[2018] UKFTT 649 9TC)

TC06797

Appeal number: TC/2017/05527

PENALTY – Failure to comply with notices under s313C of Finance Act 2004 – whether penalties "criminal charges" for purposes of Article 6 of the ECHR - whether conditions to issue notices satisfied – whether HMRC entitled to serve multiple notices – whether taxpayer had reasonable excuse – penalties of £4,000 and £3,000 imposed

FIRST-TIER TRIBUNAL
TAX CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Applicants**
- and -	
CONNAUGHT CORPORATE SOLUTIONS LIMITED	**Respondent**

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at Taylor House on 2 to 3 October 2018

Harriet Brown, instructed by Mishcon de Reya LLP for the Appellant

Georgia Hicks, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. HMRC ask that penalties be imposed on Connaught Corporate Solutions Limited (the "Company") in relation to what they regard as the Company's failure to comply with two notices sent under s313C of Finance Act 2004 ("FA 2004"). Many penalties are imposed by officers of HMRC and, if the taxpayer is dissatisfied with an officer's decision, the taxpayer's remedy is to appeal against that decision. However, penalties under s313C of FA 2004 are due only if the First-tier Tribunal ("FTT") decides to impose them. Therefore, in legal form, this is my decision on HMRC's application for the FTT to determine that a penalty under s313C is due.

Legislative provisions

2. The facts of this appeal cannot readily be understood without an appreciation of key aspects of the "DOTAS" regime relating to the disclosure of tax avoidance schemes. At the heart of the "DOTAS" regime are the definitions of "notifiable proposal" and "notifiable arrangements" set out in s306 of FA 2004 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. Summaries are no substitute for statutory language and, when it comes to applying the law I will do so by reference to the full provisions, and not my summary of them. With that important proviso, "notifiable arrangements" can broadly be understood as an implemented set of arrangements having the characteristics of a tax avoidance scheme. "Notifiable proposals" can be regarded as proposals to enter into such arrangements.

4. The prescribed descriptions of arrangements referred to in s306(1)(a) of FA 2004 are commonly referred to as the "hallmarks" and are contained in the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 (the "Hallmark Regulations"). For example, pursuant to Regulation 8 of the Hallmark Regulations, arrangements in respect of which a promoter might reasonably be expected to obtain a

"premium fee" (i.e. a fee attributable to tax advantages, or contingent on them) are "hallmarked". In addition, pursuant to Regulation 10 of the Hallmark Regulations, arrangements which might reasonably be expected to involve a taxpayer entering into specific transactions using standardised documentation are "hallmarked".

5. FA 2004 imposes disclosure obligations on persons who market notifiable arrangements and notifiable proposals. The legislation contains definitions of a "promoter" and an "introducer" in s307 of 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
>
> …
>
> (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….
>
> (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.
>
> …
>
> (5) A person is not to be treated as a promoter or introducer for the purposes of this Part by reason of anything done in prescribed circumstances.
>
> (6) In the application of this Part to a proposal or arrangements which are not notifiable, a reference to a promoter or introducer is a reference to a person who would be a promoter or introducer under subsections (1) to (5) if the proposal or arrangements were notifiable.

6. Again, the text of the provisions is complicated and sometimes opaque, and a summary can help to explain their overall effect even if it is no substitute for the full text of the provisions. A "promoter" will often be someone who has designed the relevant scheme or is acting in a bespoke way to induce a taxpayer to enter into the scheme. So, for example, a tax adviser who devises a tax avoidance scheme could fall within the definition of "promoter". Similarly, a tax adviser who contacts specific clients and suggests that they might be interested in entering into a scheme devised by someone else might be a "promoter". However, Parliament obviously considers that there are people who market tax avoidance schemes in a much less bespoke way, potentially without having been involved in the design of those schemes, and potentially without even understanding how they work. So, for example, an independent financial adviser who simply sends generic details on a tax avoidance scheme being promoted by another to his or her entire customer base, without any recommendation or suggestion that the scheme might be suitable, could fall within the definition of an "introducer". Such an "introducer" might put interested clients in touch with a "promoter", in return for a commission.

7. FA 2004 imposes a number of disclosure obligations on promoters. Since those are not in issue for the purposes of this appeal, I will not set those provisions out in full. In broad summary, promoters have to provide details of the schemes that they are promoting and lists of customers to whom they have promoted those schemes. Schemes that HMRC learn of in this way can be allocated a "scheme reference number" ("SRN") and persons implementing a scheme are obliged to quote the SRN on their tax return (so that HMRC have advance notice that the person has implemented something that could be regarded as a tax avoidance scheme).

8. FA 2004 empowers HMRC to obtain information from persons that they consider may be introducers. That power is set out in s313C of FA 2004 as follows:

> **313C Provision of information to HMRC by introducers**
>
> (1) This section applies where HMRC suspect—
>
> (a) that a person ("P") is an introducer in relation to a proposal, and
>
> (b) that the proposal may be notifiable.
>
> (1A) HMRC may by written notice require P to provide HMRC with one or both of the following—
>
> (a) prescribed information in relation to each person who has provided P with any information relating to the proposal;
>
> (b) prescribed information in relation to each person with whom P has made a marketing contact in relation to the proposal.
>
> (2) A notice must specify the proposal to which it relates.
>
> (3) P must comply with a requirement under subsection (1A) within—
>
> (a) the prescribed period, or
>
> (b) such longer period as HMRC may direct.

9. The "prescribed information" for the purposes of s313C(1) is set by regulation 15(1) of the Tax Avoidance (Schemes) Information Regulations 2012 (SI 2012/1836) ("the Information Regulations 2012") as: (a) P's name and address; (b) the name and address of each person who has provided P with any information relating to the proposal; and (c) the name and address of each person with whom P has made a marketing contact.

10. The "prescribed period" for the purposes of s313C(3)(a) of FA 2004 is set by regulation 15(2) of the Information Regulations 2012 as 10 days. Regulation 2(3) of the Information Regulations 2012 makes it clear that time is to be reckoned by reference to business days only as follows:

> (3) In reckoning any period under … [Regulation 15], any day which is a non-business day within the meaning of section 92 of the Bills of Exchange Act 1882 (computation of time) is disregarded.

11. Section 98C of the Taxes Management Act 1970 ("TMA 1970") imposes penalties for failure to comply with notices under s313C of FA 2004 and provides, relevantly, as follows:

> **98C Notification under Part 7 of Finance Act 2004**
>
> (1) A person who fails to comply with any of the provisions of Part 7 of the Finance Act 2004 (disclosure of tax avoidance schemes) mentioned in subsection (2) below shall be liable—
>
> (a) to a penalty not exceeding—
>
> (i) in the case of a provision mentioned in paragraph (a), (b), (c) or (ca) of that subsection, £600 for each day during the initial period (but see also subsections (2A), (2B) and (2ZC) below), and
>
> (ii) in any other case, £5,000, and
>
> (b) if the failure continues after a penalty is imposed under paragraph (a) above, to a further penalty or penalties not exceeding £600 for each day on which the failure continues after the day on which the penalty under paragraph (a) was imposed (but excluding any day for which a penalty under this paragraph has already been imposed).
>
> (2) Those provisions are—
>
> …(f) section 313C (duty of introducer to give details of persons who have provided information or have been provided with information).

12. Pursuant to s100(2)(f) of TMA 1970, an officer of HMRC may not make a determination imposing a penalty under s98C of TMA 1970. Rather, it is the Tribunal that is empowered to impose the penalty. That is the effect of s100C of TMA 1970 which provides, relevantly, as follows:

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

> (1A) …
>
> (2) The person liable to the penalty shall be a party to the proceedings.
>
> (3) Any penalty determined by the First-tier Tribunal in proceedings under this section shall for all purposes be treated as if it were tax charged in an assessment and due and payable.

13. It follows that, in these proceedings, HMRC are the applicants, asking the Tribunal to impose a penalty and the Company is the respondent, resisting the imposition of the penalty.

14. Section 118 of TMA 1970 deals with the concept of a "reasonable excuse" for a failure to comply with an obligation as follows:

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

Evidence

15. For HMRC, I had evidence from Donna Fracchiolla who was at relevant times a DOTAS Enforcement Caseworker in the Counter-Avoidance Directorate at HMRC. She was cross-examined at some length and I found her to be a reliable and honest witness. The Company did not rely on witness evidence.

16. There was also evidence in the form of a bundle of documents to which both Ms Hicks and Ms Brown referred me in their submissions.

Facts

17. Many of the primary facts were not in dispute, though the parties had very different views on the conclusions that should be drawn from those facts. At [18] to [47] below, I will set out my findings of primary fact. In the "Discussion" section, I will set out conclusions, including additional factual conclusions, to be drawn from those primary facts.

18. The Company carries on business as a financial adviser. At material times, its website stated that it provides tax planning solutions:

> Specifically designed to assist Owner Managed Business and High Net Worth Individuals to extract profits or gains tax effectively, enabling tax efficient use of funds (for lifestyle or investment both personally and by their family).

19. On 8 February 2016, Channel 4 broadcast a "Dispatches" programme entitled "How the Rich Avoid Tax". The makers of the programme secretly filmed an actor, Greg

Wise, approaching the managing director of the Company, Mr Ashbolt, to see if he could assist him to avoid paying tax.

Mr Ashbolt was filmed saying:

> Tax as I say to all my clients is voluntary, you can choose how much you want to pay. It's pretty much down to your moral barometer. So you can choose how much money you would like not to pay tax on.

He elaborated as to how this might be achieved sketching a diagram and saying:

> We set up a trust for you and this trust is set up for suppliers to your trade… of which you are expressly excluded as being a beneficiary therefore if you're not a beneficiary up here [pointing to the diagram] you can't be taxed up here.

20. The diagram that Mr Ashbolt was drawing was not visible on the footage (and instead the programme makers sought to explain the effect of the diagram with a cartoon drawing of their own making). Mr Ashbolt then elaborated on the proposal saying:

> Let's say in a tax year you were going to earn £500,000 so that's what you're going to pay tax on. You may say 'Do you know what, I'm happy to pay tax on 50 grand or happy to pay tax on 100'. Doesn't matter, whatever, the difference that you don't want to pay tax on that's the bit that you put in there.

21. Ms Fracchiolla and other HMRC officers saw the Channel 4 programme. HMRC were aware of tax planning schemes that sought to use "remuneration trusts" to avoid tax charges and NIC on employment income. In 2011, Parliament had enacted wide-ranging legislation on "disguised remuneration" and, since then HMRC had seen attempts to amend remuneration trust planning schemes so as to circumvent that legislation. Therefore, in Ms Fracchiolla's words, the Dispatches programme gave HMRC "cause for concern" as they thought that the Company was marketing a "remuneration trust" scheme although they could not tell full details of the scheme from the Dispatches programme. HMRC decided to try to obtain more information from the Company.

22. On 21 April 2016, Maureen Hedges of HMRC telephoned the Company to try to arrange a meeting at which Mr Ashbolt could explain more about the arrangements that were described in the Dispatches programme. The Company was under no legal obligation to meet HMRC and it declined to do so saying, instead, that HMRC should put their questions in a letter instead.

23. On 23 May 2016, HMRC wrote to the Company on an informal basis requesting the Company to provide more information. In very broad summary, HMRC's letter explained key statutory definitions such as "promoter" and "introducer". It outlined HMRC's view that, in the Dispatches programme, Mr Ashbolt had been explaining "remuneration trust" planning and asked the Company to provide information on its role in marketing that planning and other tax planning arrangements. The Company replied on 20 June 2016. It set out its view that Mr Ashbolt's statements in the

Dispatches programme had been edited in such a way as to give a misleading impression of what he had said and that, accordingly, HMRC's concerns were unfounded. The Company also explained that it did not consider the remuneration trust planning amounted to tax avoidance and stated that the Company "does not market any schemes".

24. By 20 July 2016, Ms Fracchiolla had received additional information on the Company's business that suggested to her that the Company was involved in the marketing of "notifiable proposals". Specifically:

(1) Another officer within HMRC was looking into aspects of the Company's VAT position. In the course of her enquiries, that officer had obtained a copy of a "limited agency contract" between the Company and Minerva Services Ltd ("Minerva"), incorporated in Belize. That limited agency contract entitled the Company (defined in the contract as the "Introducer") to market "Minerva plans" (though it did not specify what those plans were) and provided for the Company to receive commission on sales of Minerva plans.

(2) Ms Fracchiolla had also seen a form of Professional Liability Statement that explained that Minerva was distributing "plans" that Baxendale Walker LLP devised. She did not know what precisely what these plans were. However, since she knew that Paul Baxendale-Walker was a solicitor well-known for devising tax avoidance schemes she suspected that Minerva was promoting tax avoidance arrangements and that, since the Company was marketing "Minerva plans", the Company was acting as an introducer in relation to tax avoidance schemes.

(3) HMRC were investigating another taxpayer's tax position and had sent an information notice under Schedule 36 of Finance Act 2008 to that taxpayer requesting documents and information. It is clear from the questions that HMRC were investigating payments that the taxpayer made to a trust between 2011 and 2013 and the payment of sums out of that trust to the taxpayer's employees. Moreover, it is clear that HMRC at least regarded the planning as involving a "remuneration trust" (since question 24 in their list described the trust in those terms). In response to the question "Who did the company first approach that led to the decision to adhere to the trust", the taxpayer had answered "Connaught Corporate Solutions Limited".

25. Having reviewed the information available to her, Ms Fracchiolla suspected that the Company was acting as an "introducer" in relation to remuneration trust planning and that the remuneration trust planning might be a "notifiable proposal".[1]

26. On 9 August 2016, HMRC wrote to the Company and enclosed with their letter a notice under s313C of FA 2004. In their letter, HMRC explained that they were unable

[1] This is a finding of fact as to what Ms Fracchiolla suspected. The Company challenges the basis for this suspicion and argues that the suspicion was unreasonable. I address those challenges later in the decision.

to agree with the Company's assertion that it did not "market any schemes" (and referred in this context to the Dispatches programme, statements on the Company's website and the agency agreement with Minerva). They explained that they suspected that the Company was both a "promoter" and an "introducer" in relation to remuneration trust planning that amounted to a "notifiable proposal".

27. Enclosed with HMRC's letter was a notice (the "First Notice")[2] that read, so far as material, as follows:

> This letter is an information notice to the company. It is a legal request for information.
>
> The information required is:
>
> a) The name and address of each person who has provided Connaught Corporate Solutions Ltd with any information relating to the Remuneration trust Scheme (wef 01/01/2011)
>
> b) The name and address of each person with whom Connaught Corporate Solutions Ltd has made a marketing contact (within the meaning of section 307(4B) of the Finance Act 2004) in relation to the Remuneration trust Scheme (wef 26/03/2015)
>
> You must comply with the requirements of this notice within 10 days beginning on the day after that on which it is issued. The date of issue is 9 August 2016.
>
> If you do not provide a full response by this date you could become liable to a penalty of up to £5000.

28. The First Notice contained an inaccuracy. The deadline for the provision of information was not 10 days after the date of the notice. Rather, as noted at [10], it was 10 business days afterwards. Therefore, the actual deadline for provision of information pursuant to the First Notice was 23 August 2016.

29. On 16 August 2016, the Company provided a response declining to meet with HMRC and asserting that the Company did not promote "tax avoidance schemes" for Minerva.

30. The Company did not provide the information set out in the First Notice by 23 August 2016[3] and on 8 September 2016 Ms Fracchiolla sent the Company a "penalty warning letter" indicating that HMRC intended to commence proceedings before the First-tier Tribunal for a penalty of up to £5,000.

31. In response to the "penalty warning letter", Mr Ashbolt telephoned Ms Fracchiolla at HMRC. In that telephone call, he explained that the Company was not "ignoring HMRC" and that it has responded to the First Notice in time. Ms Fracchiolla stated that,

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[2] One of the Company's arguments in this appeal is that all notices that it received were, in reality, a single notice. In using the defined term, I should not be taken as pre-judging that argument.

[3] Indeed, as noted at [47], by the date of the hearing the Company had still not provided all the information requested in the First Notice.

because the Company had not provided the information requested in the First Notice, it had not complied with the First Notice.

32. On 11 October 2016, the Company's legal advisers, Mishcon de Reya LLP ("Mishcon de Reya"), sent a further response to HMRC's letter of 9 August 2016. In that letter, the Mishcon de Reya asked HMRC to provide details of the SRN for the remuneration trust planning or, if it could not do so, to give reasons why HMRC considered that planning to amount to notifiable proposals. Mischon de Reya asked HMRC to extend the deadline for replying to the First Notice until 10 working days after HMRC provided a response.

33. On 31 October 2016, Ms Fracchiolla responded saying that HMRC did not have an SRN because, although they suspected that the remuneration trust planning that the Company was introducing was notifiable, it had not been disclosed. She did not specifically deal with Mischon de Reya's request for an extension of time but it was clear in context that she was refusing the request since she stated that the Company had still not complied with the First Notice and so she still intended to commence proceedings before the FTT for a penalty of up to £5,000.

34. On 17 November 2016, Mischon de Reya wrote to HMRC. They said that they had only received HMRC's latest letter on 9 November and they hoped to be able to provide substantive response by 9 December 2016 and asked Ms Fracchiolla not to take proceedings for a penalty until after their response. By letter dated 5 December 2016, Ms Fracchiolla agreed to await Mischon de Reya's response but reiterated that, in view of the Company's failure to comply with the First Notice, she retained the intention to seek a penalty.

35. On 13 December 2016, Mishcon de Reya provided a substantive response to HMRC's letter of 31 October 2016. They explained that, when Mr Ashbolt responded to HMRC's letter of 23 May 2016, he had not taken formal legal advice. Their letter went on to assert that HMRC could have no reason for suspecting that any of the hallmarks set out in the 2006 Regulations apply (and, by extension could have no basis for concluding that the remuneration trust planning was a notifiable proposal). Mishcon de Reya asked HMRC, if they still considered the matters discussed in the Dispatches programme were notifiable to explain why, with reference to the relevant legislative tests.

36. On 28 December 2016, HMRC responded. They quoted extracts from their letter of 9 August 2016 which they considered explained why they suspected that the proposals were notifiable. The letter closed by stating that the s313C notice had still not been complied with and HMRC intended to proceed with an application to the Tribunal for the determination of a penalty. Mischon de Reya asked for a copy of the letter of 9 August and HMRC provided it.

37. On 4 April 2017, HMRC sent a further notice (the "Second Notice"). The covering letter sending that notice included the following paragraphs:

> The s313C Notice was sent to you on the 9th August 2016 and you were required to comply with the notice within 10 days beginning on the day

> after that on which it is issued. HMRC is minded to commence penalty proceedings before First-tier Tribunal for your failure to comply.
>
> A further s313C notice is attached at Appendix A of this letter for the period from the 10th August 2016 to the 4th April 2017.

38. The Second Notice itself required the Company to provide the following information:

> a) The name and address of each person who has provided Connaught Corporate Solutions Ltd with any information relating to the Remuneration trust Scheme (wef 01/01/2011)
>
> b) The name and address of each person with whom Connaught Corporate Solutions Ltd has made a marketing contact (within the meaning of section 307(4B) of the Finance Act 2004) in relation to the Remuneration trust Scheme (wef 26/03/2015).

In that respect, therefore, the text of the Second Notice was identical to that of the First Notice. However, the Second Notice included the concept of a "start date" which the First Notice did not saying:

> The start date for this Notice is the 10th August 2016.

39. There was, therefore, some mild contradiction between the expressed "start date" of 10 August 2016 and the request in paragraphs (a) and (b) of the Second Notice for information "wef" (which I interpreted as meaning "with effect from") 1 January 2011 and 26 March 2015. However, this contradiction was more apparent than real. A reasonable recipient of the Second Notice would have realised that the First Notice had been issued on 9 August 2016 and therefore that the Second Notice was asking for information on matters arising after the date of the First Notice. HMRC made this clear in the extract from their covering letter of 4 April 2017 referred to at [37] above that referred to the Second Notice as being "for the period from the 10th August 2016 to the 4th April 2017". Therefore, a reasonable recipient of the Second Notice would have realised that it was asking for information on (a) people who provided the Company with information on remuneration trust schemes between 10 August 2016 and 4 April 2017 and (b) people with whom the Company had made a marketing contact between 10 August 2016 and 4 April 2017.

40. The Second Notice stated that the Company had to comply with its requirements within 10 days beginning on the day after that on which it is issued and, if it did not, it could become liable to a penalty of up to £5,000. In this respect, it was inaccurate. As noted, the deadline was 10 business days from the day after the Second Notice was issued. Since 4 April 2017 was a Tuesday and 14 April 2017 and 17 April 2017 were Good Friday and Easter Monday respectively, the deadline was actually 20 April 2017.

41. On 10 April 2017, Mischon de Reya called Ms Fracchiolla and asked for an extension of time because of the upcoming Easter break. Ms Fracchiolla agreed to extend the deadline until 19 April 2017. In fact, as noted at [40], this was no extension at all. Nevertheless, Ms Fracchiolla sent Mischon de Reya an email confirming the extension of time until 19 April 2017.

42. On 20 April 2017, Ms Fracchiolla sent the Company a revised Second Notice (the "Revised Second Notice") to reflect the "extension" of time. That notice was in terms identical to the Second Notice (and, like the Second Notice, stipulated a "start date" of 10 August 2016). The Revised Second Notice wrongly stated that the information requested had to be provided within 10 days beginning on the day after it was issued. In fact, the deadline was 10 business days beginning with the first business day after it was issued. Since 20 April 2017 was a Thursday, the deadline expired on 4 May 2017 (so the Company was, after all, provided with an extension of time).

43. The Company provided no information in response to the Revised Second Notice by either the deadline set out in that notice or by 4 May 2017. It only complied with the Revised Second Notice on 19 October 2017 (see [46] below]).

44. On 6 October 2017, HMRC issued the Company a notice (the "Third Notice"). This notice required the same information as had been set out in the First Notice and the Revised Second Date, but specified a "start date" of 21 April 2017 (the day following issue of the Revised Second Notice). Like the other notices, the Third Notice wrongly stated that the information had to be provided within 10 days starting the day after the Notice was issued. However, the true deadline was 10 business days starting the business day after the Third Notice was issued. Since 6 October 2017 was a Friday, the deadline for compliance was 20 October 2017.

45. On 19 October 2017 (before the relevant deadline), the Company provided HMRC with information. In their response, HMRC gave information on

> People I have discussed Remuneration Trust Planning with *since 26 March 2015* [my emphasis]

The Company also stated that Buckingham Wealth Management Limited, a company incorporated in Belize, had provided the Company with information on remuneration trust arrangements and provided an address for Buckingham Wealth Management Limited.

46. The Company concluded its letter of 19 October 2017 by stating:

> We trust this satisfies your requirements under the notice of 6 October 2017.

However, despite the reference only to the Third Notice, HMRC accept that the Company's response also amounted to (belated) compliance with the Revised Second Notice.

47. I have concluded that the Company's response also amounted to partial, though not full, compliance with the First Notice. The First Notice required details of the Company's marketing contacts dating back to 26 March 2015 and therefore the Company's response to the Third Notice complied with this requirement. However, the First Notice required details of persons who gave the Company information on remuneration trust schemes dating back to 1 January 2011. I have concluded from the evidence at [24(3)] that the Company introduced at least one taxpayer to remuneration trust planning between 2011 and 2013. Yet Buckingham Wealth Limited was not

incorporated in Belize until 13 March 2014 and so cannot have provided the Company with information on remuneration trusts prior to that date. The Company must have obtained information from someone else, but it did not give details of that other person to HMRC. It follows that I have concluded that, by 19 October 2017, the Company still had not complied fully with the First Notice. The Company did not contradict HMRC's assertion that, by the date of the hearing, it still had not complied fully with the First Notice and I have concluded, therefore, that it still has not complied.

Submissions of the parties

HMRC's submissions

48. HMRC's position in outline was as follows:

> (1) HMRC had issued three notices under s313C of FA 2004 and were entitled to do so. Two had not been complied with in time, although HMRC accepted that the Company had complied with the Third Notice. In view of the protracted period of non-compliance with the First Notice and the Revised Second Notice, HMRC ask the Tribunal to impose the maximum penalty of £5,000 in relation to each notice.
>
> (2) The Tribunal should not enquire into whether the preconditions for issue of the s313C notices set out in s313C(1)(a) and (b) of FA 2004 were met. It is sufficient that the notices were issued and not complied with in time.
>
> (3) If the Tribunal is entitled to consider the preconditions for issue of the notices, those conditions require only that HMRC "suspect" that the Company was an introducer in relation to a notifiable proposal. Ms Fracchiolla's evidence clearly demonstrated that HMRC had formed the relevant suspicion. There is no requirement that the suspicion be reasonable. In any event, HMRC's suspicion was plainly reasonable.
>
> (4) The penalties charged are not "criminal" for the purposes of Article 6 of the European Convention on Human Rights ("ECHR"). However, even if they were "criminal", that would not affect the line of reasoning set out above.

49. The Company made the following submissions in outline.

> (1) The Tribunal can and should consider whether the preconditions set out in s313C(1) of FA 2004 were satisfied and those preconditions have to be applied on the basis that the penalties at issue are "criminal" for the purposes of Article 6 of the ECHR. The preconditions were not met as HMRC could not reasonably have "suspected", on the basis of the information that they had that the Company was acting as an introducer in relation to a notifiable proposal.
>
> (2) HMRC are entitled only to issue one notice under s313C in relation to the same proposal. Therefore, they had not issued three notices, they had issued one, so the maximum penalty could be only £5,000. That conclusion followed as a consequence of the ordinary reading of s313C. That these

penalties are "criminal" for the purposes of Article 6 of the ECHR only reinforces the interpretation as otherwise, HMRC could behave in an oppressive way by issuing multiple notices requesting essentially the same information and collect multiple penalties for non-compliance.

(3) HMRC's conduct in continuing for a long time to threaten to seek penalties without doing anything to act on that threat amounted to an implied extension of time for compliance with the notices that had been issued. Even if it did not, it would have been perceived in that way by a reasonable taxpayer, so the Company had a "reasonable excuse" for non-compliance.

(4) HMRC's conduct in refusing to disclose evidence underpinning their belief that the Company was acting as an introducer in relation to notifiable proposals gave the Company a reasonable belief that the notices it received were invalid and therefore gave it a reasonable excuse for any failure to comply.

(5) The short deadline for providing information in response to a s313C notice (just 10 business days) violates the Company's rights under Article 8 of the ECHR. As such, the relevant provisions must be construed purposively so that the prescribed deadline is 10 business days save where HMRC allow longer which they are required to do where necessary to protect the Article 8 rights of the recipient. If the 10 business day prescribed period cannot be construed purposively it must be disregarded with the result that there has been no failure to comply.

50. Given the way the parties have put their respective cases, I will adopt the following structure in this decision:

(1) First, I will consider whether the penalties are "criminal" for the purposes of Article 6 of the ECHR.

(2) I will then consider whether I am entitled to consider whether the preconditions in s313C(1) of FA 2004 were met and, if I am, whether they were so met.

(3) I will then consider whether HMRC are entitled to issue more than one s313C notice in relation to a given notifiable proposal and whether they did so in the circumstances of this appeal.

(4) I will then consider whether HMRC expressly or impliedly extended time for compliance with any notices.

(5) Next, I will consider the Company's arguments based on Article 8 of the ECHR.

(6) I will then address whether the Company had a "reasonable excuse" for any failure to comply.

(7) In the light of my conclusions at (1) to (6) above, I will consider whether a penalty or penalties should be imposed and, if so, what amount of penalty is appropriate.

Whether the penalties are "criminal" for the purposes of Article 6 of the ECHR

51. Article 6(1) of ECHR provides, so far as relevant:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 6(2) of the ECHR enshrines the presumption of innocence in criminal matters as follows:

> Everyone charge with a criminal offence shall be presumed innocent until proved guilty according to law.

Article 6(3) provides further minimum rights for those facing criminal charges:

> Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

52. In *Han and another v Commissioners of Customs and Excise* [2001] 4 All ER 687, the Court of Appeal summarised relevant aspects of the jurisprudence of the European Court of Human Rights on the nature of "criminal" charges for the purposes of Article 6 of the ECHR as follows:

> 26 It is not in dispute between the parties that the Strasbourg case law makes clear that the concept of a 'criminal charge' under Article 6 has an "autonomous" Convention meaning: *Engel-v-Netherlands* [1979-80] EHRR 647 para 81. There are effectively three criteria applied by the Strasbourg Court in order to determine whether a criminal charge has been imposed: see Engel and more recently AP, MP & TP v Switzerland [1998] 26 EHRR 541 para 39. They are:
>
> (a) the classification of the proceedings in domestic law;
>
> (b) the nature of the offence; and
>
> (c) the nature and degree of severity of the penalty that the person concerned risked incurring.
>
> The Strasbourg Court does not in practice treat these three requirements as analytically distinct or as a "three stage test", but as factors together

> to be weighed in seeking to decide whether, taken cumulatively, the relevant measure should be treated as "criminal". When coming to such decision in the course of the court's 'autonomous' approach, factors (b) and (c) carry substantially greater weight than factor (a).

I will therefore apply the three "*Engel* criteria" to the penalties at issue.

53. The first criterion is easily dealt with. The penalties are not "criminal" as a matter of the domestic law of the United Kingdom. However, as Potter LJ noted at [65] of his judgment in *Han*, this is "no more than a starting point" for the classification and is not decisive.

54. Turning to the second of the *Engel* criteria, the penalties are of potential application to everyone. If HMRC form a suspicion that someone is acting as introducer in relation to a notifiable proposal, they can serve a notice requiring information and, if the notice is not complied with, a penalty can be charged. In *Jussila v Finland* [2009] STC 29, the Grand Chamber of the European Court of Human Rights rejected an argument that the second of the *Engel* criteria was not satisfied because the VAT penalties in issue could apply only to a sector of society, namely people carrying on businesses registered for VAT. I therefore do not accept the argument that the penalty in this appeal is aimed at a narrow category of taxpayer.

55. The penalties are not evidently intended to compensate the state for loss occasioned by a taxpayer's failure to comply with a notice under s313C. Rather, their function appears to be to punish a failure to comply and deter non-compliance. In *Jussila v Finland* the European Court of Human Rights attached considerable weight to this factor and it points in favour of an argument that the penalties are criminal in nature.

56. Unlike the penalties at issue in *Han,* the penalties are not triggered by any fraud or negligence on the part of a taxpayer, the kind of behaviour that might be expected to attract criminal sanctions. Any failure to comply with a s313C notice without a reasonable excuse, whether involving fraud or negligence or not, can in principle attract the penalty and the penalty is not increased if behaviour is fraudulent or negligent. That points against a conclusion that the penalties are criminal in nature.

57. In addition, the circumstances in which the penalty can be imposed are different from those which might be expected to apply to criminal sanctions. With a criminal sanction, a prosecuting authority might be expected first to decide whether charges should be brought with those charges then being tested before an independent tribunal. Here, the decision whether penalties should be imposed is made by an entirely independent tribunal that has not been involved at all in the investigation of the alleged non-compliance. That also points against a conclusion that the charges are criminal.

58. Turning to the third of the *Engel* criteria, the maximum penalty that can be imposed is £5,000. For some taxpayers that will be a large sum of money, for others it will not be. The penalty is not charged as a percentage of any tax lost. A taxpayer cannot be imprisoned either for failing to comply with a notice under s313C or for failing to pay a penalty imposed in consequence of that non-compliance. However, in *Jussila v Finland*, the European Court of Human Rights attached little significance to the minor

nature of the penalty at issue in that case (which was actually just EUR 300), nor did the European Court of Human Rights attach much significance to the fact that the penalty was charged as a percentage of the underlying tax due (so could, in theory, have been much higher if the underlying tax liability had been higher). I therefore consider that third *Engel* criterion does not provide a strong indication one way or the other.

59. My conclusion, having applied the three *Engel* criteria cumulatively, is that the indications pointing in favour of a conclusion that the penalties are criminal in nature have the most weight. I therefore accept the Company's argument that it has been made subject to "criminal charges" for the purposes of Article 6 of the ECHR.

60. Later in this decision, I will address specific arguments that Ms Brown made as to how the penalties' nature as "criminal charges" should inform a construction of s313C of FA 2004. However, in terms of the procedure before this Tribunal, I do not consider it matters much whether the penalties are criminal charges as all the safeguards set out in Article 6 are present. The Company is entitled to a hearing before an independent body (dealing with Article 6(1)). HMRC acknowledge that they have the burden of proving that a penalty should be imposed, although the Company has the burden of establishing any "reasonable excuse" (and I consider that deals with Article 6(2)[4]). The Company has the benefit of the safeguards set out in Article 6(3)(a), (b), (d) and (e) to the extent relevant. Moreover, the Company is using its chosen legal advisers to contest liability to the penalty so benefiting from the safeguard in Article 6(3)(c). (There was no suggestion that the Company could not afford legal representation and neither Mishcon de Reya nor Ms Brown said that they were appearing *pro bono*).

The preconditions for issuing a notice under s313C of FA 2004

61. This Tribunal is a creature of statute. My power to consider whether the preconditions for issuing a notice under s313C were met has to be considered in the light of the statutory provisions giving the Tribunal jurisdiction.

62. In s100C of TMA 1970, Parliament has provided that the Tribunal has full power to decide whether a penalty should be imposed and, if so, how much that penalty should be. Parliament has not circumscribed that jurisdiction by stating expressly or impliedly that the question whether HMRC were entitled to issue a notice under s313C was "off limits". In those circumstances, I consider that I both can and should consider whether the preconditions were satisfied before deciding whether to impose a penalty.

63. I should say that I do not regard this conclusion as inconsistent with my conclusion in, for example, *Nijjar v Commissioners for HM Revenue & Customs* [2017] UKFTT 175 (TC). In that case, I was considering the very different statutory regime applicable

[4] Even though the penalties are criminal, like those considered in *Euro Wines (C&C) Limited v HMRC* [2018] EWCA Civ 46, they are "regulatory penalties" not dependent on proof of any fault on the part of the Company. Therefore, by parity of reasoning with that decision, a reverse burden of proof on questions of "reasonable excuse", which relate primarily to matters within the Company's knowledge, does not represent a disproportionate interference with Article 6 rights.

to "accelerated payment notices". Having considered that statutory regime in its entirety, I concluded that Parliament did not intend the Tribunal, in considering whether a penalty could be due, to address the question of whether the accelerated payment notice was validly issued. The statutory regime applicable to these proceedings is different from that at issue in *Nijjar*.[5]

64. The preconditions as drafted require HMRC to "suspect" that the Company was an introducer in relation to a proposal and the proposal is notifiable. I was shown some authorities on the meaning of "suspicion" and "suspect" in different contexts.

65. *R v Da Silva* [2006] EWCA Crim 1654 concerned the ingredients of a criminal offence of facilitating retention or control of proceeds of criminal conducting "knowing or suspecting" that another person is or has been engaged in criminal conduct. Therefore, the provision considered in *Da Silva* could impose criminal liability on a person who knew or suspected a relevant fact, a different situation from the question whether HMRC's suspicion of a relevant fact was enough to require it to require information from a taxpayer. The Court of Appeal concluded that, for the offence to be committed, it was enough:

> That the defendant must think that there is a possibility which is more than fanciful that the relevant facts exist. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be clear or firmly grounded and targeted on specific facts or based upon 'reasonable grounds'.

66. I was also shown *Squirrell Ltd v National Westminster Bank plc* [2005] EWHC 664 which analysed some money laundering offences. I derived relatively little assistance from these authorities on the meaning of the "suspect" in different contexts. The word is an ordinary English word. The Oxford English Dictionary gives the following usage:

> To imagine or fancy something, esp. something wrong, about (a person or thing) with slight or no proof

67. At paragraphs17 and 18 of her witness statement Ms Fracchiolla said expressly that she formed a suspicion that the Company was acting as an introducer in relation to a notifiable proposal. Ms Brown subjected Ms Fracchiolla to a searching cross-examination seeking to test the basis for her suspicion. Ms Fracchiolla's responses in cross-examination did not cast any doubt on the accuracy of her statement and Ms Brown did not go as far as suggesting that paragraphs 17 and 18 of Ms Fracchiolla's witness statement were untruthful. I am in no doubt that Ms Fracchiolla of HMRC formed the requisite suspicion.

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[5] In her oral reply to Ms Brown's submissions, in support of her argument that the Tribunal should not look at whether the requirements of s313C(1) have been met, Ms Hicks referred to some authorities that had not been mentioned in her skeleton argument. She did so largely because of questions that I asked during the hearing and so she cannot be criticised for this. Since I have rejected Ms Hicks's arguments on this issue and have accepted Ms Brown's submissions (that, given the statutory regime applicable to these penalties I should consider the requirements of s313C(1)), I have decided not to ask Ms Brown for written observations on these additional authorities.

68. Ms Brown submitted that, before a penalty can be due, HMRC must have issued their s313C notice on the basis of a reasonable suspicion. I reject that submission. Section 313C does not, on its face, require a reasonable suspicion. If Parliament had intended a reasonable suspicion to be necessary, it could have said so. No doubt if HMRC behaved oppressively and issued a taxpayer with notices under s313C on the basis of wholly unreasonable suspicions, the taxpayer could bring judicial review proceedings to the High Court who would have a discretion (but not an obligation) to quash the notices, but that is very different from saying that the statute requires a reasonable suspicion.

69. Nor do I accept Ms Brown's submission that the penalties' status as criminal charges for the purposes of Article 6 of the ECHR requires s313C to be construed as requiring a reasonable suspicion. Section 313C is not concerned with the penalties: it is the threshold provision that deals with HMRC's power to issue notices. Even though a penalty charged for a failure to comply with s313C is "criminal" in nature, I see no reason why that informs how s313C should be construed. Put another way, all of the safeguards set out in Article 6 of the ECHR are capable of applying to a taxpayer who receives a penalty for failing to comply with a notice under s313C whether the notice is issued following an HMRC "suspicion" or a "reasonable suspicion". Ms Brown submitted that, if HMRC issued a notice following an unreasonable suspicion then the Company's rights under Article 6(3) would be infringed as the Company could not be informed of the nature and cause of the allegation against him when HMRC are seeking a penalty. But that is to confuse the penalty with the reasons for issuing the s313C notice: the "nature and cause" of the allegation against the Company in relation to the penalties has always clearly been that the Company failed to comply with a notice under s313C.

70. In any event, for the reasons set out below, I am satisfied that HMRC's suspicion was entirely reasonable.

71. Ms Fracchiolla accepted in cross-examination that the "Dispatches" programme was not necessarily objective. It was prepared by Greg Wise who clearly has a personal distaste for tax avoidance and the programme reflected that distaste. However, that programme showed Mr Ashbolt saying to Mr Wise that, by setting up a trust in Belize, Mr Wise could achieve the apparently magical result of choosing how much tax he had to pay on profits of his profession as an actor. It was entirely reasonable for Ms Fracchiolla to suspect that those arrangements "might be expected to enable any person to obtain an advantage" in relation to income tax (which is one of the prescribed taxes for the purposes of the definition of "notifiable arrangements". Given the way that Mr Ashbolt was describing those arrangements, it was entirely reasonable for Ms Fracchiolla to suspect that obtaining such tax advantages was one of the main benefits that might be expected to arise from the arrangements. Mr Ashbolt's explanation of the arrangements suggested that it was straightforward to achieve the desired result: all Mr Wise needed to decide was how much tax he wanted to pay and establish a trust for the benefit of his suppliers in Belize. It was reasonable for Ms Fracchiolla to suspect that such a scheme might involve standardised products and documents of the kind featured in Regulation 10 of the Hallmark Regulations. It was also reasonable for Ms Fracchiolla to suspect that a person promoting such arrangements would expect to be paid and that

such a promoter might charge a fee calculated by reference to tax saved or contingent on tax saved (so as to amount to a premium fee falling within Regulation 8 of the Hallmark Regulations).

72. Ms Fracchiolla's knowledge of the factors set out at [24] reinforces the reasonableness of her suspicions. A taxpayer engaged in "remuneration trust" planning had told HMRC that it had learned of the idea from the Company. The Company had a limited agency contract with Minerva to market "Minerva plans". The Professional Liability statement referred to at [24(2)] indicated that Minerva plans were written by a firm who appeared to be linked with a well-known deviser of tax-avoidance schemes[6].

73. Ms Brown sought to characterise Ms Fracchiolla's suspicion as wholly unreasonable. She noted that it was not clear from the "Dispatches" programme precisely what scheme Mr Ashbolt was talking about and submitted that any suspicion had to exist in relation to a particular "proposal" and not a "global suspicion of tax avoidance". It was, she submitted, possible that, as arrangements developed before, and not altered after, 18 March 2004, the tax planning he was discussing was "grandfathered" from the DOTAS regime by s319(3) of FA 2004. Alternatively, it was possible that, the planning he was outlining was wholly ineffective as a consequence of the legislation on "disguised remuneration" enacted in Finance Act 2011 and so could never produce any "tax advantages". She argued that Ms Fracchiolla had shown in cross-examination that she was not knowledgeable on the DOTAS regime and knew little about case law on tax avoidance and so could not have formed a reasonable suspicion. She also argued that Ms Fracchiolla had shown in cross-examination that she did not know what the business arrangement was between Baxendale Walker LLP and Minerva or what "Minerva plans" consisted of.

74. I reject Ms Brown' submissions. The Dispatches programme and the arrangement with Minerva clearly indicated that the Company was marketing something. The Dispatches programme strongly suggested that what was being marketed was a hallmarked tax avoidance scheme. The arrangement between the Company and Minerva, and between Minerva and Baxendale Walker LLP reinforced the suspicion that the Company was marketing tax avoidance schemes. Ms Fracchiolla did not need to be sure that the proposals were notifiable, or that the Company was acting as an introducer to have a reasonable suspicion. She did not need to know specifically how the "proposals" worked[7]. Nor does it matter that, in cross-examination she could not recite full names of statutory instruments or the names of leading legal authorities on tax avoidance. I was satisfied that Ms Fracchiolla's role as a DOTAS Enforcement

[6] HMRC did not produce any evidence that Paul Baxendale-Walker or Baxendale Walker LLP were engaged in the devising of tax avoidance schemes. However, that proposition seemed uncontroversial and indeed, Mr Baxendale-Walker's involvement in tax avoidance schemes is set out in the decision of both the High Court and the Court of Appeal in *Barker v Baxendale Walker Solicitors and another* [2017] EWCA Civ 2056 and [2016] EWHC 664.

[7] Mr Ashbolt's conversation with Greg Wise suggested he was offering Greg Wise a way of reducing tax on profits of his acting profession whereas "disguised remuneration" schemes will typically be seeking to avoid tax and national insurance charges on employment income. I do not consider that, in order to form a reasonable suspicion, Ms Fracchiolla needed to know whether the proposals the Company was marketing sought to reduce employment income specifically or not.

Caseworker at HMRC had given her a good working knowledge of the kind of planning that is (and is not) capable of constituting a notifiable proposal and the kind of activity that does (and does not) amount to acting as an "introducer". That knowledge equipped her to form a reasonable suspicion as to the matters set out in s313C(1) of FA 2004. I am in no doubt that Ms Fracchiolla's suspicions as to those matters were entirely reasonable.

75. For completeness, I note that Ms Brown submitted that the status of these penalties as "criminal charges" meant that I should give no weight to hearsay evidence in deciding whether the penalties are due. I do not consider that submission is borne out by the authorities. In paragraph 84 of his judgment in *Han*, Potter LJ expressly stated that the classification of a VAT penalty as a "criminal charge" did not necessarily engage the provisions of the Police and Criminal Evidence Act 1984 and Mance LJ made a similar point at [88]. These remain civil proceedings as a matter of domestic law and the Tribunal is entitled to have regard to hearsay evidence under its own rules of procedure. That said, I do not consider that this decision relies significantly on hearsay evidence. The main factual issues in dispute relate to the state of Ms Fracchiolla's knowledge and the reasonableness or otherwise of her suspicions. Ms Fracchiolla gave evidence of her own beliefs (so that was not hearsay evidence). When considering the reasonableness of Ms Fracchiolla's suspicions, I have taken into account documents whose authors have not given evidence. However, in many cases, I have not done so in order to establish the truth of the propositions in those documents, but rather that the contents of the documents were sufficient to make Ms Fracchiolla's suspicions reasonable. I do not, therefore, consider that, the Company's rights under Article 6 are infringed by undue reliance on hearsay evidence particularly given that, like the penalties considered in *Euro Wines*, these are relatively minor regulatory penalties that are not dependent on proof of wrongdoing.

Whether HMRC were permitted to, and did, issue multiple notices under section 313C of FA 2004

76. Ms Brown argued that s313C of FA 2004 permits HMRC to request information "by written notice" and not "by written notice**s**". That, she submitted, indicated that Parliament envisaged that HMRC could serve only one notice per proposal. However, the use of the singular provides only a weak indication to this effect since, as a matter of statutory construction, the singular normally includes the plural (see section 6(c) of the Interpretation Act 1978). In any event a statement that HMRC may serve a notice does not, as a matter of ordinary English necessarily exclude the possibility that they may send more than one notice.

77. Ms Brown amplified her argument by submitting that the "prescribed information" under the Information Regulations 2012 that could be requested consists of the name and address of <u>each</u> person who has provided the taxpayer with information relating to the proposal and the name and address of <u>each</u> person with whom the taxpayer had made a marketing contact. Therefore, HMRC were permitted only to ask for <u>all</u> of this information; they could not ask for part of it only (for example by limiting their request to marketing contacts taking place after a certain date, or for information received after a certain date). The statute could not be envisaging that HMRC could, time and again,

ask a taxpayer to provide the same information which, she submitted, further supported the interpretation that s313C permits only one notice per notifiable proposal. I reject that submission. The Information Regulations 2012 simply set out the information that HMRC are permitted to ask for. I see no reason why they should be construed as limiting HMRC's power to choose to ask for only some of that information. In the circumstances of this appeal, HMRC have not asked for the same information on multiple occasions. On the contrary, they took care to ensure that each of their notices requested information commencing the day after the immediately previous notice was issued. However, if HMRC did behave oppressively by asking for the same information over and again, a court could restrain their actions by judicial review, or a tribunal might decide that no penalty is appropriate. There is no reason to construe s313C as limiting HMRC to one notice per proposal because of the risk of oppressive behaviour.

78. A "one notice per proposal" restriction would be incompatible with the evident purpose of s313C. Parliament has legislated to enable HMRC to require information on the "supply chain" of people involved in tax avoidance schemes from those devising the schemes to potential users. On Ms Brown's interpretation, HMRC would have just one opportunity to obtain information under s313C in respect of a particular proposal from a particular introducer. Having served their one permitted notice, they would be prevented from obtaining information from that introducer even if he or she continued to market the scheme to new clients. I see no reason why Parliament should have intended that result.

79. In addition, I do not consider how a "one notice per proposal" restriction could be imported into s313C given that s313C applies in cases where HMRC may have only a suspicion that a particular proposal may be notifiable. HMRC may not know what the precise "proposal" is. If s313C is operating in circumstances where HMRC do not know what exactly what a particular "proposal" is, I do not consider that Parliament could have intended a restriction on serving more than one notice per "proposal".

80. Ms Brown submitted that the limit of one notice per notifiable proposal followed from a construction of s313C that gave effect the status of the penalties as "criminal charges" for the purposes of Article 6 of the ECHR. For reasons similar to those outlined at [69], I do not consider that Article 6 informs how s313C should be construed. A person facing penalties for multiple failures to comply with s313C notices would have the same protections under Article 6 as a person facing, for example, multiple charges of motoring offences.

81. It follows that HMRC had the power to issue the Company with more than one notice under s313C. I am in no doubt that they exercised that power. The various notices that HMRC issued have to be interpreted by reference to the continuum of relevant correspondence between HMRC and the Company and how the communications would be read by a reasonable recipient (see by analogy the decision of the Court of Appeal in *HMRC v Bristol & West plc* [2016] EWCA Civ 397). Here the covering letters sending the Second Notice and the Third Notice referred to them as "further" notices under s313C. Moreover, the both Second Notice (and Revised Second Notice) and the Third Notice took care to specify a "start date" for the information requested so as not

to require the Company to provide again information that had already been requested in an earlier notice (see [39] and [44] above).

Whether HMRC granted successive extensions of time for compliance

82. I reject Ms Brown's submission that the Second Notice (and Revised Second Notice) and Third Notice amounted (or would be regarded by reasonable recipients as amounting to) to extensions of time for compliance with the First Notice such that HMRC only ever issued one notice under s313C.

83. The Company asked Ms Fracchiolla for an extension of time on at least two occasions: in Mishcon de Reya's letter of 11 October 2016 following issue of the First Notice and in the telephone call of 10 April 2017 following issue of the Second Notice. HMRC's response to the letter of 11 October 2016 could have left a reasonable recipient in no doubt that the request for an extension of time had been refused (see [33] above). Her response to Mischon de Reya's telephone call of 10 April 2017 involved her going to the considerable trouble first of sending an email confirming that an extension of time had been granted and second of reissuing the Second Notice. When Officer Fracchiolla granted an extension of time, she was clear on the matter, and she was similarly clear when refusing an extension. Moreover, she was clear throughout her correspondence that she thought there had been breaches of the First Notice which was inconsistent with the grant of any extension of time.

84. Ms Fracchiolla accepted in cross examination that her primary concern was to obtain the information requested from the Company. She did not want to have to ask the Tribunal to impose a penalty if she did not have to and I have inferred that, if the Company had provided earlier compliance with the First Notice and the Revised Second Notice, even if belated, she may well have decided not to seek a penalty. However, that does not demonstrate that Ms Fracchiolla or HMRC had waived any right to ask for a penalty, or had indicated to the Company that it did not matter whether it complied with the First Notice or the Revised Second Notice or not. She emphasised in her evidence that whether she chose to seek a penalty would be influenced by how late the Company was in complying. Her willingness to delay seeking a penalty was not without limit as is demonstrated by the fact that ultimately HMRC did decide to ask the Tribunal to impose a penalty.

85. Nor would a reasonable recipient have read Ms Fracchiolla's letters as indicating that HMRC were granting successive extensions of time. As noted above, those letters repeatedly warned of an intention to seek penalties. A reasonable recipient might have inferred that, since HMRC had not by, April or May 2017, when the deadline for expiry with the Revised Second Notice expired, approached the FTT for a penalty, they might not do so if information was provided in response to the First Notice and the Revised Second Notice, even if belatedly. But a reasonable recipient would not have read Ms Fracchiolla's letters as containing unqualified assurances that extensions of time had been, or would be, granted.

Article 8 of the ECHR

86. Article 8 of the ECHR provides as follows:

> **Article 8 – Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

87. First, I consider that the requirement to provide certain limited information pursuant to s313C within 10 business days is "in accordance with law and is necessary in a democratic society in the interests of … the economic well-being of the country".

88. I accept that s313C might operate disproportionately in some circumstances. For example, a taxpayer may have to produce so much information that 10 business days is not enough. Or a notice under s313C might arrive while a taxpayer is unwell, or on holiday, and so does not have sufficient time to comply by the time the information notice comes to his or her attention. However, there is no need for any "purposive" interpretation of s313C to deal with this issue and no need to "read in" a requirement that HMRC must grant extensions of time where a request would otherwise interfere with Article 8 rights. All of that is achieved by the defence of "reasonable excuse" set out in s118 of TMA 1970: if a taxpayer has a reasonable excuse for not providing information requested within the 10 business day deadline then, provided the failure is remedied within a reasonable time of any reasonable excuse ceasing, the failure to comply with the notice will be of no consequence as no penalty can be imposed.

89. Ms Brown's arguments on Article 8 also faced another formidable difficulty. When the Company finally chose to comply (with the Third Notice), it was perfectly capable of doing so within the 10 business day time limit. There is therefore no reason to suppose that the deadlines specified in the First Notice and the Revised Second Notice were unduly tight so as to amount to an interference with Article 8 rights.

Reasonable excuse

90. As noted at [46], HMRC accept that the Company complied with the Third Notice by the applicable deadline. I have found as a fact that the Company did not comply with the First Notice or the Revised Second Notice by the applicable deadlines and the Company has advanced three reasonable excuses for these failures:

> (1) It was reasonable for it to conclude that, when HMRC issued further notices under s313C rather than seeking a penalty for a failure to comply with the First Notice, HMRC was extending time for compliance with the First Notice. As such it was reasonable for the Company not to comply in time.

(2) HMRC did not provide the Company with reasons why they suspected that the Company was acting as an introducer in relation to notifiable proposals but were requesting information including the names and addresses of the Company's clients. The Company was entitled to take data protection issues seriously and not disclose information to HMRC unless satisfied the requests were validly made.

(3) It was reasonable for the Company to consider that the various notices may be invalid because HMRC had not adequately explained the basis for their suspicions and so reasonable for it not to comply with the notices by the deadline.

91. Section 118 of TMA 1970 requires me to consider two issues: first, I must consider whether the Company had a reasonable excuse for not complying with the First Notice or the Revised Second Notice by the applicable deadline. If I consider that there was such a reasonable excuse, but that excuse ceased at any point, I must consider whether the Company complied with the relevant notice within a reasonable period of time of the excuse ceasing as, if it did not, the initial reasonable excuse will not provide a defence to the penalty.

92. When the deadline for compliance with the First Notice expired, the Company could have had no idea that there would be later notices or that HMRC would delay seeking a penalty. It is therefore simply not arguable that HMRC's subsequent conduct can provide a reasonable excuse for the Company's failure to comply with the First Notice by the deadline.

93. By the time the deadline for compliance with the Revised Second Notice expired, the Company had seen that, in connection with the First Notice, HMRC were saying that they would seek a penalty but had shown no sign of actually doing so. However, as I have noted at [85], a reasonable recipient of the Revised Second Notice would not have concluded that the deadline for compliance in that notice was of no effect. In short, it was not reasonable for the Company to conclude that it had longer to comply with the Revised Second Notice.

94. In any event, the Company could have been in no doubt from 3 July 2017, when HMRC submitted their application for penalties to the Tribunal, that HMRC were seeking penalties in respect of both the First Notice and the Revised Second Notice. Therefore, even if there was initially a reasonable excuse for failing to comply with the Revised Second Notice, that excuse ceased on 3 July 2017. The Company did not comply with the Revised Second Notice until 19 October 2017 which I consider to be an unreasonable time after 3 July 2017.

95. The Company has not put forward any witness evidence that indicates that it declined to provide the information that HMRC were requesting in the First Notice or Revised Second Notice because of concerns about the confidentiality of client data[8]. It

[8] Ms Hicks invited me to draw "adverse inferences" from the Company's decision not to rely on witness evidence. That prompted Ms Brown to argue that because these are "criminal" proceedings

follows that I am not even satisfied that this was the reason why the Company failed to comply, still less that it amounted to a "reasonable excuse" for that failure. In any event, HMRC's application of 3 July 2017 set out in detail the basis for their suspicions that the Company was acting as an introducer in relation to a notifiable proposal. As I have noted at [94] above, the Company did not comply with the Revised Second Notice within a reasonable time of 3 July 2017. It still has not complied fully with the First Notice. Therefore, even if concerns about the confidentiality of client data were (initially) a reasonable excuse (which I do not accept), the information was not provided within a reasonable time of that excuse ceasing.

96. The Company has not put forward any witness evidence that suggests that its refusal to comply with the notices was motivated by a belief that the notices were invalid. Nor has it put forward evidence (for example advice from suitably qualified professional advisers indicating that the notices were not valid and so the Company was not required to comply with them) to establish that any such belief was reasonable. I am not, therefore, satisfied that this amounts to a reasonable excuse for non-compliance.

97. For all of the above reasons, I reject the Company's argument that it had a reasonable excuse for failing to comply with either the First Notice or the Second Notice.

The amount of the penalty

98. I have concluded that the Company failed to comply with the First Notice and the Revised Second Notice by the applicable deadline and had no reasonable excuse for its failure. I must, therefore, decide how much, if any, penalty to impose.

99. Ms Brown submitted that there were mitigating circumstances: the notices were unclear, HMRC were not forthcoming about their reasons for issuing the notices and, by delaying taking action to seek a penalty, HMRC allowed the Company to form the view that its conduct in failing to comply with the notices would not be heavily penalised. However, I do not accept these submissions. I think it has been clear throughout why HMRC issued the notices, but HMRC's application for penalties of 3 July 2017 could have left the Company in no doubt as to the (full) basis of HMRC's suspicions. Yet despite this, and despite the applicable deadline being 10 business days, the Company still has not complied fully with the First Notice and did not comply with the Revised Second Notice until 17 October 2017, some six months late.

100. HMRC's power to serve s313C notices is intended to enable them to track how notifiable proposals are being disseminated. Moreover, the purpose of the DOTAS regime as a whole is to give HMRC information on the nature, and spread, of avoidance schemes so that, if necessary, action can be taken to combat them. The provision of prompt information is, therefore, important to the functioning of that regime. Therefore, while the Company deserves some limited credit for the fact that ultimately it did

for the purposes of Article 6 of the ECHR, I should not draw adverse inferences from silence. However, I am not drawing any adverse inferences. I am simply saying that, since the Company has not put forward any evidence as to why it did not comply with the notices in time, it will struggle to establish that it had a "reasonable excuse" for that failure given that it bears the burden of proof on this issue.

comply with the Revised Second Notice and it has complied (partially) with the First Notice, that credit will not be significant. On the whole, the protracted delay in compliance, with the absence of any good reason for the failure, is an aggravating factor.

101. The information that the Company ultimately gave indicated that it had discussed remuneration trust tax planning with just 10 individuals (one of whom was Greg Wise, the undercover actor in the Dispatches programme) in over 2½ years. Therefore, even if the Company had provided the information HMRC requested on time, it would probably not have advanced HMRC's knowledge of this kind of tax avoidance significantly. That is a mitigating factor.

102. If HMRC wanted a penalty, they had no choice but to take proceedings before the Tribunal. The Company did not accept that penalties should be imposed and limit itself to submissions about mitigation and reasonable excuse. On the contrary, it contested the question whether HMRC was even entitled to issue notices under s313C and the hearing before me lasted nearly two full days with both sides represented by counsel. The Company is entitled to require HMRC to prove that those penalties should be imposed. However, having done so, it cannot expect the penalties to be reduced on the basis of an early admission of liability.

103. Ms Brown suggested that any penalty I impose should be reduced if the Company provides the information within a specified period of time. That suggestion could only be sensibly applied to the First Notice since the Company has, belatedly, complied with the Revised Second Notice. However, I will not adopt her suggestion. The Company has had plenty of time to comply fully with the First Notice but for reasons known only to itself has chosen not to do so. I see no reason why a provision of information at this late stage, over two years after the First Notice was issued, should operate to reduce the penalty chargeable.

104. I have concluded that a penalty of £4,000 should be charged in connection with the failure to comply fully with the First Notice and a penalty of £3,000 should be charged in connection with the belated failure to comply with the Second Notice.

105. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 5 NOVEMBER 2018