Neutral Citation: [2022] UKFTT 174 (TC)

Case Number: TC08501

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2020/00886

DOTAS – application that certain arrangements are notifiable or alternatively that they are to be treated as notifiable under sections 306A and 314A Finance Act 2004 – whether arrangements notifiable – premium fee hallmark? – yes – standardised tax products? - yes for second respondent no for first respondent– whether first respondent was a promoter – yes – application allowed

Heard on: 24-25 January and 3 March 2022
Judgment date: 29 April 2022

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellant**

and

(1) AML TAX (UK) LIMITED
(2) DENMEDICAL UK LIMITED **Respondents**

Representation:

For the Appellant: Georgina Hicks, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

For the Respondents: Rory Mullan QC, counsel, instructed by RPC solicitors

DECISION

INTRODUCTION

1. This case concerns the disclosure of tax avoidance schemes ("**DOTAS**") provisions set out in Part 7 of the Finance Act 2004 ("**FA 2004**") and regulations made thereunder. It is the applicants' (or "**HMRC**") view that the respondents are promoters of notifiable arrangements which should have been notified, by them, to HMRC, but which have not been so notified. They have applied to this Tribunal for an order that the arrangements are notifiable (the "**Application**"**).** The respondents deny that the arrangements are notifiable and indeed also deny, in the case of the first respondent ("**AML**") that it is a promoter.

THE DOTAS REGIME

2. I suspect that most readers of this Decision will be familiar with the DOTAS regime which was described by Green J in *R (on the application of Walapu) v Revenue and Customs Commissioners* [2016] EWHC 658 (Admin), [2016] STC 1682 as follows (at [11]-[12]):

> "11. The Disclosure of Tax Avoidance Schemes ("DOTAS") regime was introduced by Part 7 of the Finance Act 2004 entitled "Disclosure of Tax Avoidance Schemes". Pursuant to these provisions certain persons, normally the promoters of tax avoidance schemes, were required to provide HMRC with information about "arrangements" and "proposals for arrangements" (i.e. the tax avoidance schemes): where that arrangement or proposal might be expected to provide a person with a tax advantage in relation to a specified tax; where the tax advantage might be expected to be the main benefit, or one of the main benefits, of using the scheme; and, where the scheme fell within certain descriptions contained within the Regulations. There have been changes to the Regulations since 2004 and the scheme now in force was introduced in 2006.
>
> 12. In circumstances where a scheme is notifiable the promoter is required to provide specified information to HMRC. The obligation to notify normally accrues within 5 days of the marketing of the scheme or the making of the scheme available to clients for implementation. HMRC may issue a Scheme Reference Number ("SRN"). If so the promoter is required to pass the SRN on to the scheme users who, in turn, are obliged to notify HMRC of their use of the scheme. They do this normally by including the SRN upon their tax return. This enables HMRC to identify the users of a particular scheme."

THE ARRANGEMENTS

3. The arrangements which are the subject matter of the Application are more fully described below (the "**arrangements**" or the "**split contract arrangements**"), but the essential elements are as follows. A limited company who pays its directors a salary splits the services provided by that director into fiduciary services on one hand and employment (described as consultancy) services on the other. The director then contracts with the promoter to supply his/her consultancy services to the promoter. The promoter contracts with the company to supply the services of that director to the company, and the promoter invoices the company for providing those services. The company continues to pay the director for the fiduciary services which are supplied directly to that company. The director also enters into a loan agreement with either the promoter or an entity with which the promoter is associated which agrees to provide the director with an unsecured loan in return for the consultancy services provided to the promoter. The arrangements are said to reduce the taxable receipts by the director as the loan is not, apparently, taxable. The funds for the provision of the loan are provided by the

promoter out of the money which it has invoiced to the company, having first deducted a percentage which is typically 16 to 18%. These were described to me as "split contract" arrangements.

THE AML ENTITIES

4. AML is a UK registered and resident company. The second respondent, formerly called AML Healthcare Contracts Ltd ("**AML Healthcare**") but now called Denmedical (UK) Ltd ("**Denmedical**") is also a UK registered and resident company. A third entity which is relevant to these appeal is an Isle of Man registered and resident company, AML Contracts Ltd ("**AML Contracts**"). These three companies are associated with each other albeit that they may not be connected in the technical tax sense. However, little turns on their precise legal connection. Details of their broader association are set out below.

THE ISSUES

5. The issues which I need to resolve are as follows:

(1) Whether AML was a promoter (it being accepted that Denmedical was a promoter);

(2) Whether the split contract arrangements met the premium fee or standardised tax products hallmarks, and whether, as regards the latter, they are safe harboured by regulation 11 (both respondents);

(3) Whether those arrangements enabled (or might have enabled) a scheme user to have obtained a tax advantage (both respondents);

(4) Whether the main benefit or one of the main benefits that might be expected to arise from the split contract arrangements was the obtaining of that tax advantage (both respondents).

6. HMRC have couched the Application in alternative terms. Firstly they have applied for an order under section 314A FA 2004 that the arrangements are notifiable under those provisions. However, further or alternatively, they apply for an order under section 306 FA 2004 on the basis that HMRC have taken all reasonable steps to establish, and have reasonable grounds for suspecting, that the arrangements may be notifiable.

7. Miss Hicks and Mr Mullan made clear helpful and eloquent submissions, both orally and in writing. I am grateful for those submissions which have helped me considerably, and I have taken those submissions into account (along with all of the evidence) even though, in reaching my conclusions I have not necessarily referred to each and every argument and item of evidence in detail.

THE PARTIES RESPECTIVE POSITIONS IN A NUTSHELL

8. Mr Mullan's position is that whilst AML Contracts might be a promoter, AML is not. Since AML is the entity identified in HMRC's application, that application must fail. The legislation imposes the notification requirement on the promoter since it is the promoter who best knows about the arrangements and thus, given that it will be penalised if it does not so notify, it is a promoter which is most intimately associated with the arrangements which must notify. AML does not fulfil the criteria necessary to be a promoter. In particular, it was not responsible to any extent for the organisation or management of the arrangements. It was involved, but only as a conduit for AML Contracts. The premium fee hallmark is not met since

no premium fee was in fact paid, and the reading of the relevant regulations is that any premium fee must be linked to the confidential elements of the arrangements, and any fee paid in respect of the split contract arrangements was paid not for the complexity or knowledge underpinning those arrangements, but for the difficulty of a user setting up the arrangements themselves, and for the administrative benefits that the promoter supplied. The arrangements do not meet the standardised product hallmark since AML did not determine the form of any documentation which was determined by AML Contracts. Furthermore this hallmark does not apply since the arrangements are grandfathered, as they are substantially the same as arrangements first made available for implementation before 1 August 2006. There was no tax advantage since the loans were repayable, they were not sham loans, they came with strings attached, and thus should be taxed as loans. It is not right, therefore, to treat them as the economic equivalent of salary and test whether there was a tax advantage on that basis.

9. Miss Hicks' view is that it is clear on the facts that AML is a promoter as it was to some extent responsible for the organisation or management of the split contract arrangements. This is notwithstanding that AML Contracts was also a promoter in respect of those arrangements. The legislation clearly contemplates there being more than one promoter in respect of the same arrangements. AML knew of the split contract arrangements and the information needed to provide a valid notification is not onerous and would have been known to AML. It is clear from the evidence that the main benefit of the arrangements was to secure a tax advantage. It is clear there was a tax advantage when you contrast the position before the arrangements were entered into, and the position thereafter. The before position was that all of the salary paid to the executive directors were subject to income tax under PAYE. The after position is that some of that salary is non-taxable as it is paid by way of a loan. The premium fee hallmark is met since the promoter retained a percentage (between 16% and 18%), which increased in line with the expected tax saving and did not reflect the amount of work involved. Mr Mullan's reading of the regulations regarding confidentiality is an incorrect reading of them. It is clear that the arrangements were put in place on the back of standardised documentation the form of which was, to some extent, determined by AML. Furthermore, the safe harbouring in regulation 11 does not apply since the respondents have not demonstrated that the arrangements are the same or substantially the same as pre-August 2006 arrangements.

THE LAW

10. The relevant legislation is set out in the Appendix to this Decision. Definitions in that appendix bear the same meaning in the body of this Decision.

THE EVIDENCE AND FINDINGS OF FACT

11. I was provided with a significant bundle of documents. Officer Jack Lloyd gave evidence for HMRC. He provided two witness statements and gave oral evidence. Mr Arthur Lancaster gave evidence for the respondents. He provided one witness statement and gave oral evidence. I summarise this evidence below and, save as otherwise indicated, I find the matters set out in those paragraphs as facts. My discussion of it in relation to each of the issues in this appeal and my further findings of more specific fact are set out later in this Decision.

Background and Officer Lloyd's investigation

12. Officer Lloyd did not deal directly with the respondents or the users of the split contract arrangements. The information which formed the basis of the investigation was initially procured by other HMRC personnel and his knowledge of the arrangements derived, initially,

from reviewing that information.

13. That review comprised only a review of a sample of the users, but that suggested to him that the arrangements were first implemented in 2012 and used in the tax years 2011/2012 onwards. His evidence was that HMRC were aware that there were approximately 380 users of the arrangements. HMRC only discovered the use of the arrangements, however, in 2015 when they opened tax enquiries into the tax returns of a sample of the user companies and their directors.

14. Officer Lloyd reviewed the responses and in so doing noticed that the arrangements involved AML Contracts and AML Healthcare.

15. In a letter dated 18 January 2016 addressed to AML Contracts at its Isle of Man address, Officer Lloyd indicated that he suspected that AML Contracts was a promoter or had promoted a split contract scheme and asked for an explanation as to why, in its opinion, AML Contracts did not consider the scheme was notifiable and for documentary evidence or, if it did not consider that it was a promoter, for an explanation of its role in relation to the scheme.

16. AML Contracts' agent contacted Officer Haynes in an email dated 22 January 2016 which was copied to Officer Lloyd. In further emails on that date Officer Haynes indicated that he had been in touch with Officer Lloyd to explain that he was dealing with AML and that the information he was seeking was what Officer Haynes hoped to be able to pass to him once he had followed up details from a meeting with AML on 3 December 2015 and the delay lay with him.

17. On 3 May 2016 Officer Lloyd sent a letter comprising a notice under section 313A FA 2004 to AML Contracts. That notice required AML Contracts to state whether in its opinion the split contract arrangements were notifiable by is and if not the reasons for that opinion, and set out certain parameters relating to the reasons which should be provided. He also sent AML Contracts a second letter referring to the letter of 18 January 2016 and setting out the exchange of emails with Officer Haynes and the agent. This letter refers to a letter dated 18 April which does not seem to have dealt with the points raised by Officer Lloyd in his letter of 18 January 2016, and was the reason for issuing the notice.

18. AML Contracts responded in a letter dated 15 June 2016 in which it stated that it did not accept that it had acted as promoter and there were no requirements to disclose the split contract arrangements. It described the arrangements in brief as involving a director being paid remuneration (taxed through the payroll) and a separate consultancy fee being paid in respect of services provided. The remuneration covers the fiduciary duties of the director and the consultancy fee for other activities undertaken on behalf of the company. It says that given that the arrangements are referred to in a paragraph in HMRC's employment income manual, there was no need to provide further comment on the legislation.

19. Officer Lloyd did not consider that this response was adequate and sent a more detailed letter to AML Contracts dated 29 July 2016. He pointed out that the extract from the manual refers to exceptional circumstances, yet the split contract arrangements were based on circumstances which applied to every user of those arrangements. It also requested confirmation of what proportion of the consultancy fees was declared income and whether any of the fees were paid by way of a loan. It sought clarification of the services which were to be provided by the directors. It asked for an outline of the purpose of the arrangements if it was other than to provide a tax advantage, and for details of any commercial advantages. It also sought copies of all promotional literature and details of the fees charged for participating in

the arrangements.

20. Officer Lloyd received no response to this letter and so sent a chasing letter dated 31 October 2016 to AML Contracts.

21. Independently of Officer Lloyd's investigation, other individuals at HMRC had been conducting enquiries into taxpayer's self-assessment tax returns and had gathered information about the split contract arrangements. In early 2018, Officer Lloyd contacted the HMRC team responsible for conducting those enquiries and was afforded access to documents and correspondence provided by the scheme users of the arrangements. He found that these documents were substantially the same and appeared to be tailored to the scheme user only in terms of the amounts of the payments involved.

22. He initially reviewed the user responses for four user companies including Cameron Black Ltd.

23. As a result of their enquiries, HMRC obtained copies of contracts for services between the client user companies and AML Contracts/AML Healthcare; contracts for consultancy services between the "consultants" and those companies; loan agreements; and agreements for the provision of fiduciary duties described as services.

24. It was Officer Lloyd's view having reviewed these documents that the arrangements may have been notifiable, and that AML might have been a promoter of them (so too might have been AML Healthcare).

25. Officer Lloyd wrote to AML at its address at Blackfriars House, Parsonage, Manchester, on 4 June 2018 in which he indicated that he suspected that AML was a promoter of the arrangements which were notifiable to HMRC under DOTAS. He suspected that the arrangements might been notifiable, and that AML had not notified the arrangement to HMRC. HMRC had statutory power to require AML to provide full reasons for not notifying but was giving AML the opportunity to provide the information voluntarily. He went on to describe his understanding of the arrangements. He told AML that if it was a promoter of the arrangements and it now considered them to be notifiable, it should notify HMRC straightaway. He explained how to do this. If, on the other hand, AML thought it did not need to notify, it should explain the reasons for that to Officer Lloyd and provide him with documentary evidence. He gave AML a deadline of 4 July 2018 for responding, failing which he would issue a formal notice under section 313A FA2004.

26. AML's then agent responded by way of email on 21 June 2018 indicating that he would endeavour to provide a full response by the middle of July failing which he would update Officer Lloyd on the current position. Despite a couple of further telephone calls with the agent in which he was told that the response has been drafted but was awaiting sign off, Officer Lloyd did not receive a response to the letter of 4 June 2018 until he received a copy of a letter dated 11 July 2018 attached to a letter dated 1 March 2019.

27. Officer Lloyd issued a section 313A FA 2004 Notice to Denmedical on 19 February 2019 asking it to say whether the arrangements were notifiable and if not, to provide reasons as to why they were not so notifiable. No response has been received to this notice.

28. On 19 February 2019 the section 313A FA 2004 Notice was issued to AML asking it to state whether the arrangements were notifiable and if not reasons as to why they were not so notifiable. On 1 March 2019 the agent replied on behalf of AML attaching the letter dated 11

July 2018. It is Officer Lloyd's unchallenged evidence that that letter had not been received before then and I find that as a fact. That letter stated simply that AML acted solely as an introducer to AML Contracts and did not make marketing contacts to obtain clients for itself. In line with HMRC's guidance, the agent did not believe that AML was a promoter. The letter of 1 March 2019 did not comply with the notice either and referred to the FTT decision of Curzon Capital. It also asserted that AML was not a promoter and thus had no disclosure obligations.

29. However, no penalties for failing to comply with the section 313A FA2004 Notice have been imposed on AML or Denmedical.

30. In separate letters dated 18 July 2019 addressed to Mr Lancaster at AML and at Denmedical, Officer Lloyd explained why it was his view that the arrangements were notifiable and that AML and Denmedical were promoters and should have notified those arrangements under DOTAS. He asked the respondents to, separately, agree that the arrangements are notifiable and make disclosure within 14 days from the date of the letter, but that if no such disclosure was made, HMRC would make an application to the tribunal for an order under section 314A FA 2004 and section 306A FA 2004 that the arrangements are notifiable.

31. HMRC's application for orders under those sections was made on 13 February 2020 but subsequently amended, on 26 May 2021 following receipt of the respondents' statement of case.

The AML entities

32. AML was incorporated on 9 September 2009 and the current sole director is Mr Lancaster who has been a director since he was appointed on 22 October 2013. AML Healthcare (which changed its name to Denmedical on 11 July 2017) was incorporated on 12 August 2011. Mr Lancaster is one of the current directors.

33. There are other AML companies including AML Contracts which are incorporated resident and managed in the Isle of Man. Mr Lancaster is not a director of any of the Isle of Man companies but has provided services to them on a self-employed basis.

34. The Isle of Man companies do not form a group as there is no parent company. In each case their shares are held by the trustees of a trust and those trustees or trustees of related trusts have interests in all of the Isle of Man companies. The Isle of Man companies share the same office and many of them have similar names. Likewise, AML is not part of a group of companies and its shares are held by trustees.

The promotional material

35. An undated document entitled "AML tax catalyst" underneath which "EFFICIENT REMUNERATION PLANNING", identified offices at Park Lane in London, Knox House in Douglas (Isle of Man) and Blackfriars House, Manchester, and gives a London office telephone number and Manchester office telephone number.

36. It states that "AML is a progressive tax planning consultancy that seeks to provide tailored solutions to individuals and organisations." (AML here is not defined as the first respondent, I take it to be shorthand for AML Tax, an undefined entity). It seeks to achieve the best possible outcomes for clients. It has a wealth of experience in providing efficient remuneration strategies and tax planning to entrepreneurs and company directors which

maximises their take-home income in a safe and compliant manner. Its services are supported by leading counsel opinions. It provides a comparison of "AML versus PAYE and dividend" and notes for the three tiers of salary range of between £150,000 and £500,000, the use of the AML arrangements increases the return by between 40% and 60%. It identifies additional benefits which include receiving more than 80% of your earnings, and it is supported by leading tax and employment counsel opinions. It explains how the arrangements work and set out the split contract arrangements and the distinction between director fiduciary duties which are supplied by director/employee contract, and the separate consultancy services which are supplied by a self employed contract. It notes the extract from HMRC's employment income manual. It states the recent changes in tax rules now mean that there is a considerable tax advantage enjoyed by those who are taxed as self-employed compared to those who are taxed as employees.

37. It states that at AML Tax we employ over 50 people. Its tax team focuses solely on tax matters. It is in a unique position to develop cutting-edge strategies that deliver and give peace of mind.

38. The AML Tax website at the time (2008) indicates a considerable tax advantage being enjoyed by those who are taxed as self-employed compared with those who are taxed as employees; that it can assist business owners to benefit from this difference by structuring their remuneration so that it is taxable as income from self-employment; and that typical net returns exceed 80% of earnings after all taxes have been paid. The website of May 2013 repeats the above but adds that arrangements have been reviewed by leading tax counsel and are not subject to DOTAS. It also states that it offers its clients a unique proposition to develop cutting-edge strategies from "our prestigious offices in Mayfair London, Manchester and the Isle of Man".

39. AML Healthcare's website of June 2013 suggests that "associates" enjoy a return of up to 82% of their current self-employed earnings without the need for business expenses. It indicates that locums and associates can take home 82% of their then current earnings and that its income tax planning solution is a unique proposition that has been meticulously planned and is supported by leading tax counsels' opinion.

Mr Lancaster's acceptance

40. When this promotional material was put to him by Miss Hicks, Mr Lancaster accepted that users of the scheme would take home more of their remuneration (80%) as opposed to 40% of their earnings (rough figures). He accepted that if you used the AML structure you would pay less tax. The point of the tax planning was to assist people to structure their remuneration package in a way which suits them and gives them the best advantage. He was conscious that the expression tax advantage had a specific meaning and that receiving a loan compared with receiving an outright payment has different tax consequences.

The arrangements generally

41. The way in which the arrangements work, and the cash flows were set out in HMRC's skeleton argument and was not challenged either by Mr Lancaster or by Mr Mullan. Suitably edited, they are set out below:

(1) The scheme user is a limited company ("the **User Company**") with one or more directors willing and able to differentiate their fiduciary duties as director from their other duties. The fiduciary director duties are remunerated by way of a nominal salary, from which income tax

and national insurance contributions ("**NICs**") are deducted at source. The remaining duties (called consultancy services) are supplied back to the User Company, purportedly on a self-employed basis:

(2) Under the arrangements, the director continues to provide his/her services to the User Company but AML Contracts or AML Healthcare interposes itself into the contractual chain. The contracts are structured as follows:

(a) The first contract is between the promoter (called "the Company" or "Corporate Trustee") and User Company (called "the Client"), pursuant to which the Company / Corporate Trustee agrees to provide services, which it may provide via a "representative" who is said to be in business on his/her own account (the **"First Contract for Services"**). That representative is defined in Schedule A as the director of the User Company and the terms on which their services are provided are set out. It is the services of the director that are being supplied back to the User Company. The services are "*as agreed between the parties*", the arrangement is typically for a year (subject to renewal), and the fees are typically invoiced monthly[1].

(b) The second contract is between the promoter (in its capacity as "the **Corporate Trustee**" or "the **Company**") and the director. Pursuant to that contract the director agrees to provide his services, purportedly on a self-employed basis. The contract sets out the terms on which those services are provided to end clients (the User Company) with AML Contracts or AML Healthcare acting as agency (the "**Second Contract for Services**").

(c) The director enters into a third contract with the User Company, which is a contract of service setting out the fiduciary duties to be provided back to the company (the "**Employment Contract**") and the nominal salary to be paid.

(d) Finally, the director enters into a loan agreement with AML Contracts as trustee of the AML Contracts Trust, Knox House Trustees as trustee of the AML Contracts Limited Contractor Benefit Trust, or AML Healthcare Personnel Limited as Trustees to the AML Healthcare Trust (called "the Lender"). Pursuant to this agreement, the Lender agrees to provide the director with an unsecured loan, (sometimes expressly in return for the services rendered). This loan, said to be subject to interest charged at 4% above the Bank of England base rate, is a lump sum but the Lender may loan additional amounts. The loan is purportedly repayable one month after the repayment date but the repayment date is defined as the date on which repayment is demanded. Mr Lancaster's evidence was that on no occasion has repayment been demanded.

(3) Therefore, in addition to the nominal salary for fiduciary duties (received from the User Company), the director receives a retainer for consultancy services via (typically) AML Contracts / AML Healthcare and an unsecured loan from an Isle of Man trust.

42. The money flows are as follows:

(1) The User Company pays a nominal sum as a salary to the director in return for fiduciary duties, from which income tax and NICs are deducted.

[1] Although on the odd occasion they are invoiced weekly and, very rarely, annually.

(2) The User Company is invoiced for the consultancy services of the directors and settles these invoices by paying sums to AML Contracts or AML Healthcare.

(3) AML Contracts / AML Healthcare deduct a percentage (typically 16 - 18%), pays the director a nominal retainer for his/her consultancy services (on which s/he pays income tax), and then passes the balance of the funds onto a trust in the Isle of Man, which pays the director an unsecured loan. The loan is not subject to income tax or NICs.

43. By way of example, Atkinson Chiropractic Ltd was invoiced £9,750 for the consultancy services of Maxwell Atkinson for March 2015. This sum was paid (in this case) to AML Healthcare on 27 April 2015. Maxwell Atkinson, the director, received £916.67 from Atkinson Chiropractic Ltd and £7,078.33 from AML Healthcare Personnel, coming to a total of £7,995, which allows for a deduction of 18% by AML Healthcare.

The arrangements specifically – Cameron Black

44. Cameron Black Ltd undertakes commercial and residential interior fit out works. Or at least it did until it went into administration.

45. Its directors included Simon Black.

46. On 1 March 2012 Andrew Simpson whose email address is andrew@amltax.co.uk sent an email to Simon Black with his contact details and saying that once Simon Black had had a chance to speak his accountants, he should let Mr Simpson know a convenient time for a meeting. On 25 April 2012, Andrew Simpson sent a further email to Simon Black stating that they had spoken last week in regard to planning we discussed earlier in the year and wanted to know if there was anything that he needs to do to move things forward.

47. In an email dated 17 May 2012 from Andrew Simpson to Simon Black, which followed up a meeting between them, Andrew Simpson attached an application form as a PDF and explained what information and documentation was also required. Andrew Simpson's direct dial telephone number is a London number and the address at the bottom of the email is AML Tax, 7 Old Park Lane, London.

48. The application form identifies "AML Contracts Ltd as Trustee of the AML Contracts Trust ("AML Contracts Ltd")" on each page of the form and asked for personal information and KYC identity.

49. There is a further exchange of emails on that date between Andrew Simpson and Simon Black, the latter seeking an explanation as to how to complete the forms.

50. On 21 May 2012 Andrew Simpson sent an email to Simon Black asking whether it is okay to meet on Wednesday to go through the paperwork and application forms.

51. In an email dated 23 May 2012 Andrew Simpson tells Simon Black that the application forms had gone over to the Isle of Man and he would ask Clair to get an update in terms of time. Clair is Clair Saunders who was copied into that email.

52. On that date, Lorna Cook whose email address is LornaC@amlimited.com sent an email to Sarah Fullinger who was Cameron Black's management accountant. It sets out the paperwork that the directors need to sign. It attaches an email to the directors which welcomes them to the services AML contracts. It attaches a raft of documents including the consultant

contract for services, contract for services, appendix to the contract for yourselves, and employment contract. It indicates that "we can start processing the first payment upon receipt of the scanned signed copies of these documents…….". That email had been sent by Alana McCaughan ("**Alana**") an accountant whose email address was alana@amlimited.com.

53. The AML assessment questionnaire for "split contracts" was sent to Simon Black by Clair Saunders on 17 July 2012 and was to be completed and returned to Clair Saunders. It asked which of the directors will be using the split contract planning and further information about the company, the company's activities, the directors' duties and activities, the proportion of time that they spent dealing with statutory directors' duties, administration duties, and other duties. It sought information about the current and proposed financial packages; it asked for the billing cycle (in this case it was to be monthly of £11,905 per month). It asked about the approximate annual amount that should be billed through the self-employment contract.

54. On 23/24 May 2012 Simon Black entered into an agreement with Cameron Black Ltd to provide services of a director. It sets out the duties that he had to perform, that he should act in accordance with the company's constitution, that he should act in good faith, he should avoid conflicts, and for this he would be paid a monthly fee of £583.33. There is no evidence of any negotiation over the terms of this agreement, and it was signed by both the company and Simon Black on 24 May 2012.

55. A contract for services between AML Contracts Ltd as trustee of the AML Contracts Trust, and Cameron Black Ltd (the "**trustee**") was signed on 24 May 2012. This appears to be a standard form agreement and there was no evidence that it was negotiated between the parties. The background is that the trustee provides a variety of specialist services that may be used by Cameron Black from time to time, and the parties agree that when the corporate trustee agrees to undertake services to Cameron Black, it will do so on the terms of the agreement. The contract included a schedule which sets out the services which will be supplied. These are described as consultancy services which will be invoiced monthly, and for Simon Black, the fee is £142,860 per year.

56. On the same date, the trustee entered into a contract for services with Simon Black, who is described as a consultant, who is apparently in business on his own account as a provider of services and has the skills and abilities and can undertake services that may be of use to the trustee from time to time. It goes on to state that the trustee is the principal contractor and has engaged the consultant as a subcontractor to undertake the obligations of the trustee to its clients. It then sets out the services which will be undertaken by the consultant, the responsibilities of the trustee, the fees and expenses which would be paid to the consultant, and various boilerplate clauses dealing with termination, confidentiality, and financial and other matters. The schedule to the contract states that invoices will be sent monthly and the fees for Simon Black will be £11,000 per year.

57. In an undated loan agreement, between Knox House Trustees Limited (as trustee) as "Lender" and Simon Black as "Borrower", the Lender agreed to lend an initial sum of £8,283.01 to Simon Black and agreed that it would make further loans as may be necessary from time to time. The loan is expressed to be unsecured and carries an interest rate at 4% above Bank of England base rate. Interest is due and payable annually on or before 5 April. The loan is repayable on one months notice given by the Lender to the Borrower and must be repaid in sterling. It identifies, briefly, some default events, and includes boilerplate clauses. The version I have in the bundle is neither signed nor dated but there was no dispute that this

would have been the version signed by the parties, and I so find.

58. In an email which I think was sent on 25 May 2012 from Georganne Comish supervisor at Knox House Trustees Limited, to Simon Black, Miss Comish indicates that AML Contracts Ltd have recommended that Simon Black receive an initial interest-bearing loan of £8,283.01 from the AML Contracts Ltd Contractor Benefit Trust (COBT). The trustees are Knox House Trustees Limited which has resolved to make the loan to Simon Black. The email address is cobt@khtltd.com. That email was sent on by Simon Black to Andrew Simpson with a covering email which indicates that Simon Black was under the impression that the money would come through "today" and it is "£1k light"

59. In an email dated 24 May 2012 from Simon Black to Andrew Simpson and Alana, Simon Black explained the salaries they were proposing to pay to themselves. In an email from Robert Shaw, one of the directors, to the other directors, dated 24 May 2012, Shaw asks "did you beat them on the £11k fee and get it down or did you accept their first quote you soft southern shandy drinkers?"

60. In response, Simon Black responded "We got it down. It is not actually an upfront fee, there is no upfront fee. They take 16% in fees, insurances, admin etc, leaving us with 84% rather than about 45% that we currently get! In reality we get more in our pockets each month and we save the company £86k per year. Everyone's a winner Rodney!!"

61. Sales invoices dated 24 May 2012 from AML Contracts Ltd, at which the London telephone number is identified, were sent to Sarah Fullinger for the services supplied by the directors, in the sum of £10,952, plus VAT of £2,190.40. The AML Contracts Ltd registered office is set out at the bottom of the invoices and is the Isle of Man address. The bank details for payment is Royal Bank of Scotland, at an Isle of Man branch and account.

62. On 14 June 2012, Clair Saunders sent an email Simon Black welcoming him to the services of AML Contracts Ltd, and indicated that if he had a specific matter that he wished to raise, he should not hesitate to email her at her aforesaid email address, or alternatively to call her on a London number. She states that the operations function of the business are all run from our Isle of Man office. She sets out the payment structure. Invoice requests should be emailed to Alana at her email address above or faxed to an 01624 number. Upon receipt of the timesheet, she would raise an invoice and email it to the company which would pay in accordance with the payment terms. Payment would then be made to Simon Black on receipt of cleared funds from the company. The following day a letter of wishes will be sent to the trustees who would consider a payment from the trust (the Contractors Benefit Trust). She states that there was a one-off annual charge of £300 called a tax administration fee and that "as previously explained by your accountant, you should ensure you retain an appropriate percentage of your company profits within the company. You will then be able to pay yourself a small salary from the company."

63. On 3 July 2012, Andrew Simpson sent an email to Simon Black thanking him for the introduction to "Kevin at Peter Dann - I had a great meeting with them and it turns out that there accountant is already an introducer of mine. I will keep you up-to-date how the meetings progress."

64. In an email dated 17 September 2012 from Leanne Browne of AML tax, Leanne follows up a telephone conversation she had previously had with Simon Black in which she had asked him to confirm that the working status questionnaire was still correct. She set out a number of statements in that email which appear to reflect the answers which Simon Black had previously

given. For example, that he could vary his working hours provided that they were agreed with the clients, and that he could decide how to carry out his work.

65. On 11 October 2012 Clair Saunders sent an email to Simon Black, the subject being "refer friends or colleagues to AML and receive a £500 reward".

66. On 5 April 2013, Robin Connolly of AML Contracts sent an email to Simon Black asking whether he had arranged for his passport to be certified "by our London Office".

67. In an email dated 14 August 2013 from Estella Hardwick of Perrys chartered accountants to Simon Black, copied to Mark Shimmin of AML Tax (IOM) Ltd, tax supervisor, whose email address is marc@AML tax.co.uk, Ms Hardwick raises a couple of queries which are required to complete Simon Black's tax returns include the question of whether a DOTAS number needed to be included on his tax return She followed this up on 4 November and on 15 November Mr Shimmin replied that "in relation to the monies earned through the AML V12 split contract product, there is no requirement to include a DOTAS number on either the individual or company records. The reason being that the product we offer is not a recognised tax avoidance scheme with HM revenue & Customs."

68. HMRC's records show that for the tax years 2012/2013 and 2013/2014, both Andrew Simpson and Clair Saunders were employees of AML. Mr Lancaster accepted that both were employees of AML at the material times, although Clair Saunders moved to the Isle of Man in 2015 and worked for other AML companies.

The documents

69. I was provided with documents relating to the use of the arrangements by 12 clients in which AML/AML Contracts was involved, and documents for 9 users of the arrangements with which AML Healthcare/Denmedical was involved. These documents were essentially the First Contract for Services, the Second Contract for Services, the Employment Contract, and the loan/facility agreement. There were also invoices to which I shall return later.

70. Having reviewed these documents, I find that they are all, essentially, in a standard form, the only significant difference being the parties. So, for example, the First Contract for Services for AKS Consulting Services Ltd is entered into by AML Contracts (as Trustee) and indicates that the trustee provides a number of specialist services that may be used to AKS, and goes on to include; a number of definitions and details of the services to be undertaken; the client's responsibilities (AKS in this case); the fees and expenses which will be charged and clauses dealing with assignments, termination, confidentiality, liability and financial risk and other boilerplate clauses. It includes a schedule which sets out what services will be provided, by whom, the commencement date, the invoice period, and the fees. The First Contract for Services for a second user, Albany Environmental Services Ltd, is identical save as regards the parties and the details in the schedule. The Employment Contract relating to AKS and one of its directors, set out the duties which the directors perform, that he should act in good faith, he must exercise a degree of care skill and diligence and avoid conflicts. It sets out the director's responsibilities. It deals with termination, summary termination, and the consequences thereof. It deals with jurisdiction. The Employment Contract between Cameron Black and Simon Black is in identical terms save as regards the amount of payment.

71. The Second Contracts for Services are also essentially the same. That relating to Mr Lee Batt (Albany Environmental Services Ltd) is in identical terms to that relating to Simon Black (Cameron Black). There are however differences in the loan/facility agreements; those to which

AML Contracts Ltd as Trustee of the AML Contracts Trust is the lender are identical with each other, but differ from those in which, as in Cameron Black, Knox House Trustees is lender. But those are in identical terms with each other.

72. However, in none of the documents is AML identified as a party. The counterparty to the first Contract Services and the Second Contract for Services is, in each case, which HMRC put forward as evidence of AML being a promoter, is AML Contracts.

73. In the 9 sets of documents to which I was taken as evidence that AML Healthcare was a promoter, in all cases, that company was the relevant counterparty to most of the documents other than the loan/facility agreements, AML Healthcare Personnel Ltd being a counterparty on a small number of occasions. The terms were identical, however.

74. These documents are slightly different from the suite of documents that have been used in the AML Contracts arrangements. However, they are all based on a common template and are materially identical save as regards dates, parties, amounts etc. Where the lender is AML Healthcare Personnel Ltd (as trustee), the loan agreements are more sophisticated than those used when the lender is Knox House. But all of the loan agreements where the lender is the former, are based on the common template and are, to all intents and purposes, the same; and all of the loan agreements where the lender is the latter, are based on a common (but different) template, and are, to all intents and purposes, the same.

Invoices

75. I was shown a number of invoices relating to the arrangements which HMRC allege AML was promoter. All of these, bar one are made out by AML Contracts, are on AML Contracts paper, and the bank account details for payment are a London based account. One exception is an invoice made out by AML Management Ltd, and the payment bank is a branch based in Preston.

76. The invoices relating to the AML Healthcare arrangements were made out by that company, on its headed paper, and the payment bank was Barclays in London (the same bank, bar the Preston bank, as was the case for the AML Contracts invoices. The account numbers differ).

Involvement of AML

77. Mr Lancaster's evidence was that Clair Saunders was administrator in AML and ran administrative tasks. She had access to a database and used this to prompt follow-up meetings, to follow-up clients and to follow-up enquiries. Georgia Sheeran was a 19-year-old secretary who was employed by AML.

78. On 26 November 2014, Clair Saunders sent an email to a director of AKS in response to an email regarding a facility agreement, explaining that she would require the facility agreement to be signed and returned in order not to delay the next payment which was due. In an email dated 15 December 2014, Clair Saunders advised that director that she was still waiting for the original facility agreement in order to proceed with his application.

79. Andrew Simpson's involvement with the Cameron Black scheme is set out above.

80. In emails dated 6 and 7 January 2014 to David Jenkins (a director of a User Company) Clair Saunders explained how the arrangements work, asked for a copy of the signed loan

agreements and arranged for a further copy to be sent to Mr Jenkins who did not appear to have received the original. In November 2013, she asked Mr Jenkins for outstanding documents having received some but not all documents previously requested.

81. In January 2014 there was an exchange of emails between Clair Saunders, David Jenkins and Andrew Matthews (AML tax) in which Andrew Matthews explained to David Jenkins how the arrangements work. It explains that "the deductions we take (15%, leaving you with 85%), cover the taxes due on this self employed retainer." It goes on to say "With regard to the 90%, this is not relating to the Split Contracts planning which is most suitable for you."

82. In an email dated 17 April 2014, Georgia Sheeran asked David Jenkins to consider questions and answers set out in the email regarding an IR35 questionnaire.

83. I was shown about 14 instances in which Clair Saunders asked User Companies, and/or their directors whether those User Companies wished to raise an invoice for the services provided by a director under the First Contract for Services. These emails take a standard form, generally along the lines that "would you like us to raise an invoice for [June 2014]", or "this is just a courtesy email to enquire as to whether you would like us to raise an invoice for you for [July]."

84. I was also shown a number of instances where other AML personnel either prompted User Companies to raise invoices or were asked by those companies to raise invoices. Such personnel included Ozer McMahon, (sales support, whose email address is amltax.co.uk) and who Mr Lancaster accepted was an employee of AML at the material times, and Georgia Sheeran.

85. I was shown no instances of invoices being issued by AML.

Mr Lancaster's evidence

86. The following is a synopsis of Mr Lancaster's evidence derived from his witness statement and oral testimony. I do not find the following matters as facts, I simply record his evidence at this stage. Relevant findings of fact are made later in this Decision.

(1) The Isle of Man-based AML companies wished to expand their consultant base (i.e. the number of separate consultants who worked through one of the Isle of Man companies). In most cases they did this by direct marketing or via word of mouth, websites, Internet forums and advertisements in professional publications

(2) AML Contracts dealt with directors of UK based owner managed businesses. Such businesses invariably had their own accountants and tax advisers. AML Contracts, therefore, adopted a slightly different approach towards marketing which was to arrange for AML to provide the details of the arrangements to UK tax advisers ("**intermediaries**") who were offered a commission if their clients signed up to the arrangements.

(3) AML Contracts paid commission to the intermediaries direct and also paid amounts to AML by reference to the business derived from those intermediaries who had in turn been introduced by AML.

(4) AML wanted to create a network of accountants and other intermediaries which was subsequently branded the "AML 250". Marketing activity was then directed towards this group with the aim of introducing them to AML Contracts who could explain the arrangements to

them. Andrew Simpson was a salesperson for AML who contacted such intermediaries. Liaison with the intermediaries was the main role of AML staff which included administration of existing business and also sales and marketing to generate new business.

(5) AML was not involved in the original design or management of the arrangement, its main activity being the making and maintenance of connections between AML Contracts and the intermediaries. In his view, AML was doing nothing more than conventional introduction of clients to the promoters as undertaken by accountants and tax advisers who would have explained the arrangements and how they worked to those clients. Rather than there being a direct relationship between the promoter and those intermediaries, AML was a third party which acted as a conduit for the arrangements between the promoter, the intermediaries, and the end users.

(6) It is not surprising that AML either chased up, or prompted, invoices given that the promoter was only paid once the User Company had invoiced the promoter under the First Contract for Services, i.e. the supply of the consultant to the User Company. AML, in turn was not paid its commission until the promoter had been invoiced.

Use post 23 February 2016

87. The accounts of User Company Ndikumhouse Ltd for the year ended 31 March 2017 show that consultancy fees of £60,188 paid during that period.

88. An email to HMRC from an accountant, dated 11 February 2019, relating to John Ndikum includes a "settlement pack" in which the relevant tax year was identified as that ending 5 April 2017 and the loan amount for that year as £39,720.43.

89. An invoice from Denmedical to Chris Chisholm Dental Care Ltd for £8,229.32 was dated 23 March 2016.

90. Invoices from Denmedical to Cheshire Medical Services, for £7,200 are dated; 29 February 2016, 31 March 2016, 11 May 2016 and 18 July 2016.

91. An email from Ian Forbes to HMRC dated 18 September 2018 dealing with a proposal to settle tax liabilities relating to The Optimum Spine Centre Ltd recorded that a loan of £41,748.33 was made in the tax year 2016/2017.

Premium fee

92. Bank statements requested by Carin Harrington, a director of one of the User Companies, show that that gentleman regularly received £960.67 and £4,820.83. The total of these is 85% of the monthly invoices total of £6,750. The 15% was taken by AML Contracts.

93. Bank statements relating to Dr M Atkinson show payments of £7,078.33 received from AML Healthcare and £916.67 from AML Healthcare Personnel. These amount to £7,995 which is 82% of the invoiced amounts from AML Healthcare to the User Company.

94. Bank statements from the User Companies dealing with AML also show that AML was paid a percentage of the amounts invoiced by AML. For example Silk Moth Ltd was invoiced £5,000 for a director's consultancy services for July 2015, but the director received two

payments of £500 and £3,650 amounting to £4,150 which is 17% less than £5,000.

95. In a letter dated 22 March 2018 from Axis Corporate Solutions, Chartered Accountants, to HMRC explaining the arrangements, it was stated that "a direct fee was not taken as such. AML Contracts Limited took an agreed percentage of the invoice for administration, Tax and Class 4 NI costs."

Reasonable steps

96. HMRC opened enquiries into the tax returns of a number of User Companies, and sought information and documentation from them, which, in a number of cases, was supplied to HMRC by the User Company's agent. They also opened enquiries into tax returns filed by the consultants on the basis that those individuals had used an undisclosed tax avoidance scheme. A number of User Companies have entered into settlements with HMRC.

DISCUSSION

97. The Application (which was originally dated 13 February 2020 and amended on 26 May 2021) was an application by HMRC for an order under section 314A (or in the alternative, section 306A) FA 2004 that arrangements known as the "Split Contracts Arrangements" are, or should be treated as "notifiable arrangements" within the meaning of section 306 (1) FA 2004.

98. I shall deal first with the application under section 314A FA 2004 which is set out below (as is section 306):

> "314A Order to disclose
>
> (1) HMRC may apply to the tribunal for an order that—
>
> (a) a proposal is notifiable, or
>
> (b) arrangements are notifiable.
>
> (2) An application must specify—
>
> (a) the proposal or arrangements in respect of which the order is sought, and
>
> (b) the promoter.
>
> (3) On an application the tribunal may make the order only if satisfied that section 306(1)(a) to (c) applies to the relevant arrangements.
>
> 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)."

99. It is for HMRC to show, on the balance of probabilities, that the criteria in these sections are satisfied.

100. Essentially, HMRC have to show that the respondents who are identified in the Application are promoters of either notifiable arrangements or of a notifiable proposal.

101. In order to decide whether the arrangements or proposal is notifiable, I need to consider whether they fall within one of the hallmarks, and in this case the relevant hallmarks are the premium fee and standardised product hallmarks; and also if there was a tax advantage obtained or to be obtained, which was one of the main benefits which might have been expected to arise from those arrangements.

102. I shall therefore consider the tax advantage/main benefit provisions first, the hallmarks second, and then whether AML is a promoter, before going on to consider HMRC's application under section 306A FA 2004.

Tax advantage/main benefit

103. It is clear to me that the arrangements with which we are concerned, and which are set out at [41]) fall within section 306 (1) (b) and (c). Tax advantage is very broadly defined. The arrangements were marketed, and implemented to enable individuals to receive over 80% of their total remuneration package, pre-entry into the arrangements, after taxes. And furthermore, this was the wholly predominant if not the sole reason why the users of the arrangements, namely, the individual directors and the User Companies entered into the arrangements. This is abundantly clear from the evidence and the findings of fact I have set out above. Mr Lancaster to all intents and purposes, admitted that the reason why people entered into the arrangements was to achieve a tax saving. He did not go on to say that it was to achieve tax advantage since he recognised that that was a technical legal term.

104. The tax "magic" (if I can put it like that) of the arrangements arises from two elements of the planning. Firstly splitting a directors former employment with a company into two, categorising one of the ongoing relationships as the provision of fiduciary duties, and the other as consultancy services which are supplied to the promoter rather than to that company. Hence the justification for calling this a split contract scheme. And secondly compensating the director for the provision of those consultancy services by way of a loan from an entity associated with the promoter, rather than by way of salary or fee paid by the promoter (i.e. the entity to whom the consultancy services are supplied).

105. In considering whether there is a tax advantage, I am grateful for the comments made by Judge Mosedale in *Hyrax* (*HMRC v Hyrax Resourcing Ltd and others* [2019] UKFTT 175 ("*Hyrax*"). I agree with the following sentiments expressed by Judge Mosedale, and whilst I

am not bound by them, I gratefully adopt them for the purpose of this Decision.

> "180. The parties did not agree on the implications of this definition. HMRC's position was that it should be understood to mean what Lord Wilberforce had said 'tax advantage' meant in the case of *IRC v Parker* [1966] AC 141:
>
> > The paragraph, as I understand it, presupposes a situation in which an assessment to tax, or increased tax, either is made or may possibly be made, that the taxpayer is in a position to resist the assessment by saying that *the way in which he received what it is sought to tax* prevents him from being taxed on it, and that the Crown is in a position to reply that if he had received what it is sought to tax *in another way* he would have had to bear tax. In other words, there must be a contrast as regards the 'receipts' between the actual case where these accrue in a non-taxable way with a possible accrue in a taxable way, and unless this contrast exists the existence of the advantage is not established……
>
> 186. I think Lord Wilberforce's definition of 'tax advantage' is therefore applicable to the 2004 legislation but it really does not matter to this application whether or not it is applicable, because it is plain on the face of s 318 that 'tax advantage' refers to a contrast between the actual (or expected) tax effect of the arrangements and the tax position that would have existed but for the arrangements.
>
> 187. Words must be construed in accordance with Parliament's intent and, unless it appears otherwise, that means they should be construed in accordance with their natural and ordinary meaning. The natural and ordinary meaning of 'tax advantage' in s 318 is that it refers to a contrast in tax liability between one position and another that would otherwise have existed. That wide construction seems in accordance with Parliament's intent for certain arrangements (as defined) which involved a tax advantage to be notifiable……..
>
> 194. And, as I have indicated above at §§189-190, Mr Venables did not accept that the arrangements could result in a tax advantage because it was his case that there was no comparator situation with a greater tax liability. It was the same point he made on tax avoidance, which was that a scheme user was not in the same legal position if they used the scheme compared to the position if they had not used it. If they did not use the scheme, they had their salary as cash in hand which added to their overall wealth; if they used the scheme, they lost the greater part of the salary and received instead cash in hand which (said the respondents) might give them equivalent (actually, increased) liquidity but did not add to their overall wealth because it had to be repaid.
>
> 195. I accept Mr Venables' point that the citation from *Parker* does not expressly deal with the situation where the contrast situation is not legally identical to the actual situation in point. That is not surprising as the situation did not arise in that case where, either way, the taxpayer got cash in hand without any repayment obligation. It did not arise on the facts of *Root2Tax Ltd* either, as under the scheme in that application, the scheme user received cash in hand in the form of winnings, which there was no obligation to repay. So it does not appear that this point has been considered before.
>
> 196. It is a matter of statutory construction. The statute itself does not refer to a contrast situation; it is merely implicit because the statute talks of relief/avoidance/reduction, all of which terms indicate that there would be a contrast situation without the relief/avoidance/reduction. The statute therefore does not define the contrast situation: it

does not expressly state whether the contrast situation must be legally or only economically, identical or only similar, to the actual situation which arises.

197. I have said that the statute should be interpreted in line with Parliament's presumed intent which includes assuming Parliament intended (a) that the legislation would be effective in achieving its aim and (b) that where a person would be penalised for non-compliance, it would be clear to them what obligation was being imposed.

198. The aim of the legislation was clearly to combat tax avoidance. It is well understood (see §§164-166) that there may be tax avoidance where a person adopts a scheme which puts them in a similar economic position to the non-scheme position, but with a lower tax liability. To interpret 'tax advantage' as requiring the contrast situation only to be one where the scheme user was in an identical legal position to the one actually used would be to largely deprive the legislation of much of its effect. It is obvious the objective of tax avoidance is to put the avoider into an economically similar position (but with less tax) than he would otherwise be in, and so it seems obvious to me that Parliament intended the contrast situation to include those that were merely economically similar to the actual situation. Parliament intended the legislation to effectively combat tax avoidance.

199. While I accept that the legislation is penal and Parliament must therefore have intended the meaning of 'tax advantage' to be clear, I think that it is clear that Parliament intended to refer to economically similar contrast situations (as well as legally identical ones). A layman, including promoters and users of the scheme, when considering a scheme would consider its economic reality and not its legal form and should understand 'tax advantage' in the same way.

200. In conclusion, I find that the scheme gave, or was expected to give, rise to a tax advantage because it was intended to avoid or reduce the charge to tax on salary which would otherwise have been received by scheme users, had they not adopted the scheme and received equivalent sums in an economically similar, but legally distinct form, of small salary and large loans which were not expected to be repaid (at least not in their lifetime)….."

106. I have set out a considerable extract from *Hyrax* since in this appeal, Mr Mullan sought to make the same point as Mr Venables had done in *Hyrax*; namely that one could not compare the situations where, on the one hand, an individual received a salary, which was his to keep as of right, and receipt of a broadly similar amount by way of a loan which was repayable. This difference in the qualities of the receivable justified the difference in treatment.

107. It is clear that in this appeal, that the users of the scheme thought that the loans would never, in practice, be repayable. And the evidence shows that on not a single occasion did a lender seek to enforce its rights under the loan/facility agreements and request repayment. I strongly suspect, that had been any possibility of repayment, the directors would not have entered into the arrangements. I do not believe, for example, that Mr Black would have thought that everybody was a winner if there was a realistic possibility that his lender would seek repayment of his loan. I therefore reject Mr Mullan's proposition for the same reasons that Judge Mosedale rejected those of Mr Venables in *Hyrax*.

108. In this appeal, HMRC have made out, to my satisfaction, that on the balance of probabilities, the conditions in section 306 (1) (b) and (c) are made out. I now need to turn to

the hallmarks.

Premium fee hallmark

109. This is set on in regulation 8 as follows:

> "8 Description 3: Premium Fee
>
> (1) Arrangements are prescribed if they are such that it might reasonably be expected that a promoter or a person connected with a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements of these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.
>
> But arrangements are not prescribed by this regulation if—
>
> (a) no person is a promoter in relation to them; and
>
> (b) the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.
>
> (2) For the purposes of paragraph (1), and in relation to any arrangements, a "premium fee" is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises, and which is—
>
> (a) to a significant extent attributable to that tax advantage, or
>
> (b) to any extent contingent upon the obtaining of that tax advantage as a matter of law."

110. When considering these provisions, it is clear that the test requires one to consider a hypothetical experienced person rather than the actual users of the arrangements. This is accepted by both parties.

111. However, Ms Hicks makes the point that Judge Mosedale in *Hyrax* at [214] and Judge Poole in *Curzon* (*HMRC v Curzon Capital Ltd* [2019] UKFTT 63 ("*Curzon*") at [57) both indicated that the fact that in real life the promoter takes a cut from the gross fee paid for the scheme users services is good evidence that a promoter of substantially similar arrangements will be able to obtain a fee from those arrangements. A premium fee is a fee chargeable by virtue of any element of the arrangements and which is to a significant extent attributable to the expected tax advantage. It is clear from the evidence that the arrangements included a deduction of a percentage of the payments invoices by AML Contracts and AML Healthcare/Denmedical by the relevant entity. Mr Lancaster's evidence was that out of this, either AML or another introducer was paid its fee. It is also clear from the evidence that other costs were deducted, for example tax and class 4 National Insurance Contributions. This percentage deduction was, in my view, made because of the tax benefits which purportedly accrued to the users of the arrangements. They are, therefore, to a significant extent attributable to the expected tax advantage. This is what happened. However, I need to consider the hypothetical purchaser of the arrangements. In my view, for the reasons given in the foregoing cases, the fact that an actual payment, as a percentage, was made for the provision of the

arrangements is evidence that the hypothetical purchaser would have made a payment of a fee.

112. Mr Mullan did not seriously contest this point but observed that, in fact, AML received no fee (albeit on the evidence of Mr Lancaster, it did receive an introductory or other fee of an unknown amount, from AML Contracts).

113. His point is a more subtle one. And he says (rightly in my view having reviewed the authorities) is one that has not been considered in previous cases. It focuses on the words "but for the requirements of these Regulations" in Description 3. This phrase, in his view, means that one must consider what the position would be if the regulations were not there, and one must ask whether in those circumstances a premium fee would be paid. Would the promoter be able to obtain a premium fee from the hypothetical purchaser regardless of the requirements of the Regulations? This in turn, in his view, links payment of a premium fee to the confidential aspects of the arrangements. It is his submission that in the circumstances of this appeal, the reason why a hypothetical purchaser of services would pay a premium fee is not because he would want the arrangements kept confidential from HMRC, but because the promoters had established a structure and machinery for the arrangements to put them into place which a normal taxpayer could not do, and so the charge was for access to the structure. And a charge could have been made for this irrespective of whether the arrangements were kept confidential. It was not the particular complexity of knowledge underpinning the arrangements which justified the charge. It was the difficulty which a person faced to set up similar arrangements on their own account, and the fact that the promoters had set up, managed, and organised the arrangements for use. They could have charged the same amount regardless of the application of the regulations. And indeed the hypothetical purchaser might pay a premium because of the legal and regulatory difficulties, which would thus justify a lawyer or accountant charging a premium rate for the services required to overcome those difficulties, or to carry out the necessary detailed drafting. Such an additional fee for the sophisticated nature of the services is not, and indeed should not be, caught by this hallmark.

114. Ms Hicks says that this misreads the legislation. The text is "but for the requirements of <u>these Regulations</u>" (emphasis added). Mr Mullan's point that the fee must be obtained by virtue of the fact that they are confidential relies on the DOTAS legislation as a whole. Not the regulations dealing with the specific hallmarks. The proper purposive interpretation is to cover the situation where a promoter would be able to charge a premium fee but chooses not to do so in order to avoid the hallmark applying. She also goes on to make the point that, on Mr Mullan's submission, it is clearly the case that the percentage deduction was, in fact, made in order to gain access to the structure and thus was a premium fee since it was to a significant extent attributable to the tax advantage. And in any event why would a hypothetical user who is concerned about keeping his use of the arrangements confidential from HMRC pay a premium fee. Such a user, if he knew the arrangements were not going to be kept confidential because of the requirement to disclose, would not enter the arrangements in the first place.

115. These are deep and subtle arguments, but to my mind the position is simpler, and the phrase has been inserted to avoid a tautological get out of jail card for a promoter. The "Regulations" are those identified in section 306 (1) and thus play to the definition of notifiable arrangements. For the purposes of the tax in question in this appeal, one of the hallmarks identified in the regulations must apply. If none of the hallmarks apply, then the disclosure regime has nothing to bite on. To my mind, therefore, the legislation in FA2014 and the hallmarks in the regulations must be read as an integral whole for the purposes of the DOTAS regime. For the purposes of this section of this Decision, the identified hallmark is the premium fee hallmark. The expression "but for the requirements of these Regulations" is tantamount to

saying, “but for the obligation to disclose under the DOTAS regime”. This prevents a promoter from defending a position that an arrangement is not subject to this hallmark, and thus is non-disclosable, on the basis that the reasonably experienced purchaser of a tax scheme would not pay a premium fee because there is an obligation to disclose under DOTAS. Even if a premium fee is actually paid. The inclusion of the phrase mentioned above simply takes this defence away from the promoter, so that when considering whether the reasonable purchaser of the same or similar arrangements would pay a premium fee, one considers it on the basis that there is no obligation to disclose those arrangements under DOTAS.

116. I agree with Mr Mullan that the phrase must be given a meaningful effect, and that is what I have set out above. I also agree with him that this hallmark is not intended to bite where a premium fee is paid for complex drafting or particularly inventive tax advice. But although we have Mr Mullan’s submissions that the reason that the premium fee was paid in respect of the arrangements in this appeal is because the promoters have created an ecosystem involving the structuring, operation, and administration of the arrangements, there is absolutely no evidence that this is the case. I accordingly reject that submission.

117. Furthermore, from the evidence that I have seen, there has been no indication that disclosure was something which was raised or had any impact on the users of the arrangements. Any discussion about DOTAS was raised in the context of the completion of individual user’s tax returns during which the promoters indicated that in their view there was no disclosure obligation. In real life, therefore, it seems that the scheme users were content to pay a premium fee even if the arrangements were disclosable.

118. I have set out above why I consider that a premium fee was paid for the arrangements and why that is relevant to the premium fee hallmark and the position of the hypothetical purchaser of the arrangements. And why that hypothetical purchaser would, in the circumstances, have paid a premium fee. I see no reason why, in light of Mr Mullan’s submissions as to the interpretation of the phrase “but for the requirements of these Regulations” to alter my conclusion. In my judgment the premium fee hallmark applies to the arrangements.

Standardised tax products

119. There are two versions of the standardised tax products hallmark which are set out in Regulation 10. The basic criteria set out in these two versions are similar but not identical. Furthermore, both versions are relevant as regulation 10 needs to be read in conjunction with regulation 11, and regulation 11 was different where arrangements were first made available before 22 February 2016 compared with where those arrangements were made after that date. In simple terms, where arrangements were made before that date, they were grandfathered if it could be shown that they were the same or substantially the same as arrangements which were first made available for implementation before 1 August 2006. There is no such grandfathering for arrangements made available after 22 February 2016.

120. I will first consider the basic requirements for the application of this hallmark before moving on to the grandfathering arrangements.

121. The basic requirements for arrangements which were made available before 22 February 2016 are set out below:

> “(2) For the purposes of paragraph (1) arrangements are a product if—

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

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

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

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

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

122. The basic requirements for arrangements which were made available from 23 February 2016 to date are set out below:

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

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

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

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

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

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

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

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

123. As can be seen from my findings of fact which relate to the formal documentation used to implement the arrangements, I have no hesitation finding that whether these arrangements were made available before or after 23 February 2016, the foregoing criteria have been made out.

124. The documents were in standard form, one suite of documents being for those promoted by AML Contracts, and another suite of documents, which were in standard form but subtly different from those in respect of the arrangements being promoted by AML Contracts, for the arrangements promoted by AML Healthcare. The only amendments required to the standard documents was to set out the specific details of the particular users; their purpose was to enable those users to implement the arrangements; the users entered into the split contract

arrangements which were identical in all cases; the users would not have entered into in those arrangements were it not for the tax advantage which they thought they would obtain.

125. However, the form of those documents must also be determined by the promoter. It is accepted by Mr Mullan that AML Contracts and AML Healthcare/Denmedical are promoters. I have decided, for reasons given later in this decision, that AML too is a promoter. Mr Mullan does not seriously challenge that the form of the documents was determined by AML Contracts or AML Healthcare/Denmedical. He does however say that there is no evidence that AML determined the form of documents. I agree with him. The role played by AML in organising and managing the arrangements and thus bring it within the ambit of "promoter" did not, on the evidence, include determining the form of documents on which the arrangements were based. There is no evidence that any drafting being done by AML personnel, and it is, to my mind, more likely than not that the standard form documentation was determined by AML Contracts, and not by AML, whose role was, inter alia, to oversee and arrange for the execution of the contracts, and not to draft them in the first place or undertake any form of significant redrafting once the relevant information regarding the users, had been obtained.

126. So as far as AML is concerned, there is no need for me to consider this hallmark any further. It does not apply to AML. However I need to do so as regards Denmedical.

127. The basic disclosure requirements are in section 308 FA 2014 and are as follows:

> "(3) A person who is a promoter in relation to notifiable arrangements must, within the prescribed period after the date on which he first becomes aware of any transaction forming part of the notifiable arrangements, provide the Board with prescribed information relating to those arrangements……"

128. The regulations which brought in the new version of regulation 11 (i.e., the version which excluded the grandfathering provisions) provides that the new version does not apply if the date on which the promoter first becomes aware of any transaction forming part of the notifiable arrangements falls before 23 February 2016.

129. The grandfathering provisions in the old version of regulation 11 are:

> "11 Arrangements excepted from Description 5
>
> (1) The arrangements specified in this regulation are—
>
> (a) ……………..
>
> (b) those which are of the same, or substantially the same, description as arrangements which were first made available for implementation before 1st August 2006."

130. The parties' respective positions on this are straightforward. Mr Mullan submits that the relevant date for notifying HMRC of the arrangements fell before 23 February 2016. There was no requirement to notify after that date. And the grandfathering provisions apply. Miss Hicks says that arrangements were entered into after 23 February 2016 so the grandfathering provisions cannot apply in respect of those arrangements. And in any event, the appellants have not made out, on the basis of specific evidence, that the grandfathering provisions apply.

131. As regards the first point, I agree with Mr Mullan. It is his submission that the notifiable

arrangements were those comprising the "employment" of the directors by the promoter and the provision of rewards to those directors by loans from a trust. There was, therefore, no need to notify each time a new director was employed, or a new User Company implemented the arrangements. His authority for this proposition stems from [48] and the authorities cited therein, in the FTT decision of *HMRC v Root 2 Tax Limited* [2021] UKFTT 0346 ("*Root 2*"). "It is clear……. that the relevant notifiable arrangements were those relating to the specific partnership. The promoter had a duty to notify when he first became aware of any transaction forming part of the particular arrangements for each specific partnership but not on each occasion that an individual joined the specific partnership. The "notifiable arrangements" were the specific partnership structure and not each individual's use of it……."

132. In this appeal Mr Mullan submits that the arrangements are the equivalent of the specific partnerships in *Root 2*, and thus there was no need to notify each time the arrangements were rolled out to a new user.

133. Miss Hicks stance is that this is not the case, and there was a new duty to notify each time a new User Company used the arrangements even if there was no new duty to notify each time a new director of that User Company then joined the arrangements. Her view is that each time a new User Company joined the arrangements comprised a "transaction forming part of the notifiable arrangements".

134. I do not think she is right. And it seems to me that in the cases, which are binding on me and indeed were binding on Judge Sinfield in *Root 2*, this view is consistent with the thrust of the DOTAS regime. Both parties urged on me that the regime was intended to provide an early warning system for HMRC of tax schemes, not that, necessarily, those tax schemes were egregious. And so early notification of specific notifiable arrangements is required, and thus there seems to me to be a need to disclose those arrangements only once at an early date, which is the position urged on me by Mr Mullan. And there is no need for further disclosure of those arrangements each time a user participates in them. The relevance of that participation lies in the second limb of the DOTAS regime, namely that once a promoter has notified the arrangements to HMRC, the promoter is given a scheme reference number, and the promoter has an obligation to provide a user of the arrangements with that scheme reference number which the user then reports on a tax return. This enables HMRC to marry up the arrangements with users of those arrangements. So, each time a new User Company or director of such company participated in the arrangements, such person should have been given a scheme reference number which was to be be reported to HMRC. There was no need for a further disclosure of the arrangements by the promoter at that stage.

135. But the important point is that the specific arrangements must be notified.

136. Mr Mullan relied on the case of *R (Dickinson and others) v HMRC* [2017] 4 WLR 126 ("*Dickinson*"). In particular the following paragraphs of the decision:

> "89. The disclosure of the tax avoidance scheme (DOTAS) was made by Tenon (its promoter) in March 2006. It was registered with the number 43525375. The form making the disclosure contained the following statements:

Scheme details

Off shore employer – loan facility

Summary of proposal or arrangements

Non-resident company is established and centrally managed and controlled in the Isle of Man. This employs specialist contractors and others who work in a number of different industries. Non-resident company sponsors an employee benefit trust. Services of employees of offshore company are provided to end-users.

Employees receive remuneration through the payroll subject to PAYE. Loan facilities are also offered by the EBT. The EBT may also be used to provide other benefits

Explanation of each element of the proposal or arrangements from which the expected tax advantage arises

Offshore company with no place of business in the UK is not subject to UK corporation tax

Creation by an offshore company of an EBT whose trustees are not UK resident has no UK tax implications

Contribution to EBT is deductible under Manx Law

Payment of salary to UK resident employees of offshore companies subject to PAYE and primary NIC contributions

Benefits provided by EBT to UK resident employees are taxable in the UK under the benefits code. In particular loans provided to employees will be subject to the normal regime for employee loans

Statutory provisions relevant to those elements of the proposal or arrangements from which the expected tax advantages arise

Offshore company CT status. TA 1988 s 11

Taxation of employment related loans - ITEPA 2003 ss 173-191

Taxation of employment income – ITEPA 2003 Part two chapter 7 and 8

90. The employer of the Claimants who used this scheme during tax years 2006/07 to 2010/11 is AML, a company registered in the Isle of Man. It used it as a means of offering interest free loans to employees which were made by an EBT in the Isle of Man, which AML set up.

91. I acknowledge that this disclosure does not refer to:

(i) the likely size of the loans that would be made and so a comparison between

salary paid subject to PAYE and NIC contributions and the loans, or

(ii) the interest rate that would be charged on the loans.

92. However, to my mind, any reasonably informed reader of this disclosure at that time would appreciate that under this scheme a company registered in the Isle of Man (namely AML) would set up an EBT also registered in the Isle of Man and that:

a. AML would employ persons resident in the UK who would work in the UK for end users on the basis that those end users would pay AML for those services,

b. those payments for services would equate to what the AML employees would have been paid by way of salary,

c. AML would pay salary to those UK residents, and

d. those AML employees would or probably would also receive loans from the EBT.

93. Put another way, it seems to me that any such reader would appreciate that as was stated in AML's promotional literature (which was not provided to the Revenue at this time) that this scheme was, or had the potential to be used as, an income extraction scheme which was designed to enable UK residents to receive a combination of salary and loans which equated to what they would have earned if they had been employed by the end users in the UK. And that the loans would or might constitute a significant proportion of the sums paid to the UK residents."

137. Miss Hicks submits that the arrangements are not the same as those in *Dickinson* as set out above. In her view, in *Dickinson* it was an offshore employer providing the loans, so the offshore entity employed the people in question. Under the arrangements, AML in the Isle of Man did not employ the directors. Furthermore, AML's marketing literature boasted that the arrangements were unique. Finally, as the burden of establishing that grandfathering applies rests with the appellants, they must show by reference to facts and evidence that similar documentation was used in the arrangements as was used in *Dickinson*.

138. Mr Mullan did not say that the AML referred to above was an AML entity identified in these proceedings, but I think it is too coincidental for it not to be otherwise or a previous AML entity which no longer exists. Which AML entity it is his unknown to me.

139. The arrangements disclosed in *Dickinson* are to my mind similar to the arrangements in this appeal. Contrary to Miss Hicks submission that in *Dickinson* it was the offshore employer providing the loans, it is clear that they were paid by an EBT established by the offshore employer. I do not know whether AML Contracts or AML Healthcare "established" the offshore EBTs, but the loans were clearly provided by trusts associated with those entities.

140. It is clear that the tax saving which lies behind the *Dickinson* arrangements is identical to the tax saving in these arrangements namely, as the Judge in that case identifies, a proportion of salary which would otherwise be paid in taxable form to an employee, is paid to that employee in an ostensibly non-taxable form by way of a loan from the offshore trust.

141. It is equally clear that in *Dickinson* the beneficiary of those payments, namely the

employee, was employed by the promoter and that his services were supplied to the end user.

142. However, there are two important and distinguishing features of the arrangements which differ from those in *Dickinson*.

143. The first is that under the arrangements, the director is not employed by the promoter but has a contract for the provision of consultancy services which, it is alleged, makes him/herself self-employed and not an employee. And the loan from the offshore trust is not for employment services but to reward the director for his self-employed consultancy services.

144. Secondly, and importantly, The *Dickinson* scheme does not involve splitting out an executive director's role, into his fiduciary services on the one hand and his employment services on the other. And as regards the former, the director remained an employee of the user company, something which the *Dickinson* scheme does not mention. And in this regard I would note that this particular strategy was thought by the promoters to be of significance since they named the strategy the "split contract" scheme which I did take to be a reference to the splitting of the directors role between the fiduciary services on one hand and his employment services on the other.

145. As was said in *Dickinson* the objective of DOTAS is to notify HMRC of tax arrangements and particularly of new and innovative schemes which potentially took advantage of legal loopholes in order to enable those loopholes to be closed by subsequent legislation.

146. It is clear from the disclosure in *Dickinson* that the purpose of the scheme mentioned in that case was to reward an employee for his or her employment services by way of a loan and thus, since the loan is ostensibly not subject to tax, provide the employee with the economic equivalent of his or her salary but in a form which bears less tax. Much the same can be said of the arrangements.

147. But to my mind the aforesaid objective of DOTAS was not to provide HMRC with the tax "toolkit" or "building blocks" used by a promoter to generate a tax advantage. In this case that toolkit being the reward by way of a non-taxable loan compared with taxable remuneration. It is relatively uncontroversial that there are distinctions between the tax treatment of loans on the one hand and remuneration on the other. What DOTAS is aimed at is identifying the specific combination of building blocks or tools used by the promoter in order to generate a tax advantage. In this case, the arrangements involved taking a pre-existing situation, namely the directors employment with a User Company and rejigging it so that the director received remuneration from the User Company taxed as employment income, which was split from the contract for consultancy services which that director then entered into with the promoter. In the *Dickinson* scheme, that relationship was an employment relationship. In the arrangements, it is a self-employed relationship and the loan from the offshore trust is to reward the director for the consultancy services to the promoter and not for employment services provided to the promoter.

148. These are material distinctions between the two arrangements. To my mind the arrangements are not the same or substantially the same as those involved in the *Dickinson* scheme. In my judgment, the grandfathering in regulation 11 does not apply to the

arrangements.

Was AML a promoter?

149. The term "promoter" is defined in s.307 FA 2004, which provides, relevantly, as follows:

> "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."

150. In *Curzon*, Judge Poole summarised the three routes to becoming a promoter in relation to "arrangements" which, as in *Curzon*, are the relevant routes in this application. The parties accepted this summary as do I:

> "83. So there are essentially three routes to becoming a promoter in relation to "arrangements" (the relevant issue in these proceedings), all contained in section 307(1)(b), which could be summarised as follows:
>
> (1) By making, in the course of a "relevant business", a "firm approach" to another person in relation to the notifiable proposal which is implemented by the arrangements, with a view to making the notifiable proposal available for implementation by the person so approached, or by any other person.
>
> (2) By making, in the course of a "relevant business", the notifiable proposal which is implemented by the arrangements available for implementation by other persons.
>
> (3) By being responsible to any extent, in the course of a "relevant business", for the design, organisation or management of the arrangements."

151. In this application, HMRC's primary contention is that AML was to some extent, responsible for the design organisation or management of the arrangements. However, they also contend that AML made the arrangements, which comprise a notifiable proposal, available for implementation by others.

152. This requires an analysis of what, exactly, AML did. But before doing that, I will deal with a number of points of principle made by Mr Mullan and Miss Hicks.

153. Mr Mullan contended that it was important to identify the promoter. Whilst there can be more than one promoter in relation to arrangements, one needs to identify the real promoter, in other words the one that is most closely associated with the arrangements as it is that promoter who, under threat of penalty, must make the appropriate disclosure. In his view, AML does not fulfil that role. Miss Hicks' view is that AML, who is clearly identified as the promoter in the Application, would have known of the information required to be disclosed to HMRC as it is not extensive and indeed may be known to a number of people involved in the arrangements. All HMRC have to do is identify that AML falls into one of the statutory criteria. I agree with Miss Hicks. Subject to what I say below, it is no bar to AML being a promoter that AML Contracts is also a promoter, and that AML Contracts knows more about the arrangements than AML. AML's involvement in the arrangements would have given it the knowledge necessary to provide the information for the disclosure. The Application is technically valid.

154. Mr Mullan also makes the point that by providing for a category of entity known as an "introducer", Parliament recognises that there may be entities involved in the arrangements which do less than is required for them to be defined as a promoter, and so it is possible to be involved as such without being a promoter. And in the context of this appeal, AML was doing no more than introducers, generally, do, and in acting in the way that it did, as a conduit, it was if anything acting as introducer. I agree with the point that it is a question of fact whether the activities undertaken by AML were those of a promoter or an introducer. And it is the facts in this appeal which matter. There may be occasions where entities such as financial advisers or accountants who profess to be introducers, cross the line and in fact act as promoters. And in those circumstances, they may have a disclosure obligation. If this brings within the disclosure net entities which Mr Mullan and Mr Lancaster think should not be so caught, then that is no reason why AML should not be caught if in fact they were promoting notifiable arrangements.

155. Mr Mullan submits that the organisation and management criterion is a high bar since it must be read in the context of the other provisions of section 307 FA 2004, and in the case of AML, there is no evidence, in any event, that they were "responsible" for the design organisation or management of the arrangements. Miss Hicks submits that it simply a question of statutory interpretation, the bar for design organisation or management is set by the statutory words, and provided HMRC can show that AML "is to any extent" responsible for the design organisation or management of the arrangements, the Application should succeed. I agree with both submissions. Clearly the design organisation or management criteria must be read in context, but all HMRC have to show is that AML was to some extent responsible, rather than being wholly responsible.

156. Mr Mullan also makes the point that it must be the promoter, in this case AML, who makes the notifiable proposal available, in other words the notifiable proposal must be made available by AML and not by AML Contracts. I agree, as does Judge Poole in *Curzon*. This is simply apparent from the language used in section 307 FA 2004. His submission is that the

notifiable arrangements or proposal could only have been made available by AML Contracts.

157. So what evidence is there that AML was to some extent responsible for the design organisation or management of the arrangements, or that it made a notifiable proposal available for implementation by others?

158. It is clear from the evidence (taking the case of Cameron Black as a paradigm example) that:

(1) AML personnel met potential users and discussed the arrangements with them. I am not clear whether this was at AML's premises in London or at the premises of those potential users.

(2) AML is associated with the marketing literature in that its London office was identified therein and it was identified as part of AML Tax. That marketing literature clearly sets out the tax benefits of entering into the arrangements. AML is also associated with AML Contracts as both are identified under the umbrella AML Tax on the AML Tax website

(3) AML personnel were closely involved in engaging with potential users via email. Those emails included descriptions as to how the arrangements worked. They also provided the onboarding questionnaire and assisted in its completion. That complete a questionnaire was then sent on to, I think, AML Contracts.

(4) AML personnel sent emails to users together with copies of loan agreements and explained to them what they needed to do in order to properly execute those loan agreements.

(5) AML personnel sent the documents required to properly implement the arrangements including the Contracts for Services and the Employment Contract, and associated documents, to potential users.

(6) AML prompted User Companies and directors to raise invoices.

(7) AML personnel liaised with both users of the arrangements and their agents and provided explanations and information to both as to how the arrangements worked, what should be included on tax returns, and whether there was a disclosure obligation

159. I do not think that this amounts to making a notifiable proposal available for implementation by the potential users. As discussed above, this requires the proposal to be made available by, in this case, AML. From the evidence, AML would not make the scheme available. It is AML Contracts who made the scheme available.

160. Nor do I think that the evidence shows that AML was to any extent responsible for the design of the arrangements. Even though they are associated with AML Tax which marketed the innovative tax planning and which had obtained counsel's opinions, there is no evidence that AML itself was involved in the design. I strongly suspect that it was AML Contracts, which is clearly a promoter, which was responsible for the design of the arrangements.

161. The million-dollar question, therefore, is whether AML was to any extent involved in organising or managing the arrangements. To my mind it was.

162. Mr Mullan submits that the bar to meeting these criteria is a high one when read in context with the rest of section 307 FA 2004. I do not think this is the case although I accept that the

criteria must be read in context. Organisation and management is not defined in FA 2004, but the Oxford English Dictionary suggests that organise involves making arrangements or preparations for activity or to provide or make arrangements for a person. It also suggests that it is taking responsibility for providing or arranging; "to fix up".

163. My view is that AML was responsible to some extent for organising the arrangements within the foregoing definition and within the context of the legislation. Mr Lancaster's view was that it acted as a conduit, a weasel word which encompasses the role of an introducer as well as the role played, in this case, by AML. The legislation defines an introducer as someone who communicates information about a notifiable proposal with a view to someone else entering into the arrangements and that information includes an explanation of the tax advantage which might be expected to be obtained. AML did this but went far beyond it. It acted as more than an introducer. Its personnel were responsible for onboarding the clients, explaining how the arrangements worked, sending them the relevant paperwork, explaining how that paperwork should be completed, chasing up the relevant paperwork when it had not been properly executed, prompting users to issue invoices.

164. Mr Mullan suggested that AML has done considerably less than *Curzon* which on the specific instructions received from a third party included processing and completing the signup paperwork, issuing invoices, operating bank accounts on behalf of a party and distributing information to the users in relation to their tax returns. I do not necessarily agree with him. It seems to me that AML, apart from operating third-party bank accounts, did all this and more. The importance to Mr Mullan is that in *Curzon*, HMRC's application failed. But what is interesting in *Curzon* is that HMRC did not argue that Curzon was, to some extent, responsible, for the organisation and management of the arrangements. They specifically disavowed it as a basis for their application. Very different then from this appeal in which HMRC's main contention is that AML organised and managed the arrangements. I do not know whether Judge Poole in *Curzon* if faced with a similar argument to the ones which have been run in this appeal, would have rejected the application. But this is an adversarial process, and simply because HMRC could not reach the appropriate bar in the *Curzon* application which did not include the design organisation or management criteria, does not mean that I am fettered in any way in coming to my foregoing conclusion in relation to AM and the arrangements which are at large in this appeal.

165. I accept Mr Lancaster's evidence that AML clearly had a vested interest in prompting users to invoice since it was only once invoices had been issued and paid that AML itself was paid. But this does not exclude AML from being responsible to some extent for the organisation or management of the arrangements. Prompting invoices which were admittedly paid to an Isle of Man bank account demonstrates an ongoing involvement in the organisation of the arrangements. I do not know whether the prompts to invoice were instigated by AML itself or whether they reflected prompts, behind the scenes, sent by AML Contracts to AML (since obviously the former did not get paid either unless the invoices had been raised). Mr Lancaster's evidence does not deal with this point. Miss Hicks suggests that this is the sort of thing which one might expect Mr Lancaster to deal with in his evidence and that I should treat critically his failure to adduce it on behalf of the appellant. It is true that there is a gap in the evidence regarding the relationship between AML Contracts and AML but Mr Lancaster was there to be cross-examined, which he was in expert fashion by Miss Hicks, and I strongly suspect that there was little documentary evidence which would have shed any light on the relationship since I suspect HMRC will have made an application for specific disclosure which

turned up nothing of any relevance.

166. Mr Mullan made the point that given the number of cases which HMRC have investigated, the evidence produced in this case is woefully thin. I disagree. And in any case, all HMRC have to do is to show that in a particular case, AML was to some extent responsible for the design organisation or management of the arrangements. They only have to get home on one case. They have done this not just on the case of Cameron Black, but also by dint of the other documents which they have provided as evidence of AML's involvement in the arrangements.

167. These demonstrate not only that AML was involved in those arrangements but that it was to some extent responsible for organising or managing the arrangements. Mr Mullan suggests that the word "responsible" is important, and that even if it could be shown that AML was involved, HMRC have not shown that they were to some extent responsible for organising or managing the arrangements. I disagree. The evidence shows that AML took upon itself responsibility for organising and managing the arrangements, and in particular, in respect of Cameron Black.

168. Mr Mullan and Mr Lancaster both suggested that if I were to find that AML was a promoter in the circumstances of the arrangements, that would inevitably lead to a raft of introducers being dragged into the disclosure net and being recategorised as promoters. And this was not what Parliament intended. Again, I disagree. It is a question of fact in each particular case whether someone is a promoter. It may well be that those who have self-certified, as it were, as introducers have in fact been promoters, and in those circumstances should, quite rightly, be dragged into the disclosure net. Equally, there are those introducers who fall slap bang within the definition who have nothing to fear. I must decide this appeal on its particular facts.

169. In my judgement, AML was, to some extent responsible for organising or managing the arrangements. It acted as considerably more than an introducer. It was a promoter within the meaning of section 307 (1) (b) (ii) FA 2004.

170. For completeness, it is also my judgment that AML was acting in the course of a relevant business as defined in that section. Mr Mullan did not make any submissions to the contrary.

Doubt as to notifiability

171. In view of my foregoing conclusion, namely that AML was a promoter of notifiable arrangements, I do not, strictly speaking, need to deal with this alternative basis for HMRCs application. But it is clear to me from the evidence that HMRC did take all reasonable steps to establish whether the arrangements were notifiable and had reasonable grounds for suspecting that they may be so notifiable. This is clear from the evidence given by Mr Lloyd and which I have set out, at length, above. Mr Lloyd clearly suspected that the arrangements were notifiable arrangements, he issued section 313A Notices, and took a reasonable view that AML had failed to comply therewith. He also sought information from a number of users of the arrangements.

Conclusion

172. Drawing the strands together:

(1) Both appellants were promoters of the arrangements.

(2) The arrangements were notifiable arrangements since they; enabled a scheme user to have obtained a tax advantage; the main benefit or one of the main benefits that might be expected to arise from the arrangements was the obtaining of that tax advantage; the arrangements met the premium fee hallmark and, as regards Denmedical, the standardised product hallmark too; and, in respect of the latter, were not safe harboured by regulation 11.

DECISION

173. For the foregoing reasons I grant the Application and I make the orders sought by HMRC under both section 314 A and section 306 A FA 2004 in respect of both appellants.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

174. by virtue of article 3 (a) (i) of the Appeals (Excluded Decisions) Order SI 2009/275 any decision of this tribunal about the applicability of section 314A and section 306A is an excluded decision for the purposes of section 11(1) of the Tribunals, Courts and Enforcement Act 2007 and there is accordingly there is no right of appeal against this decision.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 04 MAY 2022

APPENDIX

STATUTORY PROVISIONS

1. Section 314A FA 2004 provides as follows:

“314A Order to disclose

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

(a) a proposal is notifiable, or

(b) arrangements are notifiable.

(2) An application must specify—

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

(b) the promoter.

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

2. 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).”

3. “Tax” is defined in s.318 to include each of income tax and corporation tax and a “tax advantage” is defined in s.318 as follows:

“(1) In this Part—

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

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

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

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

4. "Arrangements" are defined in s.318(1) FA 2004 as including any "*scheme, transaction or series of transactions*".

5. The descriptions prescribed by the Treasury (s.306(1)(a)) are set out in the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006, SI 2006/1543 ("the regulations"). Regulation 8 provides as follows:

"8 Description 3: Premium Fee

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

But arrangements are not prescribed by this regulation if—

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

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

(2) For the purposes of paragraph (1), and in relation to any arrangements, a "premium fee" is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises, and which is—

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

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

6. Up until 23 February 2016, regulation 10 provided as follows:

"10 Description 5: standardised tax products

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

But arrangements are excepted from being prescribed under this regulation if they are specified in regulation 11.

(2) For the purposes of paragraph (1) arrangements are a product if—

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

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

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

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

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

(3) For the purpose of paragraph (1) arrangements are a tax product if it would be reasonable for an informed observer (having studied the arrangements) to conclude that the main purpose of the arrangements was to enable a client to obtain a tax advantage.

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

7. After 23 February 2016, regulation 10 provided as follows:

"10 Description 5: standardised tax products

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

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

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

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

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

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

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

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

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

8. Regulation 11 provides as follows:

“11 Arrangements excepted from Description 5

(1) The arrangements specified in this regulation are—

(a) those described in paragraph (2); and

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

(2) The following arrangements are excepted from being prescribed under regulation 10—

(a) arrangements which consist solely of one or more plant or machinery leases…;

(b) an enterprise investment scheme (Part 5 of ITA 2007 and Schedule 5B to TCGA 1992);

(c) arrangements using a venture capital trust (see Part 6 of ITA 2007 and Schedule 5C to TCGA 1992);

(d) arrangements qualifying under the corporate venturing scheme (see Schedule 15 to the Finance Act 2000);

(e) arrangements qualifying for community investment tax relief (see Schedules 16 and 17 to the Finance Act 2002);

(f) an account which satisfies the conditions in the Individual Savings Account Regulations 1998;

(g) an approved share incentive plan (see Chapter 6 of Part 7 of, and Schedule 2 to, ITEPA 2003);

(h) an approved share option scheme (see Chapter 7 of Part 7 of, and Schedule 3 to, ITEPA 2003);

(i) an approved CSOP scheme (see Chapter 8 of Part 7 of, and Schedule 4 to, ITEPA 2003);

(j) the grant of one or more qualifying options which meet the requirements of Schedule 5 to ITEPA 2003 (enterprise management incentives)—

(i) together only with such other steps as are reasonably necessary in all the circumstances for the purposes of facilitating it, or

(ii) which fall to be notified to the Board in accordance with Part 7 of that Schedule;

(k) a registered pension scheme (see section 150(2) of FA 2004);

(l) an overseas pension scheme in respect of which tax relief is granted in the United Kingdom under section 615 of ICTA 1988 (exemption from tax for

superannuation payments in respect of persons not resident in the United Kingdom or in respect of trades carried on wholly or partly outside the United Kingdom);

m) a pension scheme which is a relevant non-UK pension scheme within the meaning given by paragraph 1(5) of Schedule 34 to FA 2004;

(n) a scheme to which section 731 of ITTOIA 2005 applies (periodical payments of personal injury damages);

(o) arrangements which would be prescribed by regulation 19 but for regulation 21."

9. The term "promoter" is defined in s.307 FA 2004, which provides, relevantly, as follows:

"307 Meaning of "promoter"

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

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

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

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

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

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

(i) the design of the arrangements, or

(ii) the organisation or management of the arrangements.

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

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

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

(b) is carried on by a bank…

(3) For the purposes of this section anything done by a company is to be taken to be done in the course of a relevant business if it is done for the purposes of a relevant

business falling within subsection (2)(b) carried on by another company which is a member of the same group.

(4) Section 170 of the Taxation of Chargeable Gains Act 1992 has effect for determining for the purposes of subsection (3) whether two companies are members of the same group, but as if in that section—

(a) for each of the references to a 75 per cent subsidiary there were substituted a reference to a 51 per cent subsidiary, and

(b) subsection (3)(b) and subsections (6) to (8) were omitted.

…..

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

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

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

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

10. Section 306A provides as follows:

"306A Doubt as to notifiability

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

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

(b) arrangements are to be treated as notifiable.

(2) An application **must** specify—

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

(b) the promoter.

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

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

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

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

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

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

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

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

11. Section 313A FA 2004 provides as follows:

"313A Pre-disclosure enquiry

(1) Where HMRC suspect that a person (P) is the promoter or introducer of a proposal, or the promoter of arrangements, which may be notifiable, they may by written notice require P to state—

(a) whether in P's opinion the proposal or arrangements are notifiable by P, and

(b) if not, the reasons for P's opinion.

(2) A notice must specify the proposal or arrangements to which it relates.

(3) For the purpose of subsection (1)(b)—

(a) it is not sufficient to refer to the fact that a lawyer or other professional has given an opinion,

(b) the reasons must show, by reference to this Part and regulations under it, why P thinks the proposal or arrangements are not notifiable by P, and

(c) in particular, if P asserts that the arrangements do not fall within any description prescribed under section 306(1)(a), the reasons must provide sufficient information to enable HMRC to confirm the assertion.

(4) P must comply with a requirement under or by virtue of subsection (1) within—

(a) the prescribed period, or

(b) such longer period as HMRC may direct."

12. The "prescribed period" for the purposes of s.313C(3)(a) is set by regulation 15(2) of the Tax Avoidance Regulations 2012 as 10 days.

13. The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) (Amendment) Regulations 2016/99 provide:

1.—

(1) These Regulations may be cited as the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) (Amendment) Regulations 2016 and come into force on 23rd February 2016.

(2) These Regulations do not have effect—

(a) for the purposes of section 308(1) of the Finance Act 2004 (duties of promoter relating to any notifiable proposal)[1], if the relevant date[2] falls before 23rd February 2016;

(b) for the purposes of section 308(3) of the Finance Act 2004 (duties of promoter relating to any notifiable arrangements), if the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements falls before 23rd February 2016;

(c) for the purposes of section 309(1) of the Finance Act 2004 (duty of person dealing with promoter outside United Kingdom), and of section 310 of that Act (duty of parties to notifiable arrangements not involving promoter), if the date on which any transaction forming part of notifiable arrangements is entered into falls before 23rd February 2016……….

7.—

(1) Regulation 11 (arrangements excepted from Description 5) is amended as follows.

(2) Omit paragraph (1).

(3) In paragraph (2)—

(a) for "The arrangements referred to in paragraph (1)(a) are" substitute "The followingarrangements are excepted from being prescribed under regulation 10";

(b) in sub-paragraph (b) for "Chapter 3 of Part 7 of ICTA 1988 and Schedules 5B and 5BA" substitute "Part 5 of ITA 2007 and Schedule 5B";

(c) in sub-paragraph (c) for "section 842AA of, and Schedule 15B to, ICTA 1988" substitute "Part 6 of ITA 2007";

(d) after sub-paragraph (n) insert—

"(o) arrangements which would be prescribed by regulation 19 but for regulation 21."