[2020] UKFTT 459 (TC)

TC07934

Appeal number: TC/2017/05531

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 -

WHITE COLLAR FINANCIAL LIMITED **Respondent**

TRIBUNAL: JUDGE HARRIET MORGAN

Sitting in public at Taylor House, 88 Rosebery Avenue, London on 28 October 2018

Ms Rebecca Murray, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Applicants ("HMRC")

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 [6] 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 White Collar Financial Limited ("**WCL**") 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).

3. No representative of or for WCL attended the hearing. I was satisfied, however, that in all the circumstances it was in the interests of justice and fairness to proceed with the hearing in the absence of WCL. I note the following:

(1) As set out below, the tribunal sent notice of the hearing to WCL's address provided for the purposes of these proceedings, namely, its registered office at 4 Bury Street, London, EC3A 5AW but it was returned to the tribunal. Rule 13(5) of the First-tier Tribunal (Tax Chamber) Rules state that the tribunal and each party may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving written notification to the contrary. The tribunal was not notified of any change of address.

(2) The tribunal received evidence from Mr Simon Norman, a lawyer in HMRC's Solicitor's Office and Legal Services, that HMRC also had difficulty corresponding with WCL at the specified address but that documents were delivered to it as set out below.

(3) Mr Norman set out the following in his evidence (as supported by documents he produced with his witness statement):

(a) He sent a letter dated 9 March 2018 to WCL's director, Mr Anthony George Andrew Ward, at WCL's registered office address by Royal Mail special delivery. The Royal Mail's record of the attempt to deliver that letter stated that they were unable to deliver this item and so returned it to the sender.

(b) He then sent a letter dated 27 March 2018 to Mr Ward at his residential address enclosing the letter dated 9 March 2018 and a copy of the bundle for the hearing as required by the directions issued by the

tribunal on 20 February 2018. That letter and its enclosures were returned by the Royal Mail stating "addressee gone way".

(c) HMRC re-sent the letter of 27 March 2018 letter to Mr Ward and he received it on 5 April 2018 as evidenced by the Royal Mail's proof of delivery which included Mr Ward's signature (which accords with the signature on the witness statement he produced to the tribunal of 12 September 2017).

(d) In the letter of 9 March 2018 Mr Norman mentioned that he had set out HMRC's listing information so that the tribunal could proceed to make arrangements for the hearing of HMRC's application.

(e) The tribunal then proceeded to fix the hearing date of 29 October 2018 as confirmed by the hearing notices. In a letter dated 17 September 2018 from the tribunal to HMRC, the tribunal stated: "We write to advise you that the Tribunal's Notice of Hearing issued to the Respondent at their registered address of 4 Bury Street, London EC3A SAW, has been returned undelivered by Royal Mail marked RTS. The hearing scheduled for 29 October 2018 will proceed as arranged, so that the Appellant can establish their case even if the Respondent does not participate."

(f) HMRC subsequently issued two identical letters each dated 8 October 2018 to Mr Ward at WCL's registered office address and Mr Ward's residential address. These letters referred to the date and venue of the hearing and enclosed a copy of HMRC's skeleton argument and also stated: "Lastly, pursuant to Direction 8 I confirm that HMRC requires you to be available for cross-examination at the hearing on 29 October at Taylor House, 88 Roseberry Avenue, London, EC1R 4QU."

(g) Both of the letters of 8 October 2018 were sent by Royal Mail Special Delivery:

(i) The letter sent to Mr Ward at WCL's registered office address was returned as undelivered. The Royal Mail record shows that the letter was delivered on 9 October 2018 and was signed for by a person named Fay but the letter was subsequently returned to HMRC's Solicitor's Office at Bush House on 11 October 2018. The Royal Mail record shows that the letter was signed for by a person named Adam on 11 October 2018.

(ii) The letter sent to Mr Ward at his residential address was delivered on 9 October 2018 as evidenced by Royal Mail's proof of delivery which confirmed that the letter was signed for by "WARD" on that date.

4. It is plain from HMRC's evidence that the appellant (acting through Mr Ward) was aware of the date of the hearing and that Mr Ward was aware HMRC wished to cross-examine him as a witness. In such circumstances and in the absence of any communication from WCL/Mr Ward setting out any reasons for non-attendance, it is reasonable to assume that the appellant/Mr Ward simply chose not to attend the hearing notwithstanding this knowledge and that there were no particular circumstances preventing attendance.

5. In all the circumstances, I was satisfied that for the purposes of rule 33 of the First-tier Tribunal (Tax Chamber) Rules (a) reasonable steps were taken to inform WCL of the hearing and (b) it was not in the interests of justice and fairness to postpone the hearing, in particular, given that as WCL chose not to attend this

hearing, there is no reason to suppose that it or any representative would attend any reorganised hearing.

Arrangements

6. As evidenced by the documents included in the bundles produced to the hearing, in outline, the arrangements specified by HMRC in respect of which they sought an order under Part 7 operated as follows:

(1) Individual participants in the planning signed up to:

(a) A partnership agreement dated 1 March 2012 in respect of the Surefield partnership which admitted the participants as partners. Imperium Limited, an Isle of Man company, was the managing partner of the Surefield partnership. The partnership agreement included provisions that the partnership's business was that "of providing various services to third parties under a contract for services" and that each partner was to receive "on the last day of each month on account of his share of the profits for the then current accounting period such sum as the Managing Partner may determine".

(b) A special debt facility agreement with On Target Ltd, a company incorporated in the Isle of Man, which stated that it provided for an unsecured "loan" facility which was repayable on demand by the "lender".

(2) The Surefield partnership was engaged by On Target Ltd for the supply of each participant's services as a "consultant". The participants often carried on working for the same party they had been working for prior to participating in the planning.

(3) The participant in effect received money from his or her employer or customer for the provision of the individual's services as channelled via the Surefield partnership and On Target Ltd. Amounts were deducted from the money received from the existing employer or customer in order to pay fees to WCL:

(a) The net money which the individual received via the Surefield partnership (in some cases as low as 15% of the total receipts) was paid as drawings at the sole discretion of the managing partner, Imperium Limited**.**

(b) The net money received via On Target Ltd (up to 85% of the total receipts) was paid as a "loan" under the special debt facility, albeit that participants were told by WCL that the loans would never have to be repaid and the loans were not declared on the individuals' self-assessment tax returns. The individuals' receipts are illustrated by bank statements disclosed to HMRC as included in the bundles produced to the hearing.

Evidence and facts

Witness evidence

7. 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 above as obtained by HMRC from participants in the planning whose tax returns HMRC had enquired into in connection with the planning. 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. Mr Wood said that it was through their

enquiries into the tax position of the participants that HMRC received copies of partnership agreements, loan agreements and bank statements showing payments made to the participants under the arrangements.

8. Mr Wood said that the arrangements were referred to him around March 2015 and, having reviewed the relevant documents, he formed the view that they may be notifiable arrangements, WCL may be a promoter of those arrangements and further information ought to be obtained to clarify these issues. He issued a letter to WCL dated 30 October 2015 asking why they did not consider the arrangements to be notifiable within the meaning of Part 7. As no response was received, on 2 December 2015 he issued a formal notice under s 313A.

9. Acting on behalf of the appellant, Mr Ward replied to HMRC on 18 December 2015 as follows:

> "White Collar Financial Limited ("WCF") ceased trading on 27 March 2015, but its business was that of acting as UK based administration agent for On Target Limited.
>
> Certain UK resident individuals ("the workers") would seek to undertake specific assignments for end clients, those assignments largely being sourced via a variety of UK based employment agencies, On Target Limited acted as a contracts management business and instead of contracting with the employment agencies direct we undertook a specific role as its agent in respect of the dealings with those employment agencies.
>
> We understand that On Target Limited fulfilled the contracts by itself contracting with others, including the Surefield partnership, the workers in this regard supplying their services via that partnership. However, we have no knowledge of what the relationship exactly was between On Target Limited and Surefield or the details of any contractual arrangements between those two entities; this simply had nothing to do with WCF, but we are aware that the end workers were partners of Surefield and our primary relationship was with On Target Limited.
>
> Our day to day work consisted of the following:
>
> (i) Acting on behalf of On Target Limited with regard to administering the contracts issued by the employment agencies.
>
> (ii) We would administer the issuing of invoices to the employment agencies in question.
>
> (iii) We would chase payment of the invoices as necessary and collect and reconcile the funds received before accounting for these monies to On Target Limited. None of the monies received belonged to WCF, we merely acted as agent for On Target Limited.
>
> (iv) We did have contact with the workers from time to time, but this was in the performance of our administration duties only.
>
> (v) We issued invoices for the work carried out for On Target Limited. These invoices were issued directly to On Target Limited and they were paid separately (i.e. WCF did not retain any monies collected from the employment agencies, the invoices were paid independently by On Target Limited). Our invoices were based on the work done, measured on a "time and effort" basis – WCF did not take any form of fixed percentage of the amounts collected from the employment agencies. The workers did not "belong" to WCF."

10. Mr Ward also said in the letter that WCL was not a promoter as it was not involved with services relating to taxation. Her asserted that WCL's role was purely administrative; it was not one of being a promoter.

11. On 22 January 2016 Mr Wood replied stating he did not agree with WCL's analysis and, on 7 November 2016, he notified WCL that HMRC proposed to make an application to the tribunal for a ruling under Part 7.

12. Mr Ward provided a short witness statement dated 12 September 2017 as follows:

> "1 am the sole remaining director of White Collar Financial Ltd. The company ceased trading on 27 March 2015 and has no assets to take advice to fight this case so I can only give you my non professional summation of the facts based on my own research as a non tax specialist.
>
> When we originally started trading the advice we had was the service as an administration company we were providing was not caught under the DOTAS rules. If HMRC are successful in persuading you under the rules as they now stand that we were promoters then so be it. I can only tell you we did not see ourselves that way nor was that the advice we had when we started.
>
> To be successful in persuading you that what we were doing was a 'notifiable arrangement' I understand they have to prove one of three Hallmarks are met, namely -
>
> 1: Confidentiality, 2: Receipt of a premium fee or 3: That this was a standardised tax product
>
> re 1: There was no confidentiality agreement in place with the contractors and the service we provided was well known in the marketplace.
>
> re 2: We received a fixed fee of £50,000 per month from On Target Ltd which was not as in anyway a premium or success fee, just a commercial charge based on cost & labour. The majority of this fee, circa £35.000 was spent on overheads including rent and staff salaries.
>
> re 3: We were not tax advisors and had no part in the form of any of the documentation used by On Target Ltd or The Surefield Partnership to whom we introduced the contractors.
>
> I believe that we acted entirely correctly and HMRC are incorrect in saying that there was a notifiable arrangement under the DOTAS regulations in the period we traded and that White Collar financial are deemed to be a 'Promoter' as defined in s 307 FA 2004. White Collar Financial's role was purely administrative. It was not one involved with services relating to taxation.
>
> Our day to day work consisted of the following:
>
> 1) Acting on behalf of On Target Ltd with regard to administering the contracts issued by the Employment Agencies
>
> 2) Issuing invoices to the Employment Agencies
>
> 3) Chasing payment of invoices as necessary and collect/reconcile the funds received before accounting for the monies to On Target Ltd. None of the monies received belonged to WCF; we merely acted as an administrative agent for On Target Ltd.
>
> 4) We did have contact with the workers from time to time, but this was in the performance of our administration duties only
>
> 5) WCF issued invoices for the work carried out for On Target Ltd. These invoices were issued directly to On Target Ltd and they were paid separately. We did not-retain any monies collected from the- Employment Agencies. The invoices WCF raised for its services were based on a fixed fee as mentioned above.
>
> 6) We did not pay any referral fees to word-of-mouth referred clients. Any monies were paid directly from On Target Ltd.

> I am sorry the company is not in a. position to fund professional advisors to assist in presenting the technical points in issue but I have tried to set out for you as best l can what was the reality of the situation and I hope this will assist you in your ruling."

13. I note that, as is consistent with the assertions made in the earlier letter to HMRC (see [9]), Mr Ward asserted in his witness statement that WCL had no part in the form of any documentation used for the planning, WCL did not provide services related to tax, WCL had contact with the participants in the planning only in the performance of its administrative duties and it did not pay any referral fees to word of mouth clients. However, the information in the bundles which HMRC obtained from participants and their advisers indicates that these assertions are not correct. I have set out below details of some of the examples in the bundles of the information provided to HMRC.

Information in relation to individual participants in the arrangements

14. In a letter to HMRC of 15 December 2015 (the "**Grant Thornton letter**"), Grant Thornton set out details of the arrangements used by their client, Mr Midalia. They noted that from February 2013 he did contracting work for a company called Spinnaker Red Limited under arrangements operated by WCL as follows:

> "He used an umbrella company called White Collar Financial which operated a Contractor Loan Scheme arrangement.
>
> Under the arrangement an Isle of Man company called On Target Limited engaged with a partnership called the Surefield Partnership for the supply of consultants.
>
> As suggested in the HMRC enquiry letter, On Target Limited provided Mr Midalia's services to an end user for a commercial fee. Mr Midalia then received a relatively small partnership profit share and the remainder of his fee was paid by loan…….
>
> Mr Midalia's earnings for the period 18 February to 5 April 2013 were £5,500. This comprised a partnership profit share of £2,500…… and a loan payment of £3,000 which has never been repaid…..
>
> …upon securing his job with Spinnaker Red Ltd, Mr Midalia made enquiries with Spinnaker Red Limited regarding any recommendations they could make in terms of accounting services. They recommended White Collar Financial as they had a working relationship with them and referred many of their contractors to them for accounting services.
>
> Mr Midalia made contact with White Collar and met with them at their offices in London where they verbally explained their payment scheme. Before proceeding to use the scheme, Mr Midalia conducted research online to understand if the proposed arrangement was legal and legitimate. He found no evidence to the contrary.
>
> Mr Midalia also contacted White Collar by email asking them to confirm that their scheme was legal….As is suggested by the enclosed copy email dated 25 March 2013, Mr Midalia was verbally assured by White Collar that the scheme was fully legal.
>
> White Collar encouraged existing contractors to refer others to the scheme. This is clear in the email signature used which included the line "*White Collar offer an excellent referral scheme for existing clients. Once you join us, if you successfully refer someone to us, we will pay you £500*."
>
> White Collar continued to promote their scheme to other contractors in the London IT market.
>
> Additionally, White Collar sent out an email regarding commentary on the 2013 government budget stating that their arrangements remained tax compliant…..

> The advice provided to Mr Midalia at the time he joined the partnership is detailed ..above. Following his decision to proceed, Mr Midalia also received the documents/materials listed below…..
>
> > A copy of the White Collar Financial Limited and Spinnaker Red Limited Schedule Agreement dated 3 September 2013;
> >
> > A letter to Mr Midalia from On Target Limited in relation to the On Target Business Development Fund;
> >
> > A copy of a Specialty Debt Facility Agreement between On Target Limited and Mr Midalia dated 29 April 2013.
>
> Mr Midalia has also provided his … current account statement for the period 26 March to 22 June 2013……it can be seen from the enclosed statement that total payments credited to the account during the three month period were £3,750 from Surefield and £17,200 from On Target Limited. The largest receipt being a loan payment from On Target Limited of £15,900 received on 31 May 2013."

15. Grant Thornton went on to explain that Mr Midalia continued to work for Spinnaker Red Limited using the same arrangements during the tax year 2013/14. In that year he earned £100,000, comprising a partnership profit share of £15,000 and a loan of £85,000 which had never been repaid. In 2014/15 he earned £15,000 in relation to work for Spinnaker Red Limited comprising a partnership profit share of £2,500 and a loan of £12,500 which had never been repaid.

16. The emails enclosed with the Grant Thornton letter included the following:

(1) An email dated 25 March 2013 from Mr Matt Lidster of WCL to Mr Midalia which was sent in response to the following query from Mr Midalia to Katie Smith of WCL on 24 March 2013 (into which Mr Lidster was copied):

> "I've seen in the online forums that some White Collar contractors are getting HMRC letters lately. As I'm new to White Collar I just wanted to check that everything is ok and I'm not at risk at all of investigation due to any kind of tax avoidance scheme. Matt stated that the scheme I'm on is 100% legal with HMRC and falls in to the "tax planning" category, not "avoidance". Can you please confirm this is in fact the case and I've got nothing to worry about."

Mr Lidster replied: "All good but I'll call you this morning to give you some context and details…" His email contained a sign off with details of the referral scheme as referred to in the Grant Thornton letter.

(2) An email to Mr Midalia of 28 March 2013 from Mr Patrick McFadden, who was titled the Head of Client Management at WCL, in which he said the following:

> "We are writing to you, as is our standard approach, to give you pertinent feedback on the most recent budget delivered by the Chancellor….Much of the Budget focused on the UK's trading deficit and national debt and consequently, what measures will be taken to remedy the problem; the good news is that the impending Finance Bill of 2013 will leave us and you completely unaffected as there is no legislative alteration or variant that changes our compliant status. Please feel free to contact us if you require further details…."

17. The schedule agreement between WCL and Spinnaker Red Limited referred to in the Grant Thornton letter set out brief details of the appointment of Mr Midalia as a technical project manager from 4 September 2013 to 30 May 2014 at a rate of £450 per working day plus VAT on the basis that (a) the agreement was subject to the terms, conditions and definitions outlined in a Master Services Agreement, (b) the

agreement was subject to termination by WCL or Spinnaker Red Ltd giving four weeks' notice to the other party, (c) a working day would comprise of a minimum of 7.5 working hours, and (d) WCL would invoice Spinnaker Red Ltd on the last calendar day of each month for services provided in that month.

18. The letter from On Target Limited to Mr Midalia referred to in the Grant Thornton letter included the following statements:

> "As you are aware, On Target Limited is a contracts management business based in the Isle of Man.
>
> We source contracts being issued by various end clients for the supply of specialist technicians or other skilled individuals ("the Consultants") to carry out specific projects of varying durations and on varying terms……
>
> We are anxious to secure a long term relationship with the right skilled individuals in order to retain and grow our business. In order to foster goodwill towards this cause we have decided to continue the Business Development Fund ("the BDF"). For the foreseeable future and from time to time we plan to voluntarily introduce our own monies to the BDF, the sole purpose of which will be to offer benefits to Consultants.
>
> We have re-engaged with the Surefield Partnership for the supply of Consultants. We are aware that you are currently a working partner of Surefield and thus qualify as a Consultant able to benefit from the BDF.
>
> Whilst the range of benefits to be offered may expand over time, at this stage the only benefit that can currently be obtained from BDF is a loan facility. There is, of course, no requirement for you to drawdown on this facility; it is merely there for your benefit should you wish to so wish.
>
> Should you cease being a Consultant …then you will not be entitled to any further loan advancements. The extent of the loan facility……will increase from time to time as and when monies are allocated to the BDF. The extent by which each Consultant's loan facility will increase will be decided upon by the BDF Committee and will represent the Consultant's value to our on-going business. We will advise you from time to time as to the level of your loan facility with the Company.
>
> ….[The BDF] is now prepared to offer you a loan facility of £1,300….."

19. Another participant, Ms Lucy Perry, wrote to HMRC in a letter received by them on 5 March 2015 explaining the arrangements as follows:

> "I was told by the representative who I met at the very beginning that I would not be asked to pay back any of the loans……
>
> The person I met at White Collar was called Matthew Lidster. I'm not sure of his job title but I think he was a sort of client relationship manager. I have appended all saved email dialogue I have with him.
>
> I was also surprised at the lack of promotional material at the time as I had asked for something I could take to discuss with my partner but it was explained to me that it was a very exclusive company, working only with referrals from current clients and thus they didn't like to promote in such a way. Looking back at this now I see how that could but seen as rather suspicious but unfortunately at the time I was rather naïve and the referrals from my colleagues gave me confidence in using the company……
>
> The people who introduced me to the company were fellow contractors while I worked at RBS…..
>
> I was told categorically at the first meeting I had with Matthew Lidster that the company was completely within the law and that the way the company functioned was designed by people who had once worked for HMRC and used their industry knowledge to maximise earnings. That it was by no

> means a tax avoidance scheme and that it was what they described as a form of "tax planning" in that they would set aside exactly what was required to be paid as tax on my behalf and would transfer the rest of the funds to myself. This was all discussed in personal meetings and on the telephone. All representatives tended to answer any email queries with telephone calls."

20. Ms Perry also said in the letter that (a) there was a referral scheme as set out above and she assumed her colleagues had used this, (b) before entering into the arrangements she provided her services to RBS as a consultant acting through her own company, (c) her tax return was composed and submitted by an accountancy firm employed by WCL. They sent her a spreadsheet with some questions on it which she answered and they then compiled the tax return for her to approve and submit, and (d) she did not pursue any advice on this as she was told by the representative she met at the start that this was normal protocol.

21. The bundles contained an email from Mr Lidster to Ms Perry of 23 October 2012 in which he stated that he was attaching the following links "as promised: "www.turcanconnell.com" and "www.pumptax.com" and said that "I'll call you mid-morning tomorrow to cover-off any remaining questions that you may have and establish which direction you would like to take…". This email contained the sign off setting out brief details of the referral scheme. There were further emails demonstrating that Mr Lidster set up a meeting with Ms Perry around this time.

22. The bundles also contained:

(1) A similar email to the email referred to at [21] above from Mr Lidster to Mr Adam Alpha dated 17 May 2011 in which he said the following:

> "It was a pleasure to meet you this afternoon, thank you for your time and attention. Here are the links as promised [being the links set out at [21] above]. Also please review the link to HMRC's P11d form below, as discussed. Section H is the relevant section….. I will catch up with you by phone tomorrow morning to cover off any remaining questions that you may have and hopefully move things forward with Compliance Professionals."

(2) An email of 18 May 2011 from Pascoe Bailey of WCL to Mr Alpha which read as follows:

> "May I take this opportunity to welcome you on board with us. I will be your Client Services Contact and will be looking after your needs on a day-to day- basis. Matthew Lidster will still be your principle contact for all tax related matters.
>
> The Information Guide that HJP Limited will be posting to you will take you through the process and provide answers to frequently answered questions.
>
> Please read through the guide and let me know a convenient day and time for me to call you to discuss further, I will then be able to formally welcome you to White Collar Financial and to answer any queries that you may have.
>
> Please could you sign the contracts which you will be sent leaving the start day blank, and complete the P46 from if you don't already have a P45 and please return them to HJP.
>
> It is important all these documents are returned promptly. Without this documentation HJP Limited will not be able to pay you.
>
> If you already have authorised timesheets, please submit them to [an email address at WCL] or fax them to us."

23. The information provided to HMRC by the scheme users, Mr and Mrs Tennant, included the following:

> "….We believed that our tax affairs would be in order and all we had to do was wait for notification of when we had to pay our liabilities. We believed from verbal conversations that would pay our NI and relevant taxes appropriately….
>
> No we did not expect to repay the full amount of the "loan". This money is money I have earnt each month from implementing my services at Work Smart…Please note we did not literally take the phrasing of "loan" to mean we had to repay all this money…
>
> No we have not repaid any loans….we were are not advised that these should be paid back in full…
>
> Matthew Lidster nor any employees of White Collar Financial advised us that we would never have to repay these loan amounts. From our in initial conversations this was NEVER mentioned…..
>
> We had conversations with Matthew Lidster initially who advised us how they were HMRC compliant and how they would handle my affairs appropriately. After the initial conversations with him I then had Patrick as my contact who provided me with information for pay dates and chasing me for my time sheets…
>
> Again we would like to reiterate we did not receive any promotional literature or presentational literature. The only information I have received….is that we had verbal conversations……
>
> [Mr Tennant said that he was recommended to the scheme by a work colleague.] We believed that White Collar Financial would give expert advice on how to manage our money and our tax allowances honestly and efficiently….
>
> Initially before I joined White Collar Financial I had numerous conversations with Matthew Lidster who discussed with me verbally how they were compliant with HMRC….
>
> Patrick from White Collar advised us that we would be contacted at certain times of the year to arrange our tax return and pay it.
>
> We did not consider our tax affairs as we put our trust in White Collar Financial who outsourced our tax affairs to Outsourced Accounting 7 Payroll Services Ltd…..All our financials and tax affairs were being fully managed by White Collar Financial and Outsourced Accounting…."

24. In a letter to HMRC of 22 December 2014, Mr Tennant's comments included the following:

> "I entered into these arrangements as a recommendation from a work colleague. At that time I was relatively new to contracting and at that point I wasn't sure if this would be a short term agreement and didn't want to set up a limited company so early on with being self-employed. I received no brochures, glossy magazines or any advertising. Communication was predominantly through phone conversations with a man called Patrick at White Collar Financial Ltd company and the only emails I have are the ones I referenced [above]."

25. The emails from WCL which Mr Tennant referred to in his letter of 22 December 2014 were (a) one from "Katie" stating "demonstrate its compliancy with HMRC" and (b) those he received telling him when payment was made. He reiterated at the end of the letter that he could not provide promotional literature as he was not given any by WCL and that he enclosed a confidentiality agreement with WCL (unsigned as he did not have the original).

26. The bundles contained correspondence from an accounting firm, AML Benson, in relation to the arrangements entered into by their client, Mr Field. In a letter to HMRC of 8 April 2015, their comments included the following:

> "Our client joined the Surefield Partnership on or around June 2012 and left in July 2014.
>
> Our client received something in the order of £46,000 in loans for the period to 5 April 2013….
>
> Our client was made aware of the scheme by another Surefield partner; and there was no promotional material to speak of. However, the partnership is marketed by White Collar Financial, who promote their service as a bona fide financial services company offering professional solutions. In this regard our client thought he was receiving professional advice.
>
> And you will see from their website….the company promotes its offering by suggesting that both the IR35 and working time regulations are something for contractors to be concerned about and the basis of their offering to contractors is to counteract and provide a tax efficient environment in which they can conduct their business.
>
> The company also promotes itself in general and, in particular to our client, based on service quality trust and innovation. Our client had no reason to think at the time of joining the Surefield Partnership that there was anything untoward about White Collar Financial and the Surefield Partnership….
>
> [AML Benson referred to loans made by On Target Ltd to their client but said that they did not accept that they were not repayable or that the sum "loaned" was taxable]."

27. The bundles also included a letter from PricewaterhouseCoopers ("**PwC**") to HMRC dated 19 November 2014 in relation to their client, Mr Charles Siddons. In the letter, they set out the following:

> (1) Mr Siddons was introduced to an organisation called WCL by a colleague at a time when he was about to embark on some consulting work. He "decided to engage [WCL] to administer and bill on his behalf. He became a member of the Surefield partnership which was the provider of Mr Siddon's services". WCL billed the end user for Mr Siddons' services on behalf of the partnership.
>
> (2) Mr Siddons received three types of payment: (a) his partnership profit share, (b) expenses from the end user if he incurred them, and (c) loans advanced from On Target Limited who "provided loans to members of the Surefield partnership as a benefit in order to retain them as part of a stable of skilled consultants".
>
> (3) No payments of the loans had been made to date.
>
> (4) "Mr Siddons has no promotional literature, nor does he believe he was given any. Mr Siddons, having been introduced to [WCL], met with them directly and they explained how they administer on behalf of consultants….Mr Siddons was not provided with any promotional literature. Mr Siddons is trying to obtain a copy of the partnership agreement. We enclose a sample loan document, a sample loan advance confirmation and a letter from Hays confirming that the work with Serco….would be via [WCL]. Mr Siddons was only party to the partnership agreement, the consultancy agreement and the loan agreements. If there were further agreements between the parties Mr Siddons was not directly a party to them."

28. In the bundles there were also notes of telephone conversations participants in the arrangements had with WCL. One note of 20 November 2014 stated the following:

> "Spoke to Matthew Lidster at White Collar regarding concerns with HMRC letter
>
> He assured me 2-5% of clients receive this letter each year, the first letter will go out saying I will respond with the requested information in January and they will craft a response that discloses only what is required under law in this letter. This letter will ensure the HMRC close case as they have no evidence to continue against me and would have to target the partnership or introducer for further info and the and White Collar has 100% success rate.
>
> Matthew mentioned that the less that is disclosed the less the HMRC have on file and cannot build a case. He stressed this with a number of examples that showed why they do not provide a paper trail as the scheme is compliant under letter of law but evidence might mean it is not in the spirit of the law. I was advised not to disclose all in case I was dragged into court.
>
> Matthew urged me not to take too much notice of the HMRC enquiries talked about contractor blogs and forums as they were different cases, and full of misinformation, gossip and not reliable.
>
> I asked about previous entities used HJP and SFP, and whether or not loans are written off and will I get letters showing this, he replied that again everything is done in accordance with the letter of the law and written responses would not be given due to paper trail.
>
> He asked me numerous times if I understood why there was no paper trail and I replied I that I thought so. I was uncomfortable with him pushing to say that I am fully aware of what is happening as many technical terms were used and I'm still unsure how it all works.
>
> I asked if I was still partner in surefield and he replied if no activity in 3 months then I am automatically removed. My last activity was when I started full time In June 2013 so this would have happened. I do not need to write a letter.
>
> He did mention that ultimately it was my letter, my affairs and my response was up to me but urged me to take their advice and let with deal with this as they are experienced and I should allow them to handle this."

WCL's accounts

29. The bundles also contained extracts from WCL's accounts which showed that (a) for the years ended 31 December 2013 and 31 December 2012 it had turnover of £38,354, 507 and 40,984,207 and profits before tax of £279,461 and £246,99 respectively and (b) for the years ended 27 December 20015 and 29 December 2014, it had turnover of £790,661 and 25,914,973 and profits before tax of £64,511 and £169,869 respectively

Application under s 314A

30. HMRC submitted that, based on the above evidence, WCL is a "promoter" of "notifiable arrangements" and that the requirements of s 306 are satisfied, such that the tribunal should make an order under s 314A that the arrangements summarised at [6] above are notifiable. HMRC said that in forming this conclusion the tribunal should draw appropriate inferences from WCL's decision not to adduce any documentary evidence following the principle referred to in *NRC Holding Limited v Danilitskiy and Another* [2017] EWHC 1431 ("*NRC*") (see, in particular, [24], [25], [45] and [46] of the decision in that case). HMRC also noted that the person on whom the burden of proof does not rest (namely, WCL) must make clear their case to avoid unnecessary evidence being called (see *Fairford Group plc and Another v HMRC* [2014] UKUT 329 at [48] and [49]). In their view, WCL had failed to do so.

31. In *NRC* the court referred, at [25], to the comments of Lord Sumption in *Prest v Petrodel Resources Limited* [2013] UKSC 34 as to when an adverse inference may be drawn as a result of the failure of a party to give evidence:

> "Of more importance, in the present case, is that *in Prest v Petrodel Resources Ltd* Lord Sumption, in the context of discussing whether and if so when an adverse inference may properly be drawn against a party, said at [44] that, for his part, he would adopt, with one modification that is not relevant in this case, the view expressed by Lord Lowry in *R v Inland Revenue Comrs, Ex p TC Coombs & Co* [1991] 2 AC 283, 300 that:
>
> > "In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."
>
> and also referred, by way of comparison, to *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, 340. There is a line of Australian authority to similar effect, see, for example, *The Bell Group Ltd (in liquidation) v Westpac Banking Corp (No.9)* [2008] WASC 239 at [1003] - [1022]."

Requirements of s 306

32. 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)."

33. 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 tax product if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage.

(4) For the purpose of paragraph (1) arrangements are standardised if a promoter makes the arrangements available for implementation by more than one other person." (emphasis supplied).

34. 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."

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

Meaning of promoter

36. 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,

…, 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…

(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.]

Decision

37. 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:

(1) The requirements of s 306(1)(a) are met on the basis that the arrangements fall within regulation 10 as a standardised tax product:

(a) The arrangements are a product on the basis that (i) WCL, as the promoter (see (4) below), determined the form of a series of standardised documents the purpose of which was to enable the participants to implement the arrangements, (ii) the documents were not tailored to any material extent to reflect the circumstances of the participants, and (iii) the participants entered into a specific transaction in a standardised form given WCL made the arrangements available for implementation by more than one person (see (c) below). As set out in the correspondence in the bundles, WCL explained the effect of the arrangements to the participants face to face and, it appears, gave the participants access to an online gateway which enabled them to enter into the arrangements under standardised documents as the participants in fact did.

(b) 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 participant to obtain a tax advantage:

(i) The tax advantage constituted the receipt of up to 85% of the monies relating to the provision of the participants' services in the form of a "loan" which the participants did not expect to repay and 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) There is no discernible purpose of the arrangements other than to enable participants who entered into them thereby to obtain an absolute income tax saving or at least an income tax deferral.

(c) WCL plainly made the arrangements available for implementation by more than one person.

(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.

(4) WCL was a "promoter" in relation to the relevant arrangements within the meaning of s 307 on the basis that:

(a) It 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)).

(b) It was a promoter in relation to notifiable arrangements, as it was a promoter in relation to a notifiable proposal which was implemented by those arrangements (for the purposes of s 307(1)(b)).

(c) I note that the evidence indicates that the participants were sold the tax planning structure by WCL in person at their offices and received the standardised documents from WCL online and that WCL operated a referral scheme whereby it paid existing clients who referred new clients to WCL a fee of £500 for each referral.

38. As noted, Mr Ward said in a letter to HMRC and in his witness statement that WCL had no part in the form of any documentation used for the tax planning structure, it did not provide services related to tax, it had contact with the participants in the planning only in the performance of its administrative duties and it did not pay any referral fees to word of mouth clients (see [9], [10] and [12] above). However, HMRC has provided ample documentary evidence to make a prima facie case to the contrary (as set out at [14] to [29] above). Under the principles referred to in *NRC* HMRC's evidence is compelling given that:

(1) These are matters which are within WCL's knowledge and in relation to which it could be expected to provide evidence.

(2) Whilst WCL has provided some evidence in the form of Mr Ward's witness statement (a) WCL has not provided any documentary evidence in support of the assertions made by Mr Ward and (b) Mr Ward failed to attend the hearing for cross-examination on these matters.

(3) WCL has provided no explanation for the lack of participation by it and Mr Ward in the proceedings and, in particular, for the failure to engage fully in the production of evidence.

39. I note that s 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. The use of the term "may" could be taken to indicate that the tribunal has discretion not to make an order even if satisfied that the relevant conditions are met. However, if that is the correct interpretation, no reason has been put forward by WCL as to why, if the conditions are met, the tribunal should not make an order and, in all the circumstances, I cannot see any reason why the order should not be made.

40. Given the conclusion reached on the application of s 314A, I have not gone on to consider HMRC's alternative application under s 306A.

Order

41. For all the reasons set out above, pursuant to s 314A **IT IS HEREBY ORDERED** that the arrangements summarised at [6] above are notifiable arrangements within the meaning of s 306.

Rights of appeal

42. 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

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