan scheme” which is “one of the highest profile types of tax anti-avoidance scheme that HMRC investigate”.

(2) These schemes “typically consist of payment by salary or partnership profits with the rest of the remuneration provided to the individual in the form of a loan from a trust or company”.

(3) Typically, the loan does not come directly from the company to which the individual provides work but is provided through a chain of companies, trusts or partnerships.

(4) Whilst the individual may be an employee, partner in a partnership or self-employed the common element is that a loan is made but is never repaid.

(5) The loan may be taxed as a benefit in kind but that would result in substantially less tax being paid than if the individual was subject to tax on the full sum received.

(6) OBL was incorporated on 29 December 2010. The current director is Mr Adrian Benedict Sacco.

(7) HMRC’s enquiries into the tax return of the individuals who have used the scheme show that the arrangements were used in the 2012/13 tax year. Mr Wood had reviewed the various documents obtained by HMRC in the course of these enquiries. He had included examples of the arrangements in the bundles but these are not exhaustive and do not relate to all the participants identified,

(8) He said that:

> “In a nutshell the…arrangements use a trust but avoids tax or national insurance contributions chargeable on salary, etc., that would be otherwise due on income payable to the contractor by diverting fees into the trust and associated loan structure. The end result is instead a small amount of taxable income plus a large non-taxable credit facility, which makes regular loans to the scheme user. Ultimately, it appears contractors can “defer” their income, which is to be paid at some later date, when the tax regime is more favourable. In the meantime, scheme users can obtain an interest free loan to cover their needs – the loan being balanced with the “deferred” earnings.”

(9) He set out details of the arrangements corresponding to those set out at [3] above and said that the outcome of the arrangements is that the tax which would ordinarily be due from the participant in respect of amounts received from his services is reduced to that due solely on the Basic Retainer.

11. Mr Wood explained the actions he had taken as regards the arrangements as follows:

(1) In or about June 2015, the arrangements were referred to him as a potential tax avoidance scheme that was required to be disclosed to HMRC under the relevant rules. He understood that, prior to that time, HMRC made enquiries of various participants during the course of which they obtained copies of services contracts, loan agreements, marketing material and bank statements of the participants which showed payments made to them under the loan agreements.

(2) He reviewed the material received by HMRC and formed the view that the arrangements may be notifiable arrangements, OBL may be a promoter of those arrangements and further information ought to be obtained from OBL to clarify these issues.

(3) He issued a letter to OBL dated 7 December 2015 asking why it did not consider the arrangements to be notifiable or that it was not a promoter of the arrangements within the meaning of Part 7. As no response was received, on 2 December 2015 he issued a formal notice under s 313A.

(4) A representative of OBL telephoned him on 3 February 2016 and said that OBL had replied to his earlier correspondence on 11 January 2016. He returned the call on 4 February 2016 using the number supplied and was told the letter which OBL sent to HMRC in January 2016 was signed for by Mr Alan at HMRC (or variants of that spelling) but he could not trace any person of that name in the Newcastle Central Mail Unit, which was the HMRC address to reply to.

(5) On 8 February 2016 he sent an email using the address supplied in the earlier telephone call to ask OBL to send the letter of January 2016 again. On 1 March 2016 he telephoned again on the same number and after several such calls he finally spoke with a representative on 9 March 2016 who agreed to email a copy of the letter to him.

(6) On 14 March 2016 a copy of the letter of 11 January 2016 was sent to him by email. In the letter OBL stated that there was no need to disclose the arrangements as they did not deliver any tax advantage as defined in s 306. The letter was sent from an address in the Isle of Man.

(7) On 23 March 2016 Mr Wood replied to OBL setting out his belief that tax was deferred under the arrangements and, therefore, that the arrangements were notifiable arrangements for the purposes of s 306(1).

(8) On 3 May 2016 OBL sent a letter to HMRC signed by Mr Adrian Sacco from an Isle of Man address and on Opus Management Limited stationery. In the letter Mr Sacco said that OBL had never marketed or promoted FMST and in fact he believed it was Best Marketing Ltd which marketed the arrangements. He confirmed that it was his belief that the arrangements are not notifiable as FMST's function is administrative, not for the delivery of a tax advantage and that there was no link between the trust and the loan provider. I have set out further details of this letter below.

(9) Mr Wood wrote to OBL on 7 November 2016 to inform them of HMRC's intention to apply to the tribunal for an order under s 314A that the arrangements are notifiable arrangements under s 306. He did not receive any response.

(10) He continued reviewing documents sent by individuals in the on-going tax return checks and was not dissuaded from his view that FMST is linked to the finance and thus to the tax advantage created by holding back payment of the participants' fees.

12. In the letter of 11 January 2016 which Mr Wood referred to, Mr Sacco made the following main points:

(1) It is correct that "we and others have promoted the services of the trustees of the FMST; but we would not agree with any suggestion that this means that we or anyone else should be considered a "Promoter" for the purposes of the DOTAS legislation introduced by FA 2004".

(2) There must "of course be countless commercial arrangements entered into by individuals and businesses that do not fall within DOTAS and which, accordingly, are never notified to HMRC….We confirm that the services offered by the FMST trustees do not fall within any of those definitions [of

notifiable arrangements and tax advantage in s 318]. No tax relief is being exploited. No tax is being deferred, and no tax obligation is being avoided".

13. In the letter of 3 May 2016 which Mr Wood referred to, Mr Sacco made the following main points:

(1) He confirmed "categorically" that OBL "never marketed nor promoted the services of the FMST".

(2) He assumed that in referring to Bestpay in their correspondence HMRC referred to Best Marketing Limited (BML):

> "I have not seen everything BML has written about the arrangement and would stress that neither I nor, more importantly, the FMST trustees have any director or indirect control over BML, nor indeed any company connected with BML……
>
> …it is everyday practice for contractors to engage with a service company, umbrella company or other intermediary which, in turn, enters into a contract with the ultimate client. The involvement of such an intermediary can fulfil a number of everyday commercial "functions" such as relieving the contractor of much of the administrative burden of signing contracts with clients, raising invoices, chasing, banking and reconciling payments for work done, etc….. many clients and agencies prefer and sometimes insist that contractors do not engage with them direct, but instead that those contractors' services are provided via an intermediary….."

(3) The participants were expressly excluded from benefit under the terms of the trust deed so that the relationship was purely contractual and not at all fiduciary.

(4) The trustees of FMST played no part in arranging any loans nor in providing any security, guarantee or indemnity in connection with any loans and any loans taken out by contractors engaged by the trustees were provided by entities that were neither owned nor controlled by the trustees. Any loans the participants may have received therefore cannot be said to be benefits connected with their contractual arrangements.

(5) No artificial diverting of economic benefit had taken place. The arrangements reflect standard commercial practice involving the use of intermediary businesses. The contract between the FMST trustees and the end client make it clear that the fees payable are to the trustees as a business in their own right, not in the capacity of agent for the participant nor anyone else. Likewise, the participant's obligation, under his services contract, are clearly to the trustees, and to nobody else. Furthermore, the services contract makes it clear that if the participant fulfils satisfactorily all of his obligations to the trustees, he is then entitled to all of the fees due to him under that contract. In those circumstances, the participant is of course obliged to account for and pay tax on his fees.

(6) He said that HMRC suggested that "if the [participators] had not participated in this arrangement they would have paid tax in full on their earnings but as a result of using the arrangements they would have paid significantly less". But "if a participant had not used this arrangement, it is impossible to speculate meaningfully as to what else he might have done, whether he might have decided to become a permanent employee of the end client, or someone else; or use one of the numerous alternative contracting

arrangements involving one or more intermediaries; or indeed engage in some other activity altogether".

Mr Sacco's witness statements

14. Mr Sacco submitted a witness statement on 19 March 2018 in which he confirmed that he was at that time the director of OBL. He stated the following:

> "Between 2011 and the end of 2015 [OBL] carried out activities on behalf of the trustees of the Focus Specialist Trading Trust as their agent, in connection with the running of their business.
>
> I was appointed as a director of [OBL] on 31 December 2015 at or around the time this agency activity ceased.
>
> As the current director of [OBL] I am in possession of the company's records."

15. He submitted a later witness statement on 18 April 2018 in which he made the following additional comments

> "3. The services provided by OBL for the trustees, as their agent, were solely of a "back office" and administrative nature.
>
> 4. The services were not services in relation to tax.
>
> 5. The individuals whose services were contracted via the trustees were not clients of OBL but workers.
>
> 6. All conditions regarding payments made to those workers were commercial and at arms' length terms.
>
> 7. Standardised documents were not used. Agreements were reached between the trustees and individual workers but not dictated by the trustees. If a precedent was used it was required because it was convenient to do so but the trustees never required use of a precedent.
>
> 8. Amount loaned to individual workers varies.
>
> 9. OBL did not make available any "scheme" to workers in the sense that it has not disclosed to workers intellectual property it did not have (or was legally entitled to share).
>
> 10. I add that I was appointed s director of OBL on 31 December 2015 at or around the time the agency activity described above ceased.
>
> 11. As the current director of OBL I am in possession of the company's records."

Documents – officers and ownership of OBL

16. The bundles contained annual returns which OBL filed at Companies House for the period ending 29 December in each year from (and including) 2011 to (and including) 2015 (as filed on 6 February 2012, 2 January 2013, 24 February 2014, 18 February 2015 and 7 January 2016 respectively) which showed:

(1) In each return, OBL's registered office as Drake House, Gadbrook Park, Northwich, Cheshire.

(2) In all returns except the last, OBL's director as Mr Morris Hazell and, in the last return, OBL's director as Mr Christopher Swallow.

(3) In the first two returns, OBL's company secretary as Mr Adrian Bruce and, in the later three returns, OBL's company secretary as Mr Christopher Swallow.

(4) In the first three returns, the shareholders of OBL as Mr Adrian Bruce and Mr Morris Hazell and, in the final two returns, the only shareholder of OBL as Mr Morris Hazell.

17. The bundles also contained a "Confirmation Statement" filed by OBL at Companies House on 5 January 2017 in relation to the year ending 29 December 2016 in which (a) Mr Adrian Sacco is listed as a person with significant control over OBL as regards the right, directly or indirectly, to appoint or remove a majority of the board of directors of OBL, and (b) Mr Morris Hazell is listed as a person with significant control over OBL on the basis that he held directly or indirectly 75% or more of the shares in OBL.

Documents implementing the arrangements

18. In the services contracts, the participant is referred to as the Contractor and the trustees of FMST as the Trustees. These documents contained the following main provisions:

(1) In the recitals it was stated that

> "(A) The Trustees pursuant to powers conferred on them by a Trust Deed dated 13 April 2011 establishing a settlement known as the "Focus Managed Service Trust" have established and carry on the business of contracting to provide the services of individuals without any such individual entering into a contract of employment with or being or becoming an employee of the person or persons or business or firm to whom his or her services are provided or of the Trustees or of any other person
>
> (B) The Contractor has agreed with the Trustees that in carrying on their said business the Trustees will provide the services of the Contractor to the person or persons or business or firm named in the First Schedule below ("the Trustees' Customer") and the Contractor will carry out the tasks required by the Trustees' Customer and such other tasks as are set out below in the terms as between the Contractor and the Trustees and in accordance with arrangements between them as set out below."

(2) The Contractor agreed "to do such things and personally provide such services as are required to enable the Trustees in carrying on their said business to provide the Contractor's services to the Trustees' Customer…."

(3) The Trustees were to use their best endeavours to maximise the consideration received from their customers for the Contractor's services.

(4) The Contractor was not entitled to be paid by the Trustees' Customer for his services but was entitled to be paid by the Trustees for carrying out the obligations under the agreement a sum equal to the gross amount of the consideration so received by the Trustees after deducting (a) a sum equal to the total expenses and disbursements incurred and paid by them in connection with the provision of the Contractor's services to the Trustees' Customer (b) a sum equal to the percentage of the gross amount of such consideration specified in a schedule (see (7) below) and (c) such sum or sums as have previously been paid in respect of the Basic Retainer as defined in the agreement. This was subject to the proviso that such sums would be paid at such times as would in the opinion of an accountant appointed by the Contractor maximise the net benefit to the Contractor and in the opinion of the Trustees' accountant would minimise the tax and other burdens attributable thereto but in the event of disagreement the payment was due (subject always to the Contractor having carried out all of his obligations under the Agreement) quarterly in arrears.

(5) Notwithstanding anything else in the agreement the Trustees were to pay the Contractor the Basic Retainer on each of the dates and on the terms specified.

(6) It was stated that the services were to be provided by the Contractor as independent contractor and that the Contractor was not the employee of the Trustees or the Trustees' Customer.

(7) The Basic retainer was £1,000 per month. The percentage of consideration received from the Trustees' Customer specified in the schedule to the agreements ranged from 85% to 92%.

(8) There was a list of obligations as regards the performance of the Contractor's services and it was stated that:

> "and for the avoidance of any doubt the Trustees shall be under no obligation to make any payment to the Contractor (other than the Basic Retainer or to reimburse the Contractor for any ..expenses or disbursements incurred in connection with work carried out for the Trustees' Customer and for which the Trustees have been reimbursed by the Trustees' Customer) unless and until the Contractor has satisfied the Trustees in this respect."

19. In the loan agreements Retentia Limited agreed to lend the participant a specified sum for a specified period in consideration for the participant (a) assigning the "Deferred Fees" to Retentia by way of security to support his obligations under the loan agreement, and (b) agreeing to repay the loan in accordance with the terms set out in the agreement and to pay a specified premium to Retentia Limited. The Deferred Fees were defined as the fee due to the participant under the services contract on satisfying certain conditions as set out in that contract.

20. I note the following:

(1) In the documents the address given for FMST was Drake House, Gadbrook Park, Northwich, Cheshire. That is the same address as OBL's registered office address.

(2) The services contract was signed in many instances by Mr Morris Hazell for the Trustees, as agent for OTE Limited. Mr Sacco signed some of the loan agreements and it was stated that he did so for an on behalf of Retentia Limited.

(3) At the back of some of the services contracts and loan agreements was a schedule which showed that (a) the document was circulated by a person with an email address ending with "contracts@bestpay.co.uk", (b) once it was signed by the participant it was emailed by the person with the "bestpay" email address to the relevant other party for signature, and (c) the signed document was then emailed to the parties and the person with the "bestpay" email address. One of the persons with a "bestpay" email address was Mr Blair Adamson.

Marketing materials

21. The bundles contained a document headed "Bestpay – payroll service for UK freelance and contract workers" with sub-headings entitled "FMST for Contractors" and "Focus Managed Service Trust". The contact details included the following email address: "info@best-pay.co.uk". This document included the following statements and information:

(1) "FMST is a UK settled and based Trust, registered in Northwich Cheshire…."

(2) "FMST is a truly commercial arrangement for the consummate professional, adding greater value to your work."

(3) Under a heading "Benefits to Contracts":

> "The FMST allows contractors to "defer income". The deferred income is held by the trustees and paid back to the contractors at a time

decided by them. Tax on the deferred income is likewise deferred and may be reduced or avoided altogether depending on when the deferred income is paid."

(4) Under a heading "An example of FMST benefiting a Contractor":

"A contractor works for 6 months on a project and earns £100,000. He is able to have the trust hold £50,000 of that income to be taken over to the next tax year. He then pays Tax and NI on the £50,000 that he has. If the contractor is not able to secure a role the following year then he is able to request the £50,000 from the trust to form his second year's salary and is taxed on that with the advantages of another years allowances. That is exaggerated but shows the point.

This is a real benefit to contractors working in this recessionary environment."

(5) Under the heading "A Word on Loans":

"When funds are collected by the FMST, they are invested via an independent investment company into loans. A separate loan company is able to make a tax free loan using your deferred earnings as collateral. In that way your loan is always balanced by collateral held. Should the loan be re-called it can be settled in a variety of ways depending on your circumstances at the time….."

(6) There was a diagram which gave an illustration of £100,000 of funds moving to FMST with a note that "(contractor's fees retained by trustees)" and £100,000 of funds moving to "Loan Co" with a note "(loan secured by charge over unpaid earnings)".

(7) It was stated that:

"The difference between the FMST and other trust based remuneration arrangements is that with the FMST you are contractually entitled to receive the fees agreed between you and the trustees in full, subject to you fulfilling all of your contractual obligations. With other trust based schemes you are merely a beneficiary of a discretionary trust, with no automatic right to receive full payment for the work you do. In other words, the FMST gives you certainty and security."

(8) Under a heading "Is my money safe if FMST came to an end?":

"If the trust ceased trading and was wound up, you would obviously cease to be contracted to provide services through the trust. Before winding up the trust, the trustees would have to distribute all the trust assets, including the benefit of loans made to former contractors. The trustees would still have their contractual obligation to pay your deferred earnings, subject to you fulfilling all your obligations. In practice, your right to deferred earnings would cancel your debt to the loan company."

22. The bundles also contained a document headed "The Managed Service Trust Summary of Legal and Accounting Advice". "The Trust Shop" appeared on the front page with an address in Malta.

(1) This included the following statements:

"The managed service trust is a commercial arrangement for contracting to provide the services of self-employed professionals to customers. It is a deferred payment structure that can be applied to remuneration in a range of professions. For example, in relation to sports image rights, the sports professional …can assign the rights to the trustees in return for a basic retainer, with further payments

> becoming due on fulfilment of specific criteria ultimately within the professional's control.
>
> During the period when the balance between the retainer and the total received in respect of sports image rights or other fees is invested by the trustees, and has not become payable to the professional, the accruing right to receive payments on fulfilment of the outstanding criteria can be used as collateral for a revolving loan facility.
>
> For individuals working in the UK during the course of specific projects, the payments of royalties or conditional payments could similarly be assigned to the trustees. It is worth noting that in either example, the individual professional has the ability to fulfil the criteria and accelerate the deferred payments by satisfying criteria within his own control, making the structure one of the most flexible available.
>
> The structure relieves the professional of the administrative burden of invoicing the customer for those services, and receiving and processing payment for the same. This is because intermediaries- the trustees- enter into the contract with the customer. The professional, in turn, enters into a contract for services with the trustees…."

(2) The note then set out accounting practice advice and legal advice. It was stated that the legal advice included confirmation that the structure does not fall within IR35; confirmation that it is unaffected by the December 2010 "disguised remuneration" rules; and advice on numerous legal and operational points of detail:

> "The arrangement is designed to ensure that the professional's self-employed status is preserved- and hence that he or she falls outside tax rules which might act as a disincentive to highly-paid and highly-motivated individuals who are employed, or who are treated by the income tax rules as if they were employed……..
>
> Central to the advice we have received from senior tax Counsel is his unequivocal opinion that individuals whose services are contracted through the managed service trust are not employees, and are not to be treated as if employed by the IR35 rules…"

(3) At the end of the note the sign off was:

> "ADRIAN SACCO TEP
>
> FOR FIDEMPTOR LIMITED T/A "THE TRUST SHOP"
>
> September 2011 and Revised October 2011"

23. The bundles contained a "compliance pack" headed "Bestpay - the best umbrella service for UK freelance and contract workers" (the "**Compliance Pack**"). The name "Bestpay" appeared on each page of this document.:

(1) On the first page it was stated that:

> "At Bestpay we must achieve a 100% success rate for every aspect of our Contractor Umbrella Service. Payments must be made on time every time. There is no compromise to this and no excuse for failure…..
>
> We aim to remain 100% compliant with all government regulations relating to the contractor payroll sector. Whether it be IR35, MSC, AWR or other we invest a lot of time to ensure that every aspect of our service is totally compliant. We feel that to be of the utmost importance to both our Contractors and the Agencies with whom we work…..

> Our limited liability company structure and the ongoing and extensive compliance measures that we adopted ensure that our partner agencies are protected at all times against any payroll related liabilities and/or the risk of any form of potential accounting shortfall….
>
> All of our onward payments are made "same day"….
>
> Our customer service desk is manned at all times during normal business hours and most evenings and weekends…."

(2) The company and banking details given on the next page were stated to be those for OBL.

(3) The pack included the legal and accounting advice summary referred to at [22] above, a certificate of VAT registration for OBL, a certificate of incorporation on change of name showing a change of name to OBL dated 7 October 2011, an employers' and public liability policy schedule and a professional indemnity insurance policy certificate each dated 12 January 2012 in which OBL and/or Best Payment Services Ltd was named as the insured and the address of the insured was given as Drake House, Gadbrooke Park, Northwich, Cheshire CW9 7RA. I note that is the same as the address set out in the documents for FMST and given as OBL's registered office in the annual returns.

(4) On the final page under "contact details", the address set out was the Drake House address set out in (3), the managing director was named as Mr Hazell, the "Compliance Director" was named as Mr Sacco, the "Head of Payments Team" was named as Mr Adrian Bruce and the "Head of Sales Team" was named as Mr Peter Adamson. Their email addresses and those for the rest of the team were stated to end with "@opus-bestpay.co.uk" in each case.

(5) The pack included a document which set out the expected tax advantage from the arrangements (the "**Marketing Document**").

(a) On the front page under a heading "Who is Bestpay?" it was stated that "Bestpay is a progressive and forward looking tax consultancy. We provide tailored tax solutions to individuals and organisations".

(b) It was stated that:

> "Freed from the shackles of employment, the FMST structure allows the individual to determine, in an entirely commercial manner, when he or she will be entitled to receive income; and hence, when he or she will have to account for and pay tax on that income. The individual may in practice defer entitlement to income for a considerable period – possibly until he or she has ceased to be resident in the UK, or until he or she has passed away.
>
> In the meantime the individual can draw on a credit facility, secured by a charge over the rights to income that has not yet become payable. Senior tax Counsel has advised that the use of the credit facility does not trigger any tax liability – in contrast to the current treatment of loans made from employee benefit trusts and other employment based structures."

(c) An example was set out as follows:

> "a contractor works for six months and earns £100,000. He is able to have the trust hold £50,000 of that income to be taken over to the next tax year. He then pays Tax and NI on the £50,000 that he had. If the contractor is not able to secure a role the following year then he is able to request the £50,000 from

> the trust to form his second year's salary and to [pay tax] on that with the benefit of another year's allowances. This is exaggerated but shows the point. This is a real benefit to contractors working in this recessionary environment."

(d) It was emphasised that the arrangement was not an employee benefit trust and stated that: "We have advice from a senior Queen's Counsel confirming that HMRC have no mechanism under current legislation to treat those providing services through the FMST as employees."

(e) There was a chart showing returns on a gross sum of £100,000 under the headings "Bestpay", "limited company", "PAYE" and "umbrella company". Under the "Bestpay" heading the participant was receiving virtually the full sum and it was stated that under that structure: "You can retain up to 90% of your income after tax, in a safe and compliant manner".

(f) There were the same notes on loans and whether the monies were safe if FMST was wound-up as set in the document referred to at [21] above.

24. The bundles also contained what appears to be a marketing leaflet:

(1) This was a single sheet headed "Bestpay". It gave contact details for "Bestpay" which included the email address "info@best-pay.co.uk" and phone numbers which a participant confirmed were those on which he contacted OBL (see [26(4)]). There was a statement that "The Allround Solution, assisting Contractors and Freelancers to retain up to 90% of their income" with an illustration of the benefit of the arrangements compared with working through a company.

(2) It was then stated:

> "Better than Umbrella Company, Limited Company and Offshore
>
> Bestpay's services are specifically designed to replace the traditional methods of dealing with payroll for contractors.
>
> Our services really are becoming market leading. Giving far better returns than Umbrella Companies…Huge savings on paperwork and hassle over running a Limited Company…And giving peace of mind that, as a UK based service, you are not exposed to the risk of sending funds offshore."

(3) The document ended with "£500" in large lettering and underneath: "To you for every friend you refer who uses our service."

25. Finally, the bundles contained a document headed "The…Focus Managed Service Trust CONTRACTOR PAY MANAGEMENT … structure" produced under the logo "Opus management". This included a form of testimonial from Mr Christopher Swallow of Howard Worth, a firm of accountants. I note Mr Swallow was named as director and company secretary of OBL in some of the annual returns details of which are set out at [16] above.

(1) In this document, Mr Swallow said that Howard Worth had:

> "worked closely with Morris [presumably Mr Morris Hazell who was named as director and shareholder of OBL in the annual returns details of which are set out at [16]] and the team at Opus Management Limited to advise on the set up and formation of the trust, one of our own partners is a Trustee and we are now involved with supporting the trust with ongoing accounts and bookkeeping. We have run our own due diligence on the structure, and its associates, and are satisfied with

> all relevant components. We have been in business 60 years next year and have built our business working with trusted business partners, such as Opus Management. Morris and the team always deliver on time and I would not hesitate to recommend them."

(2) The document set out details of FMST and the benefits of the arrangements which included a statement that "[w]e take care of all your administration and return you a higher net figure" and that other benefits included faster payments, "a very simple application process – guaranteed registration in under 2 hours" and set out an example of the financial benefits for a contractor compared with operating through a limited company on the basis that if the contractor had income of £100,00, he would have an increase in his net return of £12,733.26.

Correspondence with participants

26. The correspondence in the bundles between HMRC and representatives of participants included the following:

(1) Advisers stated that their clients had received advice from "Best Group International" and "Opus Bestpay" and that it had provided promotional literature, namely, the Compliance Pack (as enclosed with the relevant letter to HMRC).

(2) An adviser stated in relation to a participant that he:

> "was introduced to Retentia Ltd, as he was the Focus Managed Service Trust, by Opus Bestpay Limited, a tax planning consultancy, as part of him being provided with a tailored bespoke tax mitigation solution. [He] was assured that the solution did not require disclosure to HMRC under the DOTAS regime, which gave him comfort that he was not engaging in a tax avoidance scheme" and that he engaged in the "Opus Bestpay Solution".

(3) An adviser said:

> "[the participant] entered into the Opus Bestpay solution because he considered that it required less administration than were he to provide the services through a private limited company. He also understood that the solution allowed the individual user to determine in what he was led to believe was an entirely commercial manner, when the user would be entitled to income and, in the meantime, drawing on a credit facility secured by a charge over the rights to income that had not yet become payable. [The participant] was given assurances that Senior Tax Counsel had advised that the use of this credit facility did not trigger any tax liability and, moreover, that the solution was not a tax avoidance solution under the current DOTAS criteria. Had the tax solution provided by Opus Bestpay been a DOTAS scheme, [the participant] would not have entered into it…..
>
> Please be advised that the email communications between [the participant] and the parties involved in the Opus Bestpay solution are extremely limited and primarily deal with "Know-Your-Customer" due diligence procedures. The vast majority of the communications [the participant] had with the parties involved in the Opus Bestpay solution were by telephone."

(4) In a letter from a participant, the participant set out contact details for "BestPay employees" which included Ms Couch (Sales) and Mr Costello (Contracts/Relationships) as well as details of 13 other persons. He also set out the phone number which appeared on the document referred to at [24] above as the number for contracts, accounts and sales for "Bestpay".

Invoices and other documents

27. The bundles also included:

(1) A number of invoices from FMST to participants setting out the Basic Retainer paid to them in which FMST's address was given as the Drake House address set out above.

(2) Bank statements of a number of participants showing the receipt of the Basic Retainer and loan amounts from Retentia Limited.

(3) A letter from Howard Worth enclosing a sample of 25 invoices from OBL to end clients/agencies charging fees for the services provided by participants in the arrangements in the periods from the autumn of 2012 to the spring of 2013.

(4) A number of other similar invoices stated to be from OBL in respect of periods from July 2012 to early 2013 attached to emails sent by persons with email addresses ending with "@bestpay.co.uk".

(5) A number of "BESTPay – Pay Advices" from persons with email addresses ending with "@bestpay.co.uk" in which they advised persons, who from the contents of the email were participants, of the amount of "Retainer" and "Loan" credited to them and any expenses repayments for periods from July 2012 to March 2013. Some of these emails included statements at the bottom that:

> "Bestpayment Services Limited, Opus-Bestpay Limited, Bestpay-Tax Limited, Salazar Consulting Limited, Allied Contractors Limited, Windsor & Wales Limited do not accept responsibility for changes made to this message after it was sent….."

Correspondence between Ms Couch and a participant

28. The bundles also contained correspondence between Ms Lisa Couch and a participant. In all emails she sent to the participant, Ms Couch used an email address ending with "@opus-bestpay.co.uk". In an email which it appears was sent sometime in July 2012, she said that she had attached an illustration as promised and a copy of "our brochure which explains our payment service in more detail". She continued as follows:

> "**Our Service** – At Opus Bestpay we offer a bespoke approach to all our contractors and pride ourselves on delivering a personalised service to the individuals who join our company.
>
> You will be offered a relationship managed service ensuring that your needs are met and you remain our first priority.
>
> Our solution offers maximum tax efficiency with ease of use and the peace of mind that you are using a secure and compliant solution.
>
> Based on the information you provided you could access funds equivalent to 85% of the agreed contract value. Please see the attached illustration for full details
>
> **Our Advantages** –
>
> More take home pay from your contract;
>
> Less paperwork – let us do that for you;
>
> No delays – We will always pay you the same day that we receive monies into our account;
>
> A-Z service. We will do everything, from registering you with HMRC on day 1 through to assisting with your tax return at the end of the year;
>
> All your professional insurances are inclusive within our solution;

> **Refer a friend**: Be rewarded every time you introduce a friend or colleague to our service.
>
> **What Next?**
>
> Please have a look through the information and if you are happy to proceed please fill in our online application form http://www.opus.best-pay.co.uk/applyonline.html and email me a scanned copy of your passport and an up to date utility bill. We can then set you up immediately."

29. The participant replied with some queries on the arrangements. Ms Couch replied to this in an email on 25 July 2012 in which she said that in answer to the participant's queries:

> "1) Yes we take 15% from each invoice and you will receive gross 85%
>
> 2) Yes we cover you on PI & PL insurance
>
> 3) The payments are made as an interest free loan.
>
> 4) Yes, as soon as the funds a received in your account you are free to spend at will.
>
> 5) There is no limit on the amount you receive in loans, the amount paid is based on what you bill.
>
> 6) There are no longer term obligations as the loans are secured against the deferred income.
>
> All commercial loans are non taxable, same as if you were to have a loan with a high street bank, you would not deed to declare these as income when you do your self assessment.
>
> I have attached a link below for HMRC which shows what income is taxable – as loans are not classed as income they are not taxable…."

30. The participant replied to this email on 10 August 2012 in two separate emails:

    (1) In one email she stated that she would like to "work with you" and set out information "from your compliance pack" (OBL's company and VAT details and its bank account details) and asked for documents "I need to fill in and sign to enrol with your system".

    (2) In the other email she said that she had negotiated her contract with the client and agreed a daily rate, that they would add the name of "your company" (OBL) in the contract as well as hers and she asked if OBL's details as set out in the compliance pack were what she needed to send to her employer and if she was right that the employer needed to transfer the salary to its bank account.

31. On 13 August 2012:

    (1) Ms Couch replied to the participant in an email. She said that she had attached the link for "our online application form, which we will need to complete along with a scanned copy of your passport and utility bill", she set out the link above and said that the "information in our compliance pack is correct" and that once "we have your agencies information we will be contacting them directly".

    (2) The participant was sent an email from infor@opus-bestpay.co.uk which stated that to confirm the application the participant was to check the information set out in the email was correct (being the participant's personal details, the client's details and information relating to timesheets and payment and how the participant wished to receive notice of payment).

    (3) The participant replied in an email with her address and bank account details. She asked "do you need to set me up as a Sole Trader? Do you deal with all the paperwork involved right?" In a separate email she said that she

had amended some details in the application form and she asked if the SMS notification service had any additional cost and if there was any additional cost for having weekly payments versus monthly ones.

(4) Ms Couch replied as follows: "We will take care of all the paper work to set you up as self-employed, all that will be required is for you to sign the forms and send them back to HMRC. There is no extra cost for you to receive texts from us, and here is no difference if you chose to bill weekly or monthly."

32. On 14 August Ms Couch sent the participant an email thanking her for sending her details but noting that she had not heard from the participant's client and asking for a number to contact them on. She said: "We will be sending all of the documents to you shortly, they will come in your welcome pack which we normally send once we have the contract set up with your agency/end client".

33. A Mr Costello, who also used an email address ending with "@opus-bestpay.co.uk, then sent an email to the participant stating that he would be her relationship manager. He said that he would take care of dealing with her timesheets, expenses, any changes to her contract with the client or any new contract with a new agency or client and changes to the personal details she had provided. He asked her to let him know if she had any such new contract so that he could liaise with the new client to set up a contract between them and Opus-Best Pay. He added "Refer a Friend – Remember if you refer a friend/colleague you will be able to claim a referral payment of £500".

Mr Sacco's evidence at the hearing

34. I did not find Mr Sacco to be a convincing witness. Many of his assertions lacked credibility in light of the documentary evidence. I have commented further on his evidence in my conclusions.

35. Mr Sacco was questioned on when he became a director of OBL and whether he had any involvement before December 2015. He said he was aware of OBL before that time and agreed to take over as director when the previous directors resigned. He did not really answer the question as to how long he was aware of OBL but maintained that, whilst he had been involved with other entities, he did not undertake any activities in relation to OBL until he became a director of it.

36. He confirmed that, as shown in OBL's annual returns for the relevant years, Mr Bruce, Mr Hazell and Mr Swallow had all been involved with OBL. He asserted that OBL only had a role as an agent from 2011 to 2015 and was not involved in devising the arrangements; it only had a role in relation to implementation - mostly in preparing documents and seeking advice on various matters. He asserted that the arrangements were devised by others and that OBL had no employees; it outsourced its functional "back office" activities such as handling payments. He did not know how many people were involved in this.

37. Mr Sacco was taken to the Compliance Pack and it was put to him that OBL was referred to throughout this and that he was named as the "Compliance Director". Mr Sacco noted that the final page of the Compliance Pack on which these details were given did not refer to OBL as such but just stated "Bestpay". He suggested that "Bestpay" was the trading name for a number of entities or was an "amalgam of various entities". He said again that he was not at OBL at the time and he was insistent that the Marketing Document included with the Compliance Pack was produced by someone other than by OBL.

38. Mr Sacco accepted that OBL received payments in respect of the arrangements from the end-clients. He asserted, however, that it received them only in its capacity

as agent for FMST who passed some funds to Retentia Limited and some to the participant. He asserted that OBL carried out billing only. He said that OBL's bank details were set out in the Compliance Pack as it was in receipt of payments as an agent for FMST. It was put to Mr Sacco that invoices were issued to the end-clients in the name of OBL. He said that was because OBL was billing as an agent and it issued the invoices so that it could use its own VAT number.

39. Mr Sacco said that OBL did not have staff or resources – it acted as a "bit part player" in acting as an agent. As noted, he asserted that the structure was sold or marketed by "third parties". He confirmed that the Compliance Pack was sent to recruitment agencies. He said that its purpose was to provide substance and that it was sent for due diligence purposes. He said that he did not know if it was sent to participants. In his view, it was not clear that it was a document prepared by OBL. He asserted that the individuals named in the Compliance Pack were not officers of OBL. He was insistent that it was not clear that the Marketing Document was produced by OBL. He said again that a separate business did the marketing and due diligence and that OBL did not engage with participants.

40. Mr Sacco said that the individuals who used "bestpay" in their email addresses or who purported to act for "bestpay" did not act for OBL. He suggested such persons acted for Bestpay Marketing Limited and that in the correspondence set out above, Ms Couch misrepresented the position. He denied that the personnel with "bestpay" email addresses who it appears from the relevant schedules to the services contract and loan agreements circulated those documents were acting for OBL in doing so. He said that Mr Blair Adamson, who is one of these persons, is the brother of the Mr Peter Adamson named in the Compliance Pack but he said that Mr Blair Adamson was probably acting for Bestpay Marketing Limited.

41. It was put to him that the Marketing Document included in the Compliance Pack stated that the arrangements resulted in an increase in take home pay and that participants would therefore pay less tax. He said that was not necessarily the case; if they fulfilled the services contract, they would pay tax on the monies earned and it may be the case that individuals using the scheme had less taxable income. He said it was only a question of deferring any charge and not eliminating it and suggested that the arrangements provided administrative convenience for the parties involved. He could not explain, however, precisely why the deferral of the payments under the services contracts and loan arrangements were needed to achieve that commercial objective.

42. He was taken to the correspondence set out at [26] above in which an adviser to a participant referred to OBL as a tax planning consultancy and an adviser enclosed the Marketing Document as received from OBL. He said that this could not be correct. As before, he asserted that OBL was a billing agent only repeating the remarks recorded above: this document could not have been obtained from OBL as it did not market this arrangement, OBL did not do due diligence on behalf of FMST and a separate business did the marketing and due diligence.

43. Mr Sacco accepted that the services contracts and loan agreements produced at the hearing were substantially the same but suggested that in some cases the particular obligations applicable to participants may be different. He said that he did not act on behalf of OBL in signing any of the documents which he had signed.

44. In re-examination Mr Sacco said that the marketing of the arrangements was carried out by a business in the Isle of Man, the relevant personnel were provided by Best Marketing Limited or Salazaar Consulting Limited and that the relevant documents were not signed by OBL acting in its own right but only as agent or

administrator for the relevant parties. These companies provided the resources needed by OBL but they were not connected with it or with anyone connected with OBL. Emails with the domain name "bestpay" were sent by employees of those entities; they were not employees of OBL. He said that the services contracts and loan agreements were different in that they had longer or shorter terms and in some cases the cost of borrowing was different. He noted that in one email there was an Isle of Man address and not the Cheshire one. He suggested that documents may differ to reflect different obligations undertaken in relation to different work.

Application under s 314A

45. I am satisfied that the evidence set out above establishes that the conditions for the tribunal to make an order under s 314A are met essentially for the reasons set out by HMRC as explained at [46] and [47]. I have commented on Mr Sacco's evidence and the arguments made by OBL at [50] to [54].

46. Before turning the precise requirements, I note that, in particular, in the light of the overall written evidence and lack of credibility of Mr Sacco's evidence (see [50]), it is reasonable to infer that:

(1) The repeated references to "Bestpay" or "Opus-Bestpay" (or some variant thereof) in the Compliance Pack, including the Marketing document, and the other documentary evidence set out above are to OBL, in particular, given the inclusion of its details in the Compliance Pack and the lack of any credible suggestion as to what other entity these references relate.

(2) Those persons whom the written correspondence shows as having "bestpay" email addresses were acting on behalf of OBL, in particular, given the lack of any credible suggestion as to what other entity the term "bestpay" refers and what other person/entity there persons were acting for.

47. As HMRC submitted:

(1) The requirements of s 306(1)(a) are met on the basis that, on the evidence set out above, the arrangements fall within para 10 as a standardised tax product and do not fall within the exemption in para 11 (for arrangements made available for implementation before a specified time):

(a) For the purposes of regulation 10(2), the arrangements are a *product* on the basis that:

(i) The arrangements were implemented under standardised, or substantially standardised, documentation. From the examples in the bundles and Mr Wood's witness evidence, the two main sets of documents, namely, the services contracts and the loan agreements contain the same provisions and were not tailored to any material extent to reflect the circumstances of the client, namely, the participant. The only difference is the details of the participant and, in the case of the loan, the amount of the initial loan. Even if, as Mr Sacco asserted, there were in some cases variants in the terms of the documents of the kind he specified, any such documents would be "substantially" the same as those provided in the bundles. As is evident from the correspondence from Ms Couch (see [28] to [33]), the arrangements were offered to potential participants as a finished product; the participant entered into the services contract and the loan agreement at the same time. To secure the loan all the participants needed to do was to sign the agreement.

(ii) It is plain from the design of the arrangements and the marketing materials relating to them (see, in particular, [23]) that the purpose of the standardised or substantially standardised documentation was to enable the client (the relevant participant) to implement the arrangements as a set or series of transactions under which he could provide his services but receive the bulk of the relevant fee in a form which was considered to be non-taxable, namely, by way of a loan.

(iii) It is reasonable to infer from the totality of the evidence set out above that the form of the documentation was determined by OBL as the promoter, and, for the reasons already given, the documentation was not tailored, to any material extent, to reflect the circumstances of the client.

(iv) The participants entered into a specific transaction or series of transactions that, for the reasons already set out, were standardised, or substantially standardised in form.

(b) The arrangements are a *tax* product within the meaning of para 10(3) on the basis that it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client (the participant) to obtain a tax advantage, as defined in s 318 (1)(a) specifically to include the deferral of any payment of tax:

(i) The tax advantage constituted the receipt of the majority of the monies relating to the provision of the participants' services in the form of a "loan" which was not expected to attract income tax (or national insurance contributions) on the basis that the monies did not comprise taxable earnings for those purposes (at least at the time of receipt).

(ii) The marketing materials plainly set out that tax on the income which was deferred under the services contract was deferred and may be reduced or avoided altogether depending on when the deferred income was paid thereby increasing a participant's "take home" pay (see, in particular, [23], as regards the Marketing Document).

(iii) There is no discernible purpose of the arrangements other than to enable participants who entered into them thereby to obtain an income tax deferral if not an absolute saving. It is not apparent what benefit the participant could gain from the arrangements other than the expectation of this tax advantage. Mr Sacco said the arrangements were for administrative convenience but he was not able to explain why that necessitated the use of the deferral and loan mechanism.

(c) The arrangements are a *standardised* tax product on the basis that the promoter made the arrangements available for implementation by more than one other person (meaning other than the client). The evidence demonstrates that OBL was a promoter as set out below and it plainly did make the arrangements available for implementation by more than one other person. As noted, there were many examples of services contracts and loan agreements in the bundles and it is clear that these were circulated by persons working for OBL (see [20]) and made available through an online application process as is evident form the correspondence from Ms Couch and Mr Costello (see [28]) and that the arrangements were marketed by OBL (see [23] to [26]).

(2) As regards s 306(1)(b), for the reasons already set out at (1) the arrangements "enable, or might be expected to enable, any person to obtain an advantage in relation to" income tax (being a tax which is prescribed in relation to arrangements falling within regulation 10).

(3) As regards s 306(1)(c), it is plain that the tax advantage was the main benefit which was expected to arise from the arrangements. There is no discernible benefit for a participant in entering into arrangements of this type other than the expected generation of the tax advantage.

48. In HMRC's view, it is not entirely clear that they have to demonstrate that OBL is a promoter within the meaning of s 307 but, if that is necessary, the evidence establishes that OBL is such a promoter. In my view, HMRC plainly do need to demonstrate that someone is a promoter at least in order to establish that the requirements of regulation 10 are met.

49. I find that OBL was a "promoter" in relation to the relevant arrangements within the meaning of s 307 on the basis that:

(1) OBL was a promoter in relation to a notifiable proposal on the basis that it made a proposal for arrangements (which, if entered into, would be notifiable arrangements) available for implementation by the participants in the course of its business which involved providing services relating to tax to those persons (for the purposes of s 307(1)(a)):

(a) OBL provided services in relation to taxation in marketing the arrangements (see [23] to [26] and [28] to [33]) and/or providing administrative services relating to tax (see [28] to [33]). I note that "Bestpay" was described as a forward looking tax consultancy in the Marketing Document (see [23]), Bestpay/OBL was referred to as acting as such in the correspondence at [26] and Ms Couch referred to tax services in the correspondence at [28] to [32]. I cannot see that it affects the analysis whether OBL acted as principal in providing such services or as an agent for another party (such as FMST). A person may have a business of providing tax services whichever capacity it acts in.

(b) OBL made the proposal available for implementation having regard to the factors as set out at [47(1)(c)].

(2) OBL was a promoter in relation to notifiable arrangements, on the basis that for the purposes of s 307(1)(b) either (a) it was a promoter in relation to a notifiable proposal which was implemented by those arrangements, or (b) in the course of a relevant business which, for the reasons set out above, involved providing tax services, it was to some extent responsible for the organisation or management of the arrangements. I note the evidence at [20] as regards the circulation of the relevant documents, the evidence at [27] as regards the invoicing arrangements and the written correspondence from Ms Couch and Mr Costello at [28] to [33].

50. I do not accept that the above requirements are not satisfied on the basis of Mr Sacco's evidence. I note the following:

(1) Mr Sacco said that OBL had no involvement in providing tax services, it did not market the arrangements – another party did, it acted as an agent and administrator only and those with "bestpay" email addresses were acting for another party. However, overall, for the reasons set out below, Mr Sacco's stance on this can at best be described as confused.

(2) Mr Sacco provided no clear information on who the other party, whom he asserted marketed the arrangements, might be. He suggested in written correspondence with HMRC that it was Bestpay Marketing Limited, at the hearing he initially said that it was another business which he described as a third party, he then seemed to suggest it was Bestpay Marketing Limited but later said that it was an entity in the Isle of Man and that Bestpay Marketing Limited or Salazar Consulting Limited provided the employees needed by OBL. He suggested these entities were not connected with OBL but from the emails referred to at [27)5)] above Salazar Consulting Limited plainly was and the use of the name "Bestpay" also indicates that Bestpay Marketing Limited was.

(3) Mr Sacco was not able to provide any convincing explanation as to why, if it was not involved in marketing the arrangements, OBL's details appeared in the Compliance Pack or why, if, as he suggested, they was not in fact authorised to act for OBL, Ms Couch and Mr Costello stated they were acting for OBL in their dealings with participants. I note also that there was correspondence in the bundles showing that participants had received the marketing document included in the pack from OBL.

(4) Whilst Mr Sacco referred to the fact that he had access to the records of OBL, he did not produce any records in support of the assertions he made. Nor did OBL produce any witness who could attest to the activities of the entities Mr Sacco asserts were involved in marketing the arrangements.

(5) Mr Sacco was plainly involved in the arrangements given he signed the legal and accounting document which was included in the Compliance Pack, he signed some of the loan agreements (albeit on behalf of another party) and he was described as the Compliance Director in the Compliance Pack. He had no convincing explanation as to why he was described as the Compliance Director of OBL in the Compliance Pack if he had no role in relation to it at the relevant time. He did not state what other entity he was acting as such a director of if it was not OBL. In light of his personal involvement in the arrangements and the above factors, Mr Sacco's apparent inability to clarify his assertion that another party marketed the arrangements appears evasive.

51. OBL argued that it is not a promoter within the meaning of s 307 for the following main reasons.

(1) Neither FMST nor OBL provided tax services to the participants. FMST merely engaged them as consultants in a tax efficient manner. OBL provided services to FMST, acting only as its agent, in respect of that business. The fact that OBL is mentioned in the marketing material does not alter the nature of these contractual arrangements. This merely reflects the fact that OBL was acting as such an agent in identifying participants to act as consultants for FMST. Moreover, it is not in any event clear that the references to Bestpay are to OBL; that is the trading or brand name for a number of entities.

(2) The arrangements do not involve tax avoidance so that they do not constitute notifiable proposals or notifiable arrangements. These circumstances are no different to other cases where payments for a worker's services are contingent and performance-based. It cannot be the case that all those who pay such sums provide services in relation to taxation on the basis that the tax is deferred until the point of receipt. The worker has not received an economic benefit and avoided tax liabilities; rather the tax traces the economic substance of the arrangement. The worker has paid a high price for the deferral of tax as the funds have simply not vested in him at all.

(3) In *RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) (Appellant) v Advocate General for Scotland (Respondent) (Scotland)* [2017] UKSC 45 Lord Hodge expressly stated that payments made to trustees to be held by them subject to certain performance conditions being met cannot be treated as though they are a payment of earnings to the employee (at [41] and [47] (referring to the case of *Edwards v Roberts* (1935) 19 TC 618). The present case is far simpler. FMST simply did not make outright payments of the funds under the services contracts until the specified targets were met. There cannot be any greater provision of services relating to tax here than there would have been by the employer in *Edwards v Roberts*.

(4) The other conditions for there to be notifiable arrangements were not met for the reasons set out below.

52. On the points set out at [51]:

(1) For the reasons already set out, the documentary evidence establishes to the required standard of proof (on the balance of probabilities) that, at the relevant time, OBL provided tax services in marketing these arrangements to participants and making them available to participants. As set out above, of particular relevance in this context are the contents of the Compliance Pack, the documentary evidence that the participants received the marketing document included in this pack from OBL/Bestpay (see [23] and [26]), the evidence relating to Ms Crouch and Mr Costello's activities (see [28] to [33]) and the evidence relating to how the documents were circulated (see [20]). I note the points made above as regards Mr Sacco's evidence:

(2) For the purposes of determining whether there are notifiable proposals or arrangements, the question is not whether the arrangements involve tax avoidance but whether an informed observer (having studied the arrangements) would conclude that the main purpose of the arrangements was to enable a participant to obtain a tax advantage which specifically includes an advantage in the form of the deferral of any payment of income tax. As already set out, in my view, there can be no doubt that such an observer would conclude from the design and effect of the arrangements that their main purpose was to enable the participants to defer paying income tax on the sums received for their work (if not to avoid tax altogether). There is no other discernible commercial reason for the use of the deferral mechanism under the services contract and the loan. Mr Sacco asserted that the arrangements were made for administrative convenience but these elements of them are plainly not needed for that and do not facilitate that.

(3) I have addressed OBL's other arguments as to why the arrangements do not constitute notifiable arrangements below.

53. I have set out the following arguments OBL made that HMRC have not established that the requirements of regulation 10 are satisfied with my comments underneath:

(1) *OBL*: The word "standardised" is defined by the Merriam-Webster dictionary as "to bring into conformity with a standard". It refers, therefore, to an alteration to be made to something so that it conforms with a standard. On the basis of HMRC's asserted facts, a document used by one worker has simply been applied for use with another worker. The documents were already in a form which allowed them to be applied to other workers, as is the case with any legal precedent or form. It does not follow from the fact that the person who engages workers requires them to meet performance targets that this has been

done to conform to a standard. It is something he would have done with each participant had the others not existed - just the way a landlord would exact rent from each of his tenants even if he had had fewer of them or only one of them.

In my view, on its natural meaning as used in the overall context of regulation 10, the term standardised documentation refers to documentation provided by a person to clients in circumstances where the clients usually are not permitted or required to make material changes of substance to the terms. From the evidence set out above, that appears to be the case here.

(2) *OBL*: HMRC have not established that:

(a) The form of the documents was designed by OBL. HMRC have not argued that the final choice as to the form of the documents rested with OBL and/or that the form could not have been suggested by another party.

(b) The form of the documents was not tailored to reflect the circumstances of the particular participant. The fact that HMRC have produced documents which are in the same form does not mean that there may not be other documents which were tailored.

(c) The participants had to enter into a specific transaction or series of transactions. The amount of loans and outrights payments varied from worker to worker. Participants were not forced to take a loan for a particular amount or to take a loan at all. Moreover, it is not sufficient for HMRC to show that more than one participant entered into a similar transaction. That is simply not the same as establishing that there were participants who did not enter into those transactions.

In my view, HMRC have provided sufficient evidence to establish that on the balance of probabilities OBL established the form of the documents, the documents were not tailored and that the participants entered into specific transactions or a series of transactions. On (c), the requirement is that "a client must enter into a specific transaction or series of transactions". I do not regard the term "must" as connoting that there is somehow an element of compulsion for the client to enter into the relevant arrangements or that multiple clients must have entered into the relevant arrangements. Rather this requires that "*a* client" has in fact entered into a specific, in the sense of a clearly defined or clearly identified, transaction or series of transactions.

(3) *OBL*: It would not be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage. There was no tax advantage on the basis that, as HMRC argue, there was a deferral of any payment of tax within the meaning of s 318.

(a) There is such a deferral where the liability has arisen in the first place and the payment has been postponed or where something was to be done but was not done or it was done in a way which resulted in a postponement of the liability.

(b) There is no "deferral" where (a) something might possibly have been done but was not done or was done in a way which resulted in a postponement of the liability or (b) something might possibly have been done but was not done or was done in a way which resulted in a complete preclusion of the liability.

(c) In any event, HMRC would need to establish what it is that they assert would have been or might have been done. There cannot be a presumption that (i) but for the arrangements, the participants would have been paid outright earnings as the making of payments subject to contingencies is commonplace, or (ii) had the payments not taken the form of a loan, an amount equalling the loans would have been paid to the worker as any agency would be expected to retain a significant mark-up or (iii) that a person would always prefer to be paid outright rather than owing funds to another person. It is commonplace for asset protection and family estate planning reasons, among others, for funds to be held in trust of which the person is a beneficiary.

(d) One would expect the words in the statute to make clear that it is intended to catch such circumstances as those described above if that were the case. In that context, the decision in *Vestey v IRC* [1980] AC 1148 is relevant. In that case it was said that "the courts, if they are satisfied that the words used, on one interpretation, go so far as to create extreme injustices and departure from fiscal propriety, are well entitled to take another interpretation which does not do this". In the present case, where the disputed words have various constructions, then the tribunal must resist the one which gives HMRC the power to collect tax on a non-transaction on the assumption that it would or should have happened.

The comments made at [52(2)] also apply here. In my view, it is reasonable for an informed observer to judge whether the main purpose of the arrangements was to enable the client to obtain a deferral of tax by reference to the nature and timing of the tax charge which it is reasonable to suppose the client would otherwise be subject to absent the arrangements. In this case, it would be reasonable to suppose that, but for the arrangements, the participants would have simply provided their services to the end-clients for remuneration and would have been taxed accordingly.

(4) *OBL*: OBL did not make the arrangement available. This imposes a high threshold on the basis of *Campbell v Rochdale General Commissioners and others* [1975] STC 311. This can refer only to disclosing the concept in a way which allows or enables (practically and legally) the person to enter into the arrangement If a designer A has an idea and then advises an employer, B, on terms that B may disclose the idea to B's prospective employees only on the condition that the employee may rely on the idea with A's approval, then it follows that it is A who (when he gives permission) makes the arrangement available to the employee. This view has also been approved of in case such as in *Invensys Systems Inc v Director of Income Tax* 12 ITLR 183. In this case, HMRC have not adduced evidence or even asserted that OBL disclosed the arrangements to the participants and that it did so in a manner and on such terms that the worker then become able (legally and practically) to implement the arrangement.

In my view, on the natural meaning of this requirement, it is satisfied on the basis that OBL made the arrangements available for implementation by more than one other person (meaning other than the client referred to earlier in the provision) in the sense that it allowed or enabled participants to avail themselves of the arrangements by providing information on the arrangements and the required documentation to implement them.

54. OBL disputed that the other requirements in s 314 are met for similar reasons to those set out above. OBL added that, even assuming there is a tax advantage for these purposes, it is not one of the main benefits. The benefit to the participant was that he enters into a services contract and was able to render his services in return for a fee and on receiving a loan. In addition, he received the prospect of receiving outright payments and, in the meantime, achieved asset protection. If the worker were given the option of not paying tax but forfeiting all the aforesaid benefits, it is unlikely that he would have entered into the arrangements. He would simply not work at all.

55. For all the reasons already set out, I do not accept this argument. There is plainly no discernible benefit for the participants in the deferral mechanism under the services contract and the loan other than the expected tax advantage. The benefit OBL identifies is, in effect, simply that the arrangements enabled participants to receive indirectly sums intended as payment for their work for clients. That could, of course, have been achieved in a number of ways the simplest being for the participants to enter into agreements with their clients for the provision of their services in return for payment of the agreed remuneration

56. Section 314A provides that the tribunal *may* make an order that arrangements are notifiable only if satisfied that ss 306(1)(a) to (c) apply to the relevant arrangements. OBL argued that the use of the term "may" indicates that the tribunal has discretion not to make an order even if satisfied that the relevant conditions are met. OBL put forward a number of reasons as to why the tribunal should not exercise any such discretion to make an order. However, in my view:

(1) Read in context, the use of the term "may" is not intended to confer discretion on the tribunal as to whether an order is to be made or not. Rather, it indicates that it is only where the specified conditions are satisfied that the tribunal "may" make an order in the sense that it "is permitted" to make an order.

(2) In any event, for the reasons set out below I consider that the appellant has not put forward any reason which would justify the tribunal in not making an order if the tribunal does have any discretion in that respect.

57. OBL argued that the tribunal must exercise the discretion OBL considers the tribunal has in this regard on the basis of the principles set out in *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223. In its view, it would be unreasonable for the tribunal to make an order for the following reasons:

(1) If the tribunal were to make an order, it would be open to HMRC to give an "advance payment notice" to the participants under s 219 of the Finance Act 2014; one of the conditions for HMRC to be able to do so applies in respect of "DOTAS arrangements" (under s 219(3) and as defined in s 219(5)(a)). The recipient of an "advance payment notice" is required to pay the amount specified within it and, if the payment is not made, HMRC can charge penalties and there is no right of appeal to the tribunal. It follows that the effect of the tribunal making an order would be that persons unknown to the tribunal and of whose circumstances it is unaware would become liable to pay amounts on account of tax and penalties which otherwise they may never have become liable to pay in circumstances where they have no right of appeal.

(2) The tribunal should consider the purpose which underlies HMRC's current application and, if it considers the order is sought so that advance payment notices might be issued, the tribunal should have regard to whether tax

would eventually become payable by the workers as a court would have to do had there been an application for an interim injunction.

(3) In the present case, there is no suggestion by HMRC whatsoever that tax would be payable by the participants as the imposition by an agency of performance targets or the making of loans does not give rise to tax.

58. In my view, that the issue of an order under s 314A may entitle HMRC to issue "advance payment notices under s 219 of the Finance Act 2014 is simply not relevant to the question of whether an order should be made under s 314A in the first place. Essentially, OBL's complaint is that for HMRC to use their powers under s 219(3) and the related provisions in the Finance Act 2014 would be unfair as regards the participants. However, the correct form of recourse in that respect would be for the recipients of the notices to challenge *those* provisions and/or the validity of a notice issued under them. Assessing whether an order should be made to OBL under s 314A can be made only in the light of the purpose of s 314A itself as it operates in the context of the overall DOTAS regime and not other provisions which HMRC may or may not seek to apply.

59. Finally, OBL made detailed submissions that the provisions relating to the making of an order under s 314A or 306A infringe the prohibition on restrictions on the movement of capital between Member States and between Member States and third countries under article 63 of the Treaty on the Functioning of the European Union ("**TFEU**"). That is on the basis that:

(1) The loan which Retentia Ltd made to participants is a movement of capital between a third country and a Member State.

(2) The far-reaching consequences of the tribunal making an under s 314A or 306A are capable of prohibiting, impeding or rendering less attractive taking such a loan from parties in third countries. The consequences include that (a) as set out above, HMRC could give an "advance payment notice" to participants under s 219 of the Finance Act 2014, and (b) the promoter is subject to penalties and other requirements, in particular, given that arrangements are deemed always to have been disclosable when an order is made under s 314A which may require it to breach the confidentiality of participants.

(3) The provisions cannot be justified on the basis that they are proportionate given that they may result in liabilities arising even in cases where no tax might be payable at all. They do not target cases where there is tax avoidance in an EU sense (see *Cadbury Schweppes Case C-196/04*).

(4) The tribunal should adopt a conforming interpretation of the legislation so that the expression tax advantage in s 306(1)(b) and (c) should be construed to refer to tax avoidance in the EU sense (which does not include genuine transactions). If a conforming interpretation cannot be applied then the relevant provisions should be disapplied.

60. In my view, as HMRC argued, there is no scope for this argument in these circumstances. The DOTAS regime is designed essentially to facilitate HMRC gathering information as regards arrangements falling within their terms by requiring specified persons to disclose details of such arrangements with specified consequences, such as the imposition of penalties, for the failure to make such a disclosure where required. An order made under s 314A that arrangements are notifiable arrangements means that they are arrangements which should have been disclosed. I cannot see that it can be said, therefore, that these rules prevent anyone from taking out a loan or in any way restrict their ability to do so or make it unattractive to do so; the effect of the order is simply that the arrangements involving

the relevant loan are notifiable arrangements which should have been disclosed to HMRC.

61. Given the conclusions set out above, it is not necessary to consider the application of s 306A.

Order

62. For all the reasons set out above, pursuant to s 314A **IT IS HEREBY ORDERED** that the arrangements summarised at [3] above are notifiable arrangements within the meaning of s 306.

Rights of appeal

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

HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 18 AUGUST 2020