Neutral Citation: [2023] UKFTT 874 (TC)

Case Number: TC08951

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/12563

DOTAS – appeal under Section 311B Finance Act 2004 against decision to allocate a scheme reference number – whether reasonable grounds for suspecting notifiable arrangements – yes - whether reasonable to suspect the Appellant to be a promoter and/or involved in the supply of the arrangements - yes – appeal dismissed – decision affirmed

Heard on: 7-9 March 2023
Judgment date: 12 October 2023

Before

TRIBUNAL JUDGE KIM SUKUL

Between

GREENWICH CONTRACTS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Keith Gordon, counsel and Ximena Montes Manzano, counsel, instructed by Sharpe Pritchard

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

DECISION

INTRODUCTION

1. The hearing lasted 3 days. With the consent of the parties, the form of the hearing was video using the Tribunal's Video Hearing Service platform. The documents to which I was referred were contained within the 1,465-page hearing bundle, 329-page supplementary bundle, authorities bundles and skeleton arguments from both parties. I also have the benefit of transcripts of the hearing.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. Greenwich Contracts Limited ('Greenwich', also referred to as 'GCL') appeals under section 311B of the Finance Act 2004 ('FA 2004') against the decision made by the Respondents ('HMRC') dated 16 June 2022 to allocate a scheme reference number ('SRN') under section 311(5) FA 2004.

4. HMRC's position is that the allocation of the SRN related to arrangements which they had reasonable grounds for suspecting were notifiable arrangements within the meaning of the legislation and that the SRN was properly issued following a notice issued on 3 March 2022 under section 310D FA 2004. Greenwich contends that HMRC have not acted in accordance with the legislation and the arrangements are not notifiable arrangements.

5. I have referred to individuals who have been named in connection with various transactions by their initials only, as I do not consider it necessary to name them for the purposes of this decision.

GROUNDS OF APPEAL

6. Greenwich appeals on the following grounds:

> "(a) HMRC have not acted in accordance with section 310D (a permissible ground per section 311B(3)(a)); and
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> (b) the arrangements are not notifiable arrangements (a permissible ground per section 311B(3)(c)).
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> Furthermore, HMRC have been put to strict proof to demonstrate that the notice was properly given (a permissible ground per section 311B(3)(b)). In particular, compliance with section 311 requires HMRC to notify the person that HMRC reasonably suspect to be the promoter (at that later time) (section 311A(2), (3)).
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> Furthermore, HMRC could not have complied with section 311(3)(c), as all the evidence provided to HMRC before the notice period had expired must have led HMRC to conclude that the Appellant was not a promoter in relation to any notifiable arrangements."

BACKGROUND

7. The circumstances which gave rise to the decision under appeal involve payments in connection with Greenwich's 'umbrella' operations, where one payment was made to contractors by Greenwich, in an amount equivalent to the National Minimum Wage ('NMW'), subject to deductions for income tax and national insurance contributions ('NIC'), and a further payment, without such deductions, was made by a company called Integra Resourcing Limited ('Integra', also referred to as 'IRL'), which is registered in Malta. Greenwich also made payments to a "third-party introducer" company called Umbrella Contracts (UK) Limited ('Umbrella Contracts UK').

8. Greenwich contends, in their skeleton argument, that the background facts are as follows:

> "Background facts
>
> 3. The Appellant is a bona fide umbrella company. The Appellant's business operates in the temporary contracts' market and involves the supply of contractors on short-term contracts to the Appellant's clients either directly or via recruitment agencies. Typically, most administrative functions are carried out by the Appellant including collecting timesheets, billing and payroll.
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> 4. The Appellant operates the same business model as other umbrella companies in that the Appellant engages contractors under a contract of employment; this means that the contractors are employees of the Appellant and not of the recruitment agencies or end clients. The Appellant also has contractual obligations with recruitment agencies and end-clients which it discharges by providing the services of the contractor pursuant to the terms of each employment contract. The Appellant will then issue an invoice for its services (the supply of the contractor's services) to the recruitment agency or end client and it is paid directly in accordance with that invoice.
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> 5. In approximately 20% of cases, the contractor approaches the Appellant directly. In those cases:
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> (i) the Appellant invoices the client for the individual contractor's services;
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> (ii) the Appellant contracts to pay the individual the National Minimum Wage (on which tax and National Insurance Contributions (both employer's and employee's) is deductible);
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> (iii) the Appellant takes a 1.5% fee on the contract value;
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> (iv) the surplus (assuming no other company costs) is then paid over to the individual contractor, described as "commission", subject again to the deduction of tax and National Insurance.
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> 6. In approximately 80% of the cases, the contractor is engaged by the Appellant following a referral from a third-party "introducer". The material differences between these cases and those where there is no introducer are:
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> (i) the Appellant takes a 2% fee (rather than 1½%) on the contract value;
>
> (ii) the surplus is paid to the introducer and that is described as the "introducer fee". The Appellant is, however, left in virtually the same position as when dealing with contractors directly, with a 2% cut of the amounts paid for the contractor's services.
>
> 7. The above is a typical business model for an umbrella company."

9. In their statement of case, HMRC contended that, in cases which involved Integra, the arrangements work as follows:

> "Step 1
>
> 9. Scheme users and IRL enter into an employment agreement ("the Integra Employment Contract"). The Integra Employment Contract stipulates that IRL requires consultancy workers who are able to enter into secondary employment arrangements. Typically, on the same date the scheme users and the Appellant enter into a separate employment agreement ("the Greenwich Employment Contract"). The Greenwich Employment Contract provides that the Appellant will pay the scheme users at an hourly rate equivalent to the minimum rate allowed by the National Minimum Wage Act 1998 ("Minimum Rate"). This is the rate that applies regardless of the qualifications and experience of scheme users, and for some this is considerably lower than the

hourly rate that they could potentially earn elsewhere. The Greenwich Employment Contract further states that scheme users shall be paid any Commission due under the Commission Plan. The Greenwich Employment Contract sets out conditions relating to the Commission Plan at Schedule 1. In this schedule, it is stated that the payment of Commission is based solely on monies generated by the scheme users and received by the Appellant from clients of the Appellant. The formula for calculating the Commission on this basis is not included in this schedule. It is noted in the schedule that scheme users will only be entitled to payments in excess of the Minimum Rate when such payments are either entitled in accordance with the Commission Plan, or where the scheme users are otherwise entitled to a payment under the Greenwich Employment Contract. Scheme users are advised in this section that the Commission Plan is available on request.

Step 2

10. HMRC consider that there are reasonable grounds to suspect that a contract must exist between the Appellant and IRL that would formalise the relationship between the two employers; allow the Appellant to act as the employer of record; and allow the Appellant to enter into contracts to provide the services of scheme users to the end user either directly or via a recruitment agency. In the absence of such a contract, or substantially similar arrangements in existence via a third party, the scheme could not be implemented.

Step 3

11. The Appellant enters into a contract with a "Client" for the provision of services by scheme users. Whilst a copy of such a contract is not held it is reasonable to suspect that they exist because the Greenwich Employment Contract sets out within the Terms and Conditions a definition of "Client" as a third party, comprising either an employment businesses or other business with whom the Appellant will contract for the "provision of the Services".

Step 4

12. The scheme users provide their services to the end clients as per the contracts and any assignment schedules. As per the Greenwich Employment Contract, the scheme users are required to record their time worked on a timesheet to be verified by the recruitment agency or end client as appropriate, submit the same to the recruitment agency or end client, and provide a copy to the Appellant who in turn passes them to IRL. The Appellant issues invoices to recruitment agencies or directly to end users on the basis of these timesheets. Invoices are settled by the end client/recruitment agency by payment to the Appellant.

Step 5

13. As per the Greenwich Employment Contract, the Appellant pays scheme users at an hourly rate equivalent to the minimum rate allowed by the National Minimum Wage Act 1998. The Greenwich Employment Contract specifies further that sums due to scheme users are calculated net of PAYE and employee NICs and any other statutory deductions. HMRC have reasonable grounds to suspect that the Appellant makes a payment to IRL, possibly via another entity. This payment comprises the balance of funds received by the Appellant from the end users or recruitment agencies less the sums due to scheme users under the Greenwich Employment Contract and any amount retained by the Appellant, being the economic equivalent of a fee, as consideration for its involvement in the arrangements.

Step 6

14. As per the Integra Employment Contract, payments are made to the scheme users which are described as "bonuses" which may be paid at the discretion of IRL. These payments are made without any deductions by IRL for income tax and NICs. These are the secondary payments about which the Notice states that evidence provided by Scheme Users shows were made by the Appellant: they are in fact made by IRL.

Step 7

15. Small salary payments are made to the scheme users by IRL."

LEGISLATION

10. Extracts from the FA 2004 legislation to which I was referred are set out in an Appendix to this decision. All references to statutory provisions throughout this decision refer to FA 2004, unless stated otherwise. The relevant provisions are as follows.

11. Section 310D(1) applies where HMRC have become aware that a transaction forming part of arrangements has been entered into, or a proposal for arrangements is made available for implementation, and HMRC have reasonable grounds for suspecting that the arrangements are notifiable.

12. Under section 310D(2), HMRC may issue a notice of potential allocation of reference number to a person explaining that, unless the person is able to satisfy HMRC, before the end of the notice period, that the arrangements or proposal are not notifiable, HMRC may allocate a reference number to the arrangements.

13. Section 310D(4) states that a notice under this section must be issued to any person who, on the day the notice is issued, HMRC reasonably suspect to be a promoter in relation to the arrangements or proposal and section 310D(5) provides that a notice under this section may be issued to any other person who HMRC reasonably suspect to be involved in the supply of the arrangements.

14. Section 311(3) provides for the allocation of a reference number to arrangements where a notice in relation to arrangements has been issued in accordance with section 310D (notice of potential allocation of reference number), the notice period has expired, and the person to whom the notice was given has failed to satisfy HMRC, before the expiry of the notice period, that the arrangements are or the proposal is not notifiable. HMRC may at any time withdraw such a reference number under section 311(8).

15. Section 311(9) states that the allocation of a reference number to arrangements or proposed arrangements is not to be regarded as constituting an indication by HMRC that the arrangements could as a matter of law result in the obtaining by any person of a tax advantage.

16. Where such a reference number is allocated, section 311A(2) requires HMRC to notify the number to any person who HMRC reasonably suspect to be, or to have been, a promoter in relation to the arrangements or the proposed arrangements, and any other person who HMRC reasonably suspect to be, or to have been, involved in the supply of the arrangements or the proposed arrangements. Section 311A(3) provides that the duty applies irrespective of whether the notice under section 310D as a result of which the reference number was allocated has been issued to the person concerned.

17. A person who has been notified of such a reference number may appeal to the tribunal against its allocation only on the basis of the specific grounds set out in section 311B(3). This appeal is brought on the grounds set out in section 311B(3)(a), that HMRC did not act in accordance with section 310D in issuing the notice of potential allocation of reference number, and section 311B(3)(c) that the arrangements are not in fact notifiable arrangements.

18. Greenwich also refers to the grounds set out in section 311B(3)(b) that, in allocating the reference number, HMRC did not act in accordance with section 311, and seek to put HMRC to strict proof to demonstrate that the notice was properly given. In particular, compliance with section 311 requires HMRC to notify the person that HMRC reasonably suspect to be the promoter at that later time under sections 311A(2) and 311A(3). The tribunal may affirm or cancel HMRC's decision under Section 311B(7).

BURDEN OF PROOF

19. It is not in dispute that the standard of proof is the civil standard, namely on a balance of probabilities. The parties do, however, disagree on who bears the burden of proof in appeals under section 311B.

20. Ms Hicks points to the wording in subsection (3) which defines the permissible grounds of appeal. She argues that it is for the Appellant to demonstrate that those grounds are met (i.e. "HMRC did not act in accordance with that section [310D]", "HMRC did not act in accordance with section 311" and "the arrangements are not in fact notifiable").

21. Mr Gordon argues that:

> "(a) each of the preceding statutory steps (leading to the appealable decision) requires certain conditions to be fulfilled before HMRC can proceed and, therefore, on any appeal it is reasonable to expect HMRC to be able to (and to be required to) prove that each of those steps has been validly taken;
>
> (b) those steps rely principally on information held exclusively by HMRC (rather than the Appellant) which reinforces the view that HMRC are required to demonstrate that the statutory conditions have been met; and
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> (c) ensuring that HMRC bear the burden of proof avoids the obvious difficulties that would be caused if the Appellant were required to prove a negative.
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> Furthermore, by analogy to the well-known provisions in the Taxes Management Act 1970, section 29, it becomes even clearer that Parliament (by wording section 311B(3) as it has) did not intend to put the burden of proof on appellants.
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> (a) The Tribunal will be familiar with section 29 and, in particular, the additional conditions in subsections (4), (5) that need to be met in cases where the taxpayer has submitted a return.
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> (b) Section 29(8) expressly provides that any objection to the assessment "on the ground that neither of the two conditions is fulfilled" should be made by way of appeal against the assessment.
>
> (c) In other words, a frequent ground of appeal is based on an assertion that a prior statutory condition is not met.
>
> (d) However, it is now universally accepted (with High Court authority) that the burden of proof lies on HMRC – in other words, it is for HMRC to demonstrate that the underlying statutory conditions have been met."

22. Mr Gordon disagrees with HMRC's submission that it would make no sense within the machinery if HMRC had the burden of proving arrangements they merely suspected of being notifiable under 310D, were, in fact, notifiable. He argues that this only focuses on one of the three permitted grounds of appeal and overlooks section 306(a), for example, which is at an even earlier stage, where HMRC do have the burden of proof to show that something is notifiable, despite that being a case where there is limited information available to them. He also argues that notices in question are issued not specifically to promoters, but to persons

suspected of being a promoter, and an 'innocent pawn' in the arrangement would not be privy to the workings of the scheme or have powers to obtain information from the person suspected to be the promoter. It could not therefore be that Parliament would have put a burden of proof on an appellant in those circumstances. Mr Gordon submits that both the legal and evidential burdens fall on HMRC because the information that would justify HMRC's action is information held by HMRC. Greenwich could not be expected to provide information about what HMRC knew, illustrated by the 800 pages of documents that are part of the evidence of HMRC's Officer, which HMRC have felt appropriate to justify their actions. Mr Gordon submits that there is nothing that Greenwich could fairly put in their evidence up front to satisfy any of the statutory hurdles. All they can do is effectively respond to HMRC's own evidence.

23. The parties agree with the principle that the burden of proof is on the party who substantially asserts the affirmative of the issue, although Ms Hicks argues that Greenwich asserts that HMRC have not acted in accordance with section 310D and the arrangements/proposals are not notifiable, whereas Mr Gordon argues that HMRC asserts that they have acted in accordance with section 310D and the arrangements/proposals are notifiable. The parties also agree with the comments made by Henderson J in *Revenue and Customs Commissioners v Household Estate Agents Ltd* [2008] STC 2045 at [46], that the matter can usually be tested by asking which party would succeed if no evidence were adduced on the issue, but both parties argue they would succeed.

24. It is not in dispute that the objective of the DOTAS regime is to provide HMRC with early information about certain tax arrangements, from which obtaining a tax advantage is or might be expected to be a main benefit, and how the arrangements work, as well as to provide HMRC with information about who has used the scheme in an attempt to obtain the tax advantage, so that HMRC may open enquiries if appropriate.

25. The DOTAS arrangements are a set of administrative measures designed to impose on promoters a duty (subject to serious sanctions if not observed) to provide advance warning to HMRC of tax avoiding schemes. The essence of the scheme is thus to enable HMRC to apply the law to new types of arrangements as they emerge. (See *R (on the application of Walapu) v Revenue and Customs Commissioners* [2016] EWHC 658 (Admin), [2016] STC 1682 at [152]).

26. Whilst I accept appeals concerning both section 29 Taxes Management Act ('TMA') 1970 and section 311B can be based on an assertion that a prior statutory condition is not met, I agree with the submission made by Ms Hicks that an appeal in relation to section 29 TMA 1970 discovery assessments concern an entirely different mechanism, where the courts have decided that the burden of proof rests with HMRC when they are seeking to re-open tax affairs after the end of the relevant period to issue a charge to tax and the wording of the statute provides that the appellant shall not be assessed unless the conditions are satisfied.

27. I am also not convinced that it is appropriate to adopt the parallels Mr Gordon suggests regarding HMRC's burden of proving that statutory conditions are met in relation to the validity of information notices or enquiry notices. I do not consider imposing a burden of proof on HMRC to show that statutory conditions have been met and the arrangements are notifiable is consistent with a regime designed to impose a duty to provide advance warning to HMRC of tax avoidance schemes.

28. I also do not accept Mr Gordon's submission that the burden of proof is on HMRC because Parliament would not have put a burden on an innocent pawn to show the arrangements are not in fact notifiable when they do not have any knowledge of the scheme. There is no requirement concerning 'knowledge' within the statute. Showing that the arrangements are not notifiable is one of the three permitted grounds of appeal. It seems to me that an appeal brought by an innocent pawn is more likely to be made under the grounds that HMRC did not act in

accordance with section 310D, because they could not have reasonably suspected the appellant to be involved in the supply of the arrangements. If the appellant was not involved in the supply of the arrangements, the material to show that will be in the appellant's hands. If the appellant is involved in the supply of the arrangements, the material to show that the arrangements were not notifiable will again be in the appellant's hands.

29. I therefore consider the burden of proof to rest with Greenwich in this appeal. If I am wrong on this issue, I have addressed whether this would affect the outcome of this appeal at [130] below.

EVIDENCE

30. The documentary evidence before the Tribunal has been referred to at [1] above. In addition, I heard evidence from Ms Bainbridge, Director, for Greenwich, and from HMRC's Officer, Ms Fracchiolla.

31. Although there are some legal points in issue, the outcome of this appeal is based on my findings on the disputed facts, following my consideration of the evidence. In the circumstances of this case, I consider it to be appropriate to set out the witness evidence adduced in some detail.

Evidence of Ms Bainbridge

32. Ms Bainbridge presented 4 witness statements dated 17 October 2022, 6 December 2022, 19 December 2022 and 10 February 2023. In her first statement dated 17 October 2022, Ms Bainbridge states the following:

> "15. On 3 March 2022, Ms Donna Fracchiolla of HMRC wrote to the company to provide us with notice that HMRC may allocate a 'Scheme Reference Number' (SRN), under the 'Disclosure of Tax Avoidance Schemes' regime (DOTAS) (Exhibit 1). This communication followed an existing enquiry into the company's Corporation Tax return for the periods ending October 2018, 2019 and 2020. HMRC quote on many occasions during the letter that Greenwich Contracts Limited provided onshore support to a company called Integra Resourcing Limited (IRL), an entity registered in Malta engaged in promoting tax avoidance, and was somehow involved in the supply of a tax avoidance arrangement.
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> 16. HMRC explained that if the company was issued with an SRN that they may publish the information on the arrangement and alleged promoter, but that they would provide further information before publication. They also asked that if we do not agree with the notice to allocate an SRN, we should write to them before 2 April 2022,
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> 17. A response was provided to Ms Fracchiolla on 1 April 2022 (Exhibit 2). I started by advising Ms Fracchiolla that her statement about Greenwich Contracts Limited providing onshore support to IRL was incorrect as Greenwich Contracts Ltd has never entered into any contractual agreement with that company. I also took the time to explain to Ms Fracchiolla how an umbrella company operates and the different ways in which we market our company so that we can generate further business. I requested that Ms Fracchiolla provided evidence of why HMRC concluded that the company would be allocated an SRN.
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> 26. Greenwich Contracts Limited has never entered into a contractual agreement with IRL, something which HMRC fails to acknowledge after extensive correspondence advising the same. Even after requesting evidence from HMRC that the company is "apparently" in an agreement with IRL, they have failed to provide such evidence.

This is unsurprising as such evidence does not exist.

27 In June 2022, as soon as we were told of HMRC's decision to issue a SRN because of concerns over the IRL cases, I contacted UCUK and asked them to stop sending us any more work which comes from IRL. They complied with my request.

28. The repercussions of HMRC's actions of publishing the company's name will be chilling. It will clearly have an extremely detrimental effect on the company's finances, which stands to lose its clientele, all of which will likely be irreversible."

33. In her second statement dated 6 December 2022, Ms Bainbridge states:

"33. The contractors referred to at [8] of HMRC's SoC, namely [SD], [LC] and [ON], only worked for the Appellant for a short period of time during 2021 (a matter of a 4-8 months). [RS] did not work for the Appellant.

36. Using an umbrella company and having a long-standing relationship with that umbrella company helps the contractor build up their employment rights, i.e. statutory sick pay allowance, holiday pay, statutory maternity/paternity pay and pension contributions. These are not available when using agencies directly or their own limited company, the latter of which results in them needing to complete tax returns, accounts etc., which comes at extra cost for the contractor. The contractor does not have to worry about their tax and NI contributions, as the ordinary deduction of PAYE and NIC is done by the umbrella company when making their salary payment. The contractor is also covered under the umbrella company's insurance policies.

37. There are also advantages and incentives for end-users and agencies to engage contractors through an umbrella company such as the Appellant. In particular, it removes any obligations on them to operate payroll taxes and/or concern themselves with ordinary employment law rights and obligations. The small margin which the umbrella company levies is ordinarily borne by (or reflected in) a higher day rate for the contractor, otherwise it is borne by the contractor themselves, given the advantages and services offered by the umbrella company.

"Relevant tax business"

38. At paragraph 68 of HMRC's SoC, HMRC aver that, by virtue of the fact that the contractors enter into a contract of employment with the Appellant, the Appellant is a "relevant tax business", within the meaning of s307, FA 2004. HMRC also aver that:

"The Appellant also provides scheme users with the templates and documents required to participate in the scheme and enters into arrangements with end users. HMRC also reasonably suspect from the context of available evidence that the Appellant then pays the majority of the amounts it receives from end clients and recruitment agencies to a third party so enabling IRL to make further payments to scheme users."

39. I am not aware of what "templates and documents" HMRC are referring to. Likewise, I am not aware of the "third party" referred to.

40. The following sentence in HMRC's SoC: "these activities, when carried out in the context of these particular arrangements and the tax advantages they are intended to give rise to, clearly demonstrate that the Appellant is providing services relating to taxation and so is carrying on a relevant business" is a non-sequitur. The Appellant is not providing any services relating to taxation. Its services are limited to those described above, in that it acts as a conventional

umbrella company, which employs contractors and utilises their services for the benefit of third parties.

41. More particularly, the Appellant does not: (i) devise tax avoidance arrangements; (ii) connive with others that devise tax avoidance arrangements; (iii) offer any tax advice; (iv) suggest or promote any tax benefits associated with contracting more generally; (v) advise or assist with any tax compliance matters, such as completion of self-assessment tax returns; or (vi) have any ability to offer any services related to taxation. I cannot understand how it can be said that our business involves the provision to other persons services relating to taxation. It plainly does not.

42. On a day-to-day basis, the Appellant contacts new contractors that have been introduced to the company, whether it be directly to the umbrella, by the agency or introducing company. When a new contractor joins the company, we go through their commission plan and inform them about their salary payment and when this will be made. We also ask that they complete our online application form via our portal and accept their contract of employment with the Appellant company. The Appellant is responsible for ensuring that all invoices are raised and emailed to the relevant end users/recruitment agencies. The Appellant makes payments to contractors daily upon receipt of funds from the end users/recruitment agencies. Once payments have been reconciled, a salary payment is made in line with the contract of employment, subject to tax and NI deductions. A reconciliation is done every day on bank statements to ensure no payments are missed and everything has been paid correctly. Other daily tasks that we carry out include liaising with end users/recruitment agencies in relation to contracts to ensure all details are correct. We answer all queries related to the contractors' payments or queries from the end user/recruitment agency about invoices that have any discrepancies. The Appellant is compliant with all its regulatory obligations in all respects.

"Makes available for implementation"

43. HMRC seek to cast the Appellant in the same light as Hyrax Resourcing Limited (HRL) from HMRC v Hyrax Resourcing Limited and others [2019] UKFTT 0175 (TC). Unlike HRL, the Appellant is not part of any scheme or arrangement being promoted – it is entirely unconnected to IRL. It also does not make or approve any loans to the contractors and does not assign any rights to third parties. It provides a pure umbrella company service.

44. At paragraph 71 of HMRC's SoC, it is said that "HMRC have Greenwich Employment Contracts that the Appellant made with scheme users as evidence that the Appellant made the proposal available for implementation". I cannot comprehend how entering into a contract of employment equates to evidence of making a proposal available for implementation. There are no other relevant agreements which the Appellant is party to.

45. It is not surprising that HMRC are unable to point to any evidence of the Appellant actually promoting the supposed arrangement, as it does not.

"Organisation and management"

46. At paragraph 74 of HMRC's SoC, HMRC rely on the fact that the Appellant (i) collates timesheets; (ii) issues invoices / collects payments; and (iii) makes payments of NMW salary to contractors (pursuant to their contracts of employment), as evidence that the Appellant is playing a "crucial" role in "organising and managing" the supposed arrangement.

47. HMRC's contentions are nonsensical. The activities described above are standard functions performed by all umbrella companies. The Appellant would operate in entirely the same way for any contractor or introducer. The fact that the contractors may receive payments from a third party, which the Appellant is not privy to, cannot be said to 'taint' the ordinary functions the Appellant carries out for all its employees. If that were the case, the Appellant could be non-compliant from a DOTAS perspective, but may never know, given it is not party to any other contractual arrangements with the contractor. I think that would be a surprising outcome.

48. In relation to HMRC's further misconceptions contained in paragraph 75 of their SoC, I can confirm that no payments are made by the Appellant to IRL. HMRC have all of the company's bank statements and financial records – they should be able to ascertain all of this from those records. I cannot see how it could be "reasonable" for HMRC to hold the suspicions they say they do, in light of all the evidence provided to them by the Appellant."

34. In her final statement dated 10 February 2023, Ms Bainbridge states:

"In paragraph 24 of Ms Fracchiolla's witness statement, it is said that "GCL now say they take a 2% fee; and then the payment of the surplus is made to another entity Umbrella Contracts (UK) Limited ("UC(UK)L"). This entity is not shown on the user documents we hold, and it appears the user has no knowledge of this entity or its involvement in the scheme." GCL has always stated to HMRC that it takes a 2% fee. Indeed, this is reflected in HMRC's own meeting notes at SB4, Doc 11. This specific user's apparent lack of knowledge about UCUK is most likely to be because the lead generation came from IRL to UCUK and then to GCL. If IRL had not informed the "user", then they most likely would not know about UCUK.

4. Also in relation to paragraph 24 of Ms Fracchiolla's witness statement, as I indicated in footnote 2 on page 3 of my third witness statement, the contractor signs a declaration with GCL before signing a contract of employment. This advises that an introducers' fee will be paid to UCUK. There is an example of such a declaration at SB4, Doc 2.

5. In paragraph 25 of Ms Fracchiolla's witness statement, it is said that:

"GCL has not stated:

• how much UC(UK)L retain

• how UC(UK)L makes payments to IRL

• how UC(UK)L calculates how much to pay IRL

• how GCL provides IRL with the banking information and personal data to pay the user"

I am unable to answer the first three bullets, as these facts and matters are not within my own knowledge – neither I nor GCL are connected to 'UC(UK)L'. On the final bullet, GCL does not provide IRL with this information. I assume this comes via UCUK. I pass no information directly to IRL as I am not made aware of their involvement in any arrangements. The only information passed to UCUK is the breakdown and invoices for introducers fees.

6. In paragraph 56 of Ms Fracchiolla's witness statement, it is said that, "In 2020, [SS] an employee of GCL …". [SS] was a contractor employed with GCL who operated with us between 24th July 2019 to 17th January 2020. GCL contacted [SS] on 26th March 2020, as we had not received timesheets from her recruitment agency since January, so we wanted to make sure everything was fine. [SS] advised that the recruitment agency had changed

> how she was paid. [SS] also informed us that she had received a letter from HMRC. I stated clearly that we were not tax advisers and could not advise her in this regard. [SS] told me that she was paid through IRL at this point. I asked [SS] if this was a second employment but she was unable to say. I advised her to speak to IRL as I could not comment on payments they had made.
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> 7. In paragraph 57 of Ms Fracchiolla's witness statement, it is said that "20 July 2021 IRL emailed a scheme user [RS] and stated: “Good morning [RS], I have noticed we have not received any billing information through from Greenwich. Could you please confirm if you have submitted any timesheets?” This indicates to me that GCL was providing billing information to IRL". I am not aware of any email correspondence or conversation between IRL and [RS]. Having reviewed our records, I have seen that [RS] did not sign up with GCL and never operated as an employee of GCL.
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> HMRC's Document Bundle
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> 8. On 18th October 2021, [ON] sent a letter to HMRC referring to "Globe Locums" and "Contractingwise". This letter is included in HMRC's Document Bundle accompanying their List of Documents at page 42. I believe Contractingwise is a broker and Globe Locums is a recruitment agency. I am unable to comment on whether Globe Locum utilised Contractingwise's services. From [ON]'s letter, this seems to be the case. In my communications with Globe Locums, they never disclosed to me any other entities that they worked with.
>
> 9. On 22nd September 2021, [SD] sent a letter to HMRC referring to VIVID/Medacs. This letter is included in HMRC's Document Bundle accompanying their List of Documents at page 96. GCL was on Vivid/Medacs's preferred supplier list along with several other umbrella companies. In this particular instance, [SD] was introduced to GCL through UCUK not through Vivid/Medacs. GCL being on the supplier list was irrelevant in this case as Vivid/Medacs did not make the referral to GCL.”

35. In cross examination, Ms Bainbridge confirmed that where there is no ‘introducer’, the contract value is divided into the NMW element which is paid to the contractor subject to deductions and then what Greenwich call ‘the surplus’, which is paid to the contractor, subject to a small percentage reduction of about 1.5 per cent for Greenwich’s fee. However, Ms Bainbridge said that the money received from the agency is not the contractor’s gross pay, it is the income of Greenwich. The contractor’s gross pay is based on their contract of employment.

36. She did not agree that the gross contract value is the money that is paid in return for the services rendered by the contractor, stating that the money that is received from the agency to the umbrella company (Greenwich) is the income of the umbrella company for the services that it has done. The gross salary payment which is due to the contractor is based on the contract of employment and the commission plan that they are on. The contractor is paid the NMW rate then the surplus is paid to the contractor as a commission, subject to tax and national insurance.

37. Ms Bainbridge agreed that where there is an introducer, which is 80% of the company income, the NMW element is still paid to the contractor but the surplus, rather than being paid as commission is paid back to the introducer. Ms Bainbridge said that the contractor agrees to that prior to signing and is aware that that fee has to be paid.

38. Ms Hicks suggested to Ms Bainbridge that, properly understood, that surplus is the contractor’s money. Ms Bainbridge disagreed and stated that it is the umbrella company’s money, i.e. Greenwich’s money, and that where there is no introducer the surplus is paid over to the contractor because “they were never introduced to us, they came to us directly”. She

accepted that the surplus was a reward for their services but where there was an introducer she did not agree that it was still a reward for their services just paid back through the scheme. Ms Bainbridge said that she was paying an 'introducer fee' that has been invoiced to her umbrella company, Greenwich. She accepted that the income was calculated based exactly on the hours that the contractor has worked for the end client, but that where there was an introducer, contractors were content to be paid the NMW rate and for the balance of their contract value to go to somebody else, as that was what they have agreed to and what they had been made aware of.

39. Ms Bainbridge has become aware that HMRC's investigation concerns the money that is paid to the introducer being paid to the individual contractor via another means, but that is not what she agreed. She did not know what happened to the surplus amounts paid to the introducer because Greenwich entered into an agreement with an introducing company, i.e. Umbrella Contracts UK, that provides lead generation, and they were paid for that lead generation.

40. With regard to what is told to the contractors in these circumstances, Ms Bainbridge confirmed that they are happy to be paid NMW rates for a job that is worth a lot more and that they "are made aware when they come to us in the first sign−up with us, we speak with them, we make them aware of which commission plan they are going on, what their salary payment will be from us and that we also need to pay an introducing fee. They also actually sign a declaration confirming that they are aware that that fee needs to be paid".

41. When asked whether Greenwich wanted to know where the money earned from the end clients goes, Ms Bainbridge said that she had signed a contract with Umbrella Contracts UK who were paid an introductory fee for their leads. She did not accept that an introducer fee is paid on the first introduction and said: "It can be paid either way. We also do have agencies that require timesheet rebate as well off us if they have referred a contractor to us, so it can come off either timesheet or in one bulk payment." Ms Bainbridge did not dispute that in this case the introducer fee is being paid on every single payment and the amount is 40% to 80% of the contract value. She said it is "the money that is agreed based on the income of the umbrella company".

42. Ms Bainbridge denied that she knew that the money went to Umbrella Contracts UK and then through Integra back to the contractors, and said that she was not aware that any surplus funds were moving into another company or whether the contractors entered into these arrangements, to be paid ostensibly NMW because, really, they are being paid at the same time by Greenwich and by Integra, who were not deducting tax and NIC. She also denied that that is how she gives contractors a 'better return' on the contract value and denied that this is why she said in an email to [SS] that they may have untaxed amounts coming from other sources.

43. Ms Bainbridge said that she did not know why Integra emailed [RS] saying that "Greenwich will be in touch with you shortly to run through what they need to get you onboarded with them" but she did not act in co−ordination with them. She was not able to comment on why Integra sent a text message to [RS] saying they had not received any billing information through Greenwich, but it was nothing to do with her.

44. When taken to the information provided by [ON], who referred to "the employment related payments received from Greenwich. Also employment with Integra Resourcing Ltd", Ms Bainbridge did not agree that this showed that Greenwich acted in co−ordination with Integra to pay them the NMW rate with the surplus being paid via Integra.

45. Ms Bainbridge was also taken to the information provided to HMRC from [SD], who said that Greenwich required him to sign an NDA (non−disclosure agreement) and a contract. [SD] stated that: "The contract is attached, but after asking the NDA agreement still hasn't been received. Payments were made by a dual payment from Greenwich and then a

'discretionary bonus' via Integra resourcing." Ms Bainbridge confirmed that this means nothing to her. Ms Bainbridge agreed that a contract between [SD] and Integra appeared to be signed a few days apart from the contract between [SD] and Greenwich and accepted that, from the taxpayer's point of view, they are part of the same arrangements, but not from her point of view because she was not aware of any other employment.

46. Ms Hicks suggested that the whole point of these arrangements is for contractors to obtain a better return on their contract value and that is why Greenwich's marketing says, "request an illustration today" from Greenwich Contracts, "Find out your take home pay using our umbrella service… At Greenwich Contracts, our team wants to find out what is best for you". Ms Bainbridge said that this is the standard illustration request that is on every umbrella company. "We always try and get our illustrations as close as possible as to what the contractor's take home would be, i.e. the tax code could be different, student loans could be included. A lot of umbrella companies don't include that and just base it on the standard tax code for that year."

47. Ms Bainbridge denied that she had been operating a similar scheme for years. She confirmed that the 2018-19 tax enquiry referred to in her third witness statement was in respect of Greenwich, Umbrella Contracts UK and a company called Smart Ventures Ltd ('SVL'). During that enquiry she explained that: "GCL have 'introducers' that find GCL new contractors and leads and generate Google keywords which led to an increase in contractors joining", similar to the present case. Predominantly introducers found contractors for GCL and were paid a fee. An example was provided of: " ... the end client would pay £1000 to the recruitment/employment agency who provided the employee to GCL, the agency deducted their costs and passed the rest to GCL. GCL would then deduct their 1.5 to 2 per cent umbrella margin and pay NMW to the employee. The remainder is used to meet GCL's expenses". All contracts were drawn up based on her instructions. She said during that enquiry that "GCL only paid employees directly and employees only received a minimum wage" and that any "third party payments were outside the knowledge of GCL".

48. Ms Bainbridge was asked if she was saying that on two separate occasions she had been involved in tax avoidance arrangements that she knew nothing about. Her response was that she had paid an introducer fee for leads being generated. She confirmed she had also said in the earlier 2018-19 enquiry, in respect of tax avoidance arrangements, that she did not know anything about it. During that enquiry, she was told by HMRC, by way of a letter dated 29 October 2021, that: "HMRC hold evidence showing that the same days you make NMW payments to employees and pay what you refer to as the introducer fees, SVL and GAL make much larger tax and NIC free payments to your employees. In my view this can only have come from the introducer fees you paid to SVL and GAL. The outcome is that it left your employees with a take home pay of 80 per cent or more as only a fraction of it was accounted through your payroll". She replied that she could not comment on any secondary payments that the contractors received from further employment, only what they received from Greenwich.

49. She agreed that what she was told then and what she was being told now is very similar but insisted that she had not been operating a scheme, but operating an umbrella company that pays contractors. Ms Hicks suggested that if she was an unwitting pawn the first time round, she was not this time round. Ms Bainbridge replied: "No, I still am not aware of anything that was going on with Integra."

50. Ms Bainbridge accepted that she is the ultimate owner of Greenwich and that the ultimate owner of Umbrella Contracts UK is Auspice Holdings Limited, of which she is one of seven shareholders. She became a shareholder in July 2021 and when she said in her witness statement of February 2023 that neither she nor Greenwich were connected to Umbrella

Contracts UK she meant that she is not directly connected, although she accepts that she is connected to Auspice Holdings Limited, which is the ultimate owner of Umbrella Contracts UK. Ms Bainbridge said that there has always been a contract of service between Greenwich and Umbrella Contracts UK. She knew that there was a connection between Auspice Holdings Limited and Umbrella Contracts UK and Umbrella Contracts UK to Greenwich, but she is not involved in the day−to−day running of Umbrella Contracts UK or Auspice Holdings Limited.

51. It was put to Ms Bainbridge that, in her response to HMRC's notice, she did not seek to explain how the arrangements worked regarding introducers, or how this issue may have arisen, or why HMRC's view was mistaken, and instead only focused on her role. Ms Bainbridge said that she did clarify that Greenwich does not engage or contract with Integra and she did state that she had not worked for that company.

52. During re-examination, Ms Bainbridge was asked about the commercial justification for a regular obligation to the introducers, such as Umbrella Contracts UK. She said that introducers stipulate that they require payment on a weekly basis for the referral of the lead generations each week, as contractual rates can vary week−on−week, and they want to make sure that they have their money from us. It is the introducer that sets out the weekly payment. If she said to them – "you are getting 40 per cent in week 1, you are not going to get anything as much as that in week 2, week 3, week 4", they would not provide any more lead generation, so Greenwich is better off paying 40 per cent every week.

53. With regards to her email to [SS], Ms Bainbridge said she referred to untaxed income under advice from a tax adviser.

54. Ms Bainbridge was asked to comment on why contractors might be willing to come to her company on the basis of lower pay. She replied: "So we have −−well, we did have very good relationship with agencies, one I had spent many years building up, was great relationships with the consultants at the agencies which helped the contractors, so, as I have mentioned here and also in my telephone conversation with HMRC a few years ago, the contractors like the fact −−because it's just me that runs the company, that they only ever speak to me, so they pick up that phone and all they get is me on the other end of the phone, so I understand what the query is, where the query is at."

55. When asked if someone is picked up by Integra, how or why Integra might know about Greenwich, Ms Bainbridge said that a plausible explanation would be that Umbrella Contracts UK lets Integra know which umbrella company the lead is going to.

Comments on Ms Bainbridge's evidence

56. I accept Ms Bainbridge's evidence regarding general matters concerning the operation of the business. However, on the basis of my view of the totality of the evidence, having considered the likelihood of the responses, and given her awareness of the operations regarding a similar scheme from HMRC's 2018-19 enquiry, I do not find Ms Bainbridge's evidence to be credible with regard to the arrangements that are the subject of this appeal. In particular, I do not accept as credible that Ms Bainbridge:

(1) Was not aware of anything that was going on with Integra.

(2) Did not act in co−ordination with Integra via Umbrella Contracts UK.

(3) Did not know that the money went to Umbrella Contracts UK and then through Integra back to the contractors.

(4) Was not aware of the second payment being paid to the contractor.

(5) Was not aware of the dual payment from Greenwich and then a 'discretionary bonus' via Integra received by [SD].

(6) Considers that 'introducer fees', at the frequency and in the amounts involved, were paid for lead generation.

(7) Believes that contractors are happy to be paid minimum wage for their work on the basis that she is able to deal effectively with any queries.

(8) Considers that the arrangements were not entered into for tax reduction purposes.

Evidence of Ms Fracchiolla

57. Ms Fracchiolla's evidence was that she was provided with access to documents obtained from HMRC Investigators, which were limited as users sign a non-disclosure agreement with Greenwich. In response to enquiries issued by HMRC to contractors, HMRC received examples of Greenwich and Integra employment contracts, which were substantially the same and were only tailored to the scheme users in so far as parties' personal details and amounts of the payments involved. Other documents were also obtained e.g. timesheets, invoices, payslips and bank statements.

58. She initially reviewed the enquiry responses for [LC], who provided information in response to an early intervention education letter sent to them by HMRC and had entered into the arrangements with Integra on 21 June 2021, and [ON] who entered into the arrangements with Greenwich on 23 June 2021. Ms Fracchiolla also referred to the evidence relating to prospective scheme user [RS] who provided to HMRC on, 15 September 2021, a partial screenshot of a text message from Integra which stated: "Good morning Rita, I have no.. have not received any billing…through from Greenwich. Co…confirm if you have submitte… timesheets? Kind regards, D… (Integra)". She also referred to [SD], who entered into the arrangements with Integra on 9 March 2021, and with Greenwich on 15 March 2021.

59. Ms Fracchiolla said that on 1 December 2021 these documents were reviewed, and it was identified that the transactions forming part of the arrangements occurred after the 10 June 2021 (the date of royal assent for FA 2021), and on 8 December 2021 an email chain from [RS] was reviewed which was in respect of "onboarding" by Integra. Having reviewed the documents, Ms Fracchiolla suspected that the arrangements were notifiable arrangements, and the Appellant is a promoter of the arrangements.

60. Ms Fracchiolla's description of the arrangements in her witness statement dated 22 December 2022 is as follows:

> "18. The arrangements can be broken down into the following steps.
>
> 19. Users of the arrangements ("Scheme Users") require an umbrella company to enter a contract with an end client to provide their services and receive payments. GCL being the UK registered umbrella company.
>
> 20. The user enters into an "Employment Agreement" with GCL and at the same time enters into a second "Employment Agreement" with IRL registered in Malta.
>
> 21. The Employment Agreement with GCL stipulates that the employee will work on client assignments and in so doing will be an employee of GCL. The employment agreement provides that GCL will pay the employee at least the National Minimum Wage ("NMW") pay rate together with any commission to be paid under the Commission Plan (section 9(a)(i)). The Commission Plan is referred to at Schedule 1 of the employment agreement and states at point 1 that "A Commission Plan cannot be altered to apply retrospectively", and at point 4. No payment can be made in excess of the pay rate unless it is in accordance with this Commission Plan which is available on request.

22. Once the Scheme Users are employees of GCL, they are then required to forward timesheets to GCL after completing their work for the relevant period. The Scheme Users obtain a timesheet from a third-party recruitment agency or end user to whom their services are provided and forward this to GCL. GCL then invoice the recruitment agency or end user for the services carried out by the Scheme Users.

23. Once GCL receive the funds for the services carried out, they then process the next step of the arrangements. The Scheme Users are provided with copies of the remittance note from the agency/end user to GCL confirming their pay rate and hours worked. GCL is then paid for its services by the recruitment agency or end client pursuant to an invoice issued by the umbrella company to the recruitment agency/end client.

24. On review of the user evidence, I noted the gross contract value and the net amount scheme users were paid after the amount paid to HMRC, the difference was approximately 15-20% which I suspected was being retained by GCL. A "margin" was not shown on the GCL payslips to users which is required. I did not know at the time I issued the Notice under section 310D FA2004 how the economic rewards of promoting the arrangements were being divided between the other entities and I still do not have complete information on this matter. GCL now say they take a 2% fee; and then the payment of the surplus is made to another entity Umbrella Contracts (UK) Limited ("UC(UK)L"). This entity is not shown on the user documents we hold, and it appears the user has no knowledge of this entity or its involvement in the scheme.

25. GCL has not stated:

• how much UC(UK)L retain

• how UC(UK)L makes payments to IRL

• how UC(UK)L calculates how much to pay IRL

• how GCL provides IRL with the banking information and personal data to pay the user

26. The employment contracts include provision for the balance to be paid on to the Scheme Users in two ways.

• First, Scheme Users are paid an amount by GCL the "pay rate" – per the GCL Employment Contract this is a sum per hour equivalent to the minimum rate allowed by the National Minimum Wage Act 1998. This amount is paid subject to deduction of tax and NICs.

• At or about the same time, IRL makes a small payment (c.£10) subject to a deduction of tax and NIC. The IRL Employment Contract stipulates that IRL requires consultancy workers who are able to enter into these secondary employment arrangements. IRL also makes a second payment to the Scheme User which is made without deduction of tax and NIC.

27. GCL involvement in the scheme as described above demonstrates to me that they are carrying on a relevant business. This is because the involvement in the scheme means that GCL are carrying on any trade, profession or business which involves the provision of services relating to taxation to any other person (see §92 Revenue & Customs v Curzon Capital Ltd [2019] UKFTT 63 (28 January 2019)).

28. I suspect GCL have made a notifiable proposal available for implementation and that GCL are therefore a promoter under section 307(1)(a)(iii) FA2004.

> 29. GCL relevant activities include:
>
> • being a party to the main contracts that are required to enable users to implement the arrangements, including the Scheme Users' contracts of employment.
>
> • providing Scheme Users with the templates and documents required to participate in the scheme.
>
> • entering arrangements with end users/agencies to facilitate Scheme Users performing services for those end users/agencies.
>
> 30. I also suspect GCL of being a promoter of notifiable arrangements under section 307(1)(b)(ii) FA2004 because evidence suggests that GCL is responsible to at least some extent for the organisation and management of the arrangements.
>
> 31. Evidence provided by Scheme Users shows that GCL:
>
> • collate time sheets for Scheme Users
>
> • issue invoices to end clients/agencies and collect payment in respect of these invoices
>
> • make NMW payments to Scheme Users in accordance with their contract of employment
>
> • arrange for secondary payments to be made to Scheme Users via UC(UK)L
>
> 32. I considered that the conditions for giving the section 310D Potential allocation of an SRN were met and after my decision was approved, I issued the notice on the 3 March 2022 with the view to giving the promoter the opportunity to make representations and provide evidence that might allay my suspicions.
>
> 33. The conditions for giving this notice have been met. These are that (both of the following):
>
> • we have become aware that the proposed arrangements described above have been made available for implementation
>
> • we have reasonable grounds for suspecting that the arrangements described above are notifiable
>
> 34. The proposed arrangements were made available on or after 10 June 2021. I first became aware that the proposed arrangements had been made available on 25 November 2021."

61. In cross-examination, Mr Gordon suggested that Ms Fracchiolla was failing to look at the facts in an objective way. He also suggested that someone deciding not to deduct income tax is not an effective tax−avoidance scheme and that if a worker signs up to these arrangements they are probably being misled by the promoters and would think they are paying tax. Ms Fracchiolla accepted that someone could be caught up within arrangements without realising there are questionable tax practices going on and that could also apply to other companies in the contractual chain, if they did not do due diligence.

62. With regard to Ms Fracchiolla's initial suspicion that 15% to 20% of income was being retained by Greenwich, she accepted that she knew that Integra was a party to these transactions and they might have been taking some of the sum but said that she "put it was Greenwich because I didn't know at the time, because Greenwich takes the revenue so it appeared that it was them". When questioned further, she said it was "because Greenwich was the main company in the UK" and that "it wasn't unreasonable to suspect that it was companies in the

chain but I didn't know about the chain and Umbrella Contracts UK. I had very limited information".

63. Ms Fracchiolla confirmed that, before she issued the section 310D letter, she spoke to her colleague regarding a corporation tax enquiry into Greenwich's returns for the various years, where HMRC had similar concerns that the payments might eventually reach the hands of the employees without proper deduction of tax, but she did not know at the time she issued the letter that Umbrella Contracts UK was involved. She accepted that her colleague who conducted the corporation tax enquiry knew that 2% was the fee being retained by Greenwich throughout. She was aware of other schemes, and aware that some of them operate in a similar way, but what she was looking at, at the time, was the evidence from contractors which did not mention Umbrella Contracts UK. With regard to whether she could have accessed this information had she considered it to be reasonable, she replied: "There's an awful lot of information held in the department. I wasn't going to access ––we've got loads of schemes very similar to this that are all being investigated, all being published, you know. It's ... I wouldn't have the time to look at all the evidence for all the different schemes."

64. Ms Fracchiolla agreed that given her additional knowledge now, she accepts that in all these Integra cases the introducer fee is paid to Umbrella Contracts UK which then presumably makes a payment to Integra, and it is Integra which makes the secondary payments to the workers. Ms Fracchiolla also agreed that in the formal information notices and the other informal information requests, there were no questions asked of the contractors about Umbrella Contracts UK.

65. Although Ms Fracchiolla accepted that she had not seen any agreement between Greenwich and Integra, she did not accept that there is no direct line of communication because of the text message provided by [RS], which said that there was billing information between Greenwich and Integra. Ms Fracchiolla also considered the Integra employment contracts, which say that there is a host and a secondment agreement, with the host being responsible for all statutory deductions within the host's jurisdiction in relation to the secondment contract of employment. Ms Fracchiolla considered this to be because Integra is not in the UK and needed somebody in the UK to facilitate, which was Greenwich.

66. When asked if it is possible that Integra is creating a false trail if they are carrying out an avoidance arrangement, she said it did not appear to be a false trail from the evidence, because Greenwich is dealing with the same contractors. She accepted that her colleague knew that payments were not made direct from Greenwich to Integra but considered this information to relate to a different scheme, although she accepted both sets of transactions involved Umbrella Contracts UK as introducers. Ms Fracchiolla accepted that her colleague was aware there was a contract and payment route through Umbrella Contracts UK, but she was only going on the evidence she had in front of her, which said there was a secondment agreement between Greenwich and Integra, and she had no reason to doubt that that was the case because that was the employment agreement that Integra had for a long time, so she was sure Greenwich must have been aware of the Integra employment agreement.

67. She accepted that payments are not made directly from Greenwich to Integra, but to Umbrella Contracts UK, and that it was possible that Greenwich was providing the information to Umbrella Contracts UK who was then providing the information to Integra, but because Integra receives billing information, she considered that there must be a relationship, whether via Umbrella Contracts UK or directly, and that Umbrella Contracts UK just seems to be inserted to deflect from the fact that Greenwich and Integra were acting together. Her view was that there were untaxed payments being received by Integra employees who were also the

employees of Greenwich. Integra paid the secondary payment from money that it received from Greenwich via Umbrella Contracts UK.

68. Ms Fracchiolla considered that Greenwich gives the option of having some of the wages at a different tax rate on the basis that Greenwich is the one that onboards the contractors. Greenwich deals with them when they come in, they liaise with the contractors, they explain to them about the payments, and as Integra is in Malta, then the only company in the UK is Greenwich.

69. She accepted that Greenwich is not benefitting in any way differently from the Integra cases from any other case where an introducer is involved if they are getting 2% from all of them, but she did not know if any money was coming in at a later date.

70. Ms Fracchiolla considered that Greenwich had the opportunity to have provided as much information as they wanted to. She did not share information held by HMRC with them when requested because it was not for HMRC to provide the information to Greenwich, it was for Greenwich to provide the information to HMRC, because they had a better understanding of how the arrangements worked, how the payments were made. She had already told them how she thought the scheme worked. They could have then challenged that and said, "no it doesn't work in this way, here is all the information to prove it".

71. Ms Fracchiolla agreed that Greenwich told her they do not engage with Integra, explained how umbrella companies work, including references to introducers, said that any rewards that she claims have been received have not been received by Greenwich and have not been provided by Greenwich, and said they do not operate the loans or discretionary payments that she had assumed. However, because they were saying that there was no contractual agreement with Integra, and her view was that the Integra employment contract showed that they were facilitating the arrangements in the UK, and that they had a secondment agreement, from that evidence she held, she still considered Greenwich was a promoter along with Integra and notified Greenwich of the scheme reference number.

72. She accepted it was possible that Integra was taking the majority of the fee that was being charged for the service to the workers, but it was the income of Greenwich and it had made its way to Integra, which could have been via Umbrella Contracts UK.

73. Ms Fracchiolla accepted the work could have come from Integra and been farmed out to Greenwich via Umbrella Contracts UK but considered that there must have been some relationship between Greenwich and Integra for the scheme to work, otherwise she did not understand where Integra got their information from, or how Integra onboarded workers in the UK, if Greenwich was not party to the arrangements.

74. She agreed, in theory, there was nothing to stop one of the introducers failing to comply with PAYE without Greenwich's knowledge and that information might not have come directly from Greenwich but could have been derived from Umbrella Contracts UK, but if that were the case, she would have expected the text message provided by [RS] to say, "I have not received any billing information from Umbrella Contracts UK".

75. She agreed there is no corporate connection between Greenwich and Integra but considered, from Integra's employment agreement, that Greenwich held the secondment contract and Greenwich was facilitating the arrangements in the UK, because that is what it says on Integra's employment contract and that is what Greenwich were doing. She said: "If Greenwich are saying that is not what they were doing, that is the evidence that I had, was the employment agreement, as well as all the other evidence which shows that the two payments had been made, and that money is Greenwich's employees' money that made its way to Integra via UC UK or any other introducer, it ended up with Integra."

76. Ms Fracchiolla did not accept that she acted too hastily or that, because of the pressure HMRC is under, that HMRC can fail to spot innocent parties in the contractual chain. She did not agree that Greenwich is an innocent party.

77. When asked what she would have expected to see if Greenwich was an innocent party, she said: "Well, to me it doesn't matter whether they are an innocent party or not for DOTAS… I reasonably suspected they were a promoter of the arrangements, because they were, to some extent, involved in those arrangements and the organisation and management… so even if Greenwich was an innocent party that wouldn't have made a difference to my decision."

Comments on Ms Fracchiolla's evidence

78. I accept Mr Gordon's submission that Ms Fracchiolla contradicted herself when asked about when she first spoke to her colleague who had conducted the corporation tax enquiry. I also accept that she failed to look fully at the wider picture being considered by her colleague in relation to the same taxpayer and in relation to what she herself called "similar schemes". However, overall I found the evidence given by Ms Fracchiolla to be credible and reliable.

THE FACTS

79. There is some agreement between the parties regarding the general circumstances from which the appeal arises. There is, however, significant dispute on some of the key facts in this case. On the basis of my consideration of the evidence, I make the following findings of facts which I consider to be more likely than not:

(1) Greenwich was involved in arrangements for the purposes of reducing tax.

(2) The arrangements were that Greenwich received the full contract value under a contract of employment they held with contractors, then paid an amount equivalent to NMW to the contractor, subject to the deduction of tax and NIC. Payments to contractors made by Greenwich were reflected accurately in Greenwich's PAYE records. After a further deduction of Greenwich's fee of 2%, the balance of the contract value was paid by Greenwich to Umbrella Contracts UK, who then paid an amount to Integra. A further fee deduction was taken before Integra, under a second contract of employment with the same contractor, made a payment to the contractor without deductions for income tax and NIC. In total, 15-20% of the full contract value is deducted as fees by the entities in the chain.

(3) An equivalent employee contracted to Greenwich who does not enter into the scheme would receive the entirety of the consideration for their services rendered, subject to deductions for PAYE, NIC and fees. By entering into the scheme, contractors receive a NMW salary from Greenwich plus additional payments from Integra that are not subject to tax and NIC. The aggregate amounts received in the form of NMW and payments from Integra are worth more to contractors than the net income they would have received had they not used the scheme. The principal reason for this is that tax and NIC is not deducted from amounts that users receive from Integra.

(4) Although the Integra employment contract makes reference its "absolute discretion to make advances of bonus and on such terms as the Company shall, in its absolute discretion, determine", the exact reason for Integra's failure to make full deductions for income tax and NIC is unknown.

(5) Greenwich undertook the activities required in the UK to operate the scheme, including on-boarding the contractors.

(6) Greenwich was a promoter of the scheme.

(7) Greenwich was aware of the nature of the scheme and the activities involved in implementing the scheme.

(8) On 25 November 2021, HMRC became aware that a transaction forming part of the arrangements had been entered into after 10 June 2021.

(9) On 8 December 2021, HMRC became aware that a proposal for arrangements was made available for implementation on 15 June 2021.

THE ISSUES

Requirements of section 310D

80. Section 310D(1) provides:

> "This section applies where–
>
> (a) HMRC have become aware that–
>
> (i) a transaction forming part of arrangements has been entered into,
>
> (ii) a firm approach has been made to a person in relation to a proposal for arrangements, with a view to making the proposal available for implementation, or
>
> (iii) a proposal for arrangements is made available for implementation, and
>
> (b) HMRC have reasonable grounds for suspecting that the arrangements are notifiable, or the proposal is notifiable."

81. Section 310D applies "only in relation to transactions entered into, firm approaches made, and proposals that are made available for implementation on or after the commencement date", which is 10 June 2021 (see FA 2021, Sch. 31, para. 44, 45(1)).

Section 310D(1)(a) Become aware that a transaction has been entered into, a firm approach has been made, or a proposal made available for implementation

82. I have accepted Ms Fracchiolla's evidence that, on 25 November 2021, having been provided with documents obtained by HMRC investigators, she became aware of the following transactions forming part of arrangements:

(1) [LC] had entered into arrangements with Integra on 21 June 2021, by virtue of an employment agreement signed by [LC] and Integra on 21 June 2021;

(2) [ON] had entered into arrangements on 23 June 2021, by virtue of the employment agreement signed by [ON] and Greenwich on 23 June 2021;

(3) [SD] had entered into arrangements with Integra on 9 March 2021, by virtue of an employment agreement signed by [SD] and Integra on 9 March 2021;

(4) [SD] had entered into arrangements with Greenwich on 15 March 2021, by virtue of the employment agreement signed by [SD] and Greenwich on 15 March 2021;

83. I have also accepted Ms Fracchiolla's evidence that, on 8 December 2021, she became aware that a proposal for arrangements was made available for implementation in respect of [RS] on 15 June 2021, by virtue of information supplied by [RS] to HMRC.

84. Greenwich contends that HMRC have not limited themselves to transactions entered into, firm approaches made, and proposals that are made available for implementation, on or after 10 June 2021, referring to the timing of [SD]'s involvement. They also contend that [RS] did not even enter into any arrangements and that the evidence relating to the other two individuals is, at best, inconclusive.

85. I accept Greenwich's argument that the evidence relating to [SD]'s contract with Integra dated 9 March 2021 does not amount to evidence of a transactions entered into on or after 10 June 2021. However, I agree with HMRC's submission that they need only become aware of a single transaction, as the statute refers to "a transaction". I therefore consider the transaction relating to [LC] and [ON] to have met the condition in section 310D(1)(a)(i). I also agree the condition in section 310D(1)(a)(iii) is met with regard to the proposal for arrangements made available for implementation relating to [RS].

86. I therefore consider the requirements of Section 310D(1)(a) to have been met.

Notifiable

87. The question of whether proposals or arrangements are notifiable is relevant when HMRC issued the section 310D notice and when allocating the scheme reference number under section 311. The meaning of notifiable as defined by section 306, is notifiable arrangements means any arrangements which:

> (a) fall within any description prescribed by the Treasury by regulations (i.e. one of the "hallmarks" found in SI 2006/1543),
>
> (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.

Hallmarks

88. The arrangements must fall within any description prescribed by the Treasury by regulations. The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 set out various such 'hallmarks'. The regulations referred to in this appeal are set out in the Appendix to this decision.

Description 3: Premium Fee

89. This hallmark does not require that a premium fee is paid; only that it might be reasonably expected that a promoter of substantially similar arrangements would be able to obtain a premium fee from a person experienced in receiving services of the type being provided. (See *HMRC v Hyrax Resourcing Ltd & Ors* [2019] UKFTT 175 (TC) ('*Hyrax*') at [211]) The parties agree that the actual fee can be taken into account when considering the hypothetical test.

90. Greenwich argues that they received only 2% of the contract fee, in precisely the same way as it has in all its other cases of referrals from Umbrella Contracts UK (and other referring agencies) and the scheme appears to be a straightforward case of non-compliance, achieving no tax advantage. They make the point that HMRC's warnings regarding tax avoidance say that users may have to pay back the amounts of tax and NICs avoided and interest. An experienced user therefore would not pay any fee, let alone a premium fee, for these arrangements.

91. I do not agree with the submission made by Greenwich on this point. Given that around 15 to 20% of the contract value was deducted by entities in the contractual chain, I accept HMRC's argument that that a promoter of substantially similar arrangements would be capable, in a hypothetical scenario, of charging a premium fee.

Description 5: standardised tax products

92. The requirements of this hallmark are that the arrangements have standardised, or substantially standardised, documentation, the purpose of which is to enable the

implementation, by the client, of the arrangements; and the form of which is determined by the promoter, and not tailored, to any material extent, to reflect the circumstances of the client. A client must enter into a specific transaction or series of transactions and that transaction or that series of transactions are standardised, or substantially standardised in form. 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 and arrangements are standardised if a promoter makes the arrangements available for implementation by more than one other person.

93. Greenwich says there is nothing in their standard documents, such as their employment contracts, that permits any tax advantage to arise and the only documentation that could underpin the non-compliance in the present case is Integra's employment contract, with which Greenwich has not had any involvement. The hallmark requires a promoter to make the arrangements available for implementation and Greenwich is not a promoter.

94. HMRC argues that the documents simply have to enable the person to implement the arrangements, and that without users entering into the agreement with Greenwich, by which they would agree to be paid NMW rates and then a larger amount through the introducer fee, the arrangements would not be able to be implemented. HMRC refers to Ms Bainbridge's evidence with regards to on-boarding and that the Greenwich employment contract, based in the UK, enables the arrangements to work, because the Greenwich employment contract is interlinked with the Integra employment contract.

95. I accept the arguments made by HMRC regarding this hallmark and I consider, on the basis of the evidence and the facts as found, the standardised tax products hallmark is met.

Description 8: Employment income provided through third parties

96. Greenwich accepts that Condition 1 of this hallmark is met. I agree with HMRC that this is because there is a relevant arrangement for rewarding employees under section 554A Income Tax (Earnings and Pensions) Act 2003 ('ITEPA') and there is a 'relevant step' taken by 'any person' (section 554C(1)(a) ITEPA). Integra is 'any person', and they take a relevant step each time they make the secondary payment to users of the scheme.

97. The parties are in dispute as to whether Condition 2 of this hallmark is met. It requires the main benefit, or one of the main benefits, of the arrangements is that an amount that would otherwise count as employment income is reduced or eliminated. Greenwich argues that there is no attempt to do so, as this appears to be a blatant case of non-compliance. However, I agree with HMRC that at least one of the main benefits of Integra being the employer that makes these payments is precisely to prevent those payments from counting as employment income.

98. I do not consider the exemptions set out in Condition 3 to be met, as Greenwich argues, because I have found that there is a connection between the relevant step and a tax avoidance arrangement.

99. I therefore consider the employment income provided through third parties hallmark is met.

Hallmarks - conclusion

I am satisfied that the arrangements fall within the hallmarks referred to above as prescribed by the Regulations and I am therefore satisfied that the arrangements fall within any description prescribed by the Treasury by regulations.

Enabling a tax advantage

100. For these purposes, a tax advantage is defined in section 318(1) as "advantage", in relation to any tax, means 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, the deferral of any payment of tax or the advancement of any repayment of tax, or the avoidance of any obligation to deduct or account for any tax.

101. Mr Gordon argues that, given the distinction between tax avoidance and evasion, a tax advantage in this context relates to one that is permissible (or arguably permissible) under the law. Further, these provisions are to be construed objectively and ensure that a scheme must be one that either actually enables a tax advantage to be obtained or might reasonably be expected to bring about such a tax advantage. Therefore, the statute does not cover any set of arrangements where no tax advantage could reasonably be expected to arise. The arrangements as described by HMRC seem to be wholly ineffective, and obviously so. A conscious decision by an employer (here, Integra) not to operate PAYE does not give rise to a tax advantage.

102. HMRC argue that, by virtue of the arrangements, the users seek to gain an advantage with respect to income tax and that an equivalent employee who does not enter into the scheme would receive the entirety of the consideration for their services rendered, subject to deductions for income tax and NIC.

103. I agree with HMRC and, on the basis of the facts as I have found them, I consider these arrangements might be expected to enable a person to obtain a tax advantage. The statue makes no reference to a requirement that the scheme be permissible (or arguably permissible) under the law or that the expectation to bring about such a tax advantage is a reasonable one, and I am not convinced that there is any basis for such an interpretation.

104. I am therefore satisfied that the arrangements 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.

Main benefit

105. Greenwich argues that they fail to see how this alleged tax advantage can be a main benefit of the arrangements, when there is no evidence of any advantage being obtained by any of the employees or by Greenwich, and there is no evidence that any benefit might have been expected.

106. On the basis of the evidence in this case and my findings on the facts, I consider (as Judge Mosedale did in *Hyrax* at [205]) there to be no other rational reason for why anyone would implement such a convoluted and expensive set of arrangements, save for the expected tax advantage. It seems an obvious and logical inference that the scheme was implemented by users because of the desire to obtain the tax advantage, and the main benefit that might be expected to arise from the arrangements would therefore be the tax advantage.

107. I am therefore satisfied that the arrangements 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 a tax advantage.

Notifiable - conclusion

108. Having concluded that the arrangements fall within a description prescribed by the Treasury by regulations, 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 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, I am satisfied that the arrangements were notifiable arrangements within the meaning of section 306(1).

Section 310D(1)(b) Reasonable grounds for suspecting the arrangements are, or the proposal is, notifiable

109. Greenwich submits that HMRC did not have reasonable grounds for suspecting that the arrangements were notifiable when they issued the notice and section 310D(1)(b) has therefore not been met. HMRC contend that, on any view, it was reasonable for them to have formed that view, given the evidence reviewed by Ms Fracchiolla, as exhibited to her witness statement, which includes Greenwich and Integra employment contracts, timesheets, payslips, bank statements and correspondence from contractors.

110. Greenwich argues that the notice of potential allocation of a scheme reference number issued under section 310D provides a description of the arrangements which HMRC knew to be inaccurate on the basis of information held by their corporation tax officer. I agree that it is reasonable to expect HMRC to have considered easily accessible information within HMRC's possession before the issue of the notice. However, it is my view that taking the information held by their corporation tax officer (regarding the operation of a similar scheme) into consideration would have addressed some of the points referred to in the description of the arrangements set out in the notice, but would not have changed the overall position regarding whether HMRC had reasonable grounds for suspecting that the arrangements were notifiable.

111. HMRC held information regarding the standard terms of Integra's employment contract, which states:

> "1.5 it Is expressly agreed that in accordance with the Company's requirements You agree to secondment of Yourself to third parties with whom the Company has a secondment agreement ("the Host").
>
> 1.6 For the avoidance of doubt You agree with the Company that in the event that It Is required You are prepared to execute a second contract of employment with any Host subject to the following :
>
> (a) any employment contract with the Host shall contain all statutory employment rights relevant to the Host's jurisdiction; and
>
> (b) the Host shall be responsible for all statutory deductions within the Host's jurisdiction in relation to the second contract of employment"

112. The information provided to HMRC by contractors under Integra's employment contract showed that they also held a "second contract of employment" with Greenwich. HMRC held information that payments made to contractors by Integra were without deduction of income tax and NIC. I consider this provides reasonable grounds for suspecting that the arrangements were notifiable.

113. Further, whilst I accept the argument made by Mr Gordon that the evidence relating to [SD]'s contract with Integra dated 9 March 2021 does not amount to evidence of a transaction entered into on or after 10 June 2021, for the purposes of section 310D(1)(a), I agree with HMRC that there is nothing in the statutory provisions (or their purpose) to suggest that this evidence could not be taken into account in forming a suspicion, on reasonable grounds, that the arrangements were notifiable under section 310D(1)(b).

114. I therefore consider the requirements of Section 310D(1)(b) to have been met.

Section 310D(4) reasonably suspect to be a promoter

115. A notice under Section 310D may be issued only to "any person who, on the day the notice is issued, HMRC reasonably suspect to be a promoter in relation to the arrangements or proposal".

Meaning of promoter

116. The definition of promoter is set out in section 307. The definition includes that a person is a promoter in relation to a notifiable proposal, if, in the course of a relevant business, the person makes the notifiable proposal available for implementation by other persons. It also states that a person is a promoter in relation to notifiable arrangements, if he is 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 the design of the arrangements, or the organisation or management of the arrangements. The section also provides that 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. The term "relevant business" includes any trade, profession or business which involves the provision to other persons of services relating to taxation.

117. Greenwich argues that there is no evidence to suggest it falls within this provision and that HMRC's reliance on them collating timesheets, issuing invoices/collecting payments and making payments of NMW salary to contractors, as evidence that they are playing a "crucial" role in "organising and managing" the supposed arrangement is, at best, a demonstration of HMRC's lack of understanding as to how umbrella companies operate. These are standard functions performed by all umbrella companies. Greenwich would operate in entirely the same way for any contractor or introducer. The fact that the contractors may receive payments from a third party, which Greenwich is not privy to, cannot denude the ordinary functions it carries out for all its employees. If that were the case, Greenwich could be non-compliant from a DOTAS perspective, but might never know, given it is not party to any other contractual arrangements with the contractor. That would be a perverse outcome, if indeed the legislation could be said to operate in that way.

118. I do not agree with the submissions made by Greenwich on this issue. I have found that Greenwich were aware of the arrangements and, whilst their activities may be standard functions performed by all umbrella companies, in the context of the facts in this case, I consider those functions to have been performed for the purposes of the organisation or management of the arrangements.

119. I also disagree with Greenwich in their submission that they are not, and cannot reasonably be suspected of, carrying on a relevant business because they do not offer tax advice, discuss tax returns, devise tax avoidance schemes, or connive with others that devise tax avoidance schemes, and there is no agreement between them and Integra to manage or organise any tax avoidance arrangements.

120. I agree with the remarks made by Judge Poole in *HMRC v Curzon Capital Ltd* [2019] UKFTT 63 (TC) at [91] that "the phrase "services relating to taxation" is in my view sufficiently broad in meaning to cover the activity of administering a tax avoidance scheme, even when doing so without any clear knowledge of the detailed way in which it is intended to work". I consider Greenwich to have been acting in the course of a relevant business when carrying out its activities which I have found to be connected with the arrangements.

121. I therefore consider HMRC reasonably suspected Greenwich to be a promoter because I consider, in the course of a relevant business, they were to some extent responsible for the organisation or management of the arrangements.

Requirements of section 310D - conclusion

122. I am satisfied that HMRC have become aware that a transaction forming part of arrangements has been entered into by Greenwich, a proposal for arrangements was made available for implementation by Greenwich, and that HMRC had reasonable grounds for suspecting that the arrangements were notifiable, or the proposal was notifiable. I am also

satisfied that HMRC reasonably suspected Greenwich to be a promoter. I therefore consider the requirements of section 310D to have been met and the notice issued pursuant to that provision to have been properly issued.

Requirements of section 311

123. Section 311 provides for the allocation of a reference number to arrangements where notice in relation to arrangements or a proposal has been issued in accordance with section 310D (notice of potential allocation of reference number), the notice period has expired, and the person to whom the notice was given has failed to satisfy HMRC, before the expiry of the notice period, that the arrangements are not notifiable or (as the case may be) that the proposal is not notifiable.

124. Mr Gordon argues that even if HMRC had a reason to suspect Greenwich to be a promoter in relation to these arrangements at the time the section 310D notice was issued, the information provided by Greenwich was more than sufficient to make HMRC realise that they had been focusing on the wrong party, and section 311A(3) makes clear that the allocation of a scheme reference number should not necessarily be to the person to whom the prior section 310D notice was given.

125. I do not agree with the submission that HMRC's failure to be dissuaded from their previous suspicion reflects their refusal to consider the representations fairly.

126. Mr Gordon suggests that HMRC must have been satisfied that the arrangements are not notifiable because:

> "(a) First, the Appellant expressly rejected the notion that it had entered into any contractual relationship with IRL – yet such a contract was not only assumed by HMRC but, as HMRC acknowledge, "[i]n the absence of such a contract, or substantially similar arrangements in existence via a third party, the scheme could not be implemented" (SoC10).
>
> (b) Secondly, the Appellant carefully explained how it operates (and umbrella companies generally operate) and made it clear that a substantial part of the earned fee is passed to the referring entity: the Appellant retains only its standard 2% fee. There is no expectation on the Appellant's side that any recipient would then fail to operate PAYE correctly in relation to any further payments made to the contractors.
>
> (c) Thirdly, HMRC's own internal correspondence makes it clear that the Appellant has been setting out the facts consistently to different HMRC officers. Yet, HMRC's conclusion in the present case is inconsistent with the approach taken elsewhere by HMRC.
>
> (d) Fourthly, the contractors' correspondence disclosed by HMRC (on which their asserted suspicions are presumably based) says nothing to suggest that the Appellant is a knowing participant (let alone a promoter) of any arrangements designed to avoid tax (or to knowingly fail to comply with an employer's obligations)."

127. Taking into consideration that HMRC's reasonable suspicion that the arrangements were notifiable was based on the information provided to HMRC by contractors regarding their employment contracts with Integra and Greenwich, and the fact that payments made to contractors by Integra were without deduction of income tax and NIC, I do not accept that the information provided by Greenwich was more than sufficient to satisfy HMRC that the arrangements are not notifiable.

128. Mr Gordon further submits that in order to comply with section 311 one has to read in the subsequent conditions in section 311A, which places a duty on HMRC to notify certain

persons of an allocated reference number. I disagree with Mr Gordon's submission that the provisions regarding the allocation of a scheme reference number under section 311 and the notification of that scheme reference number under section 311A should be taken together for the purposes of an appeal based on section 311B(3). The right of appeal provision makes it clear that an appeal may be brought against the allocation of a reference number (see section 311B(2)) and that a permitted ground of appeal is that, in allocating the reference number, HMRC did not act in accordance with section 311 (see section 311B(3)(b)). On this issue, the right of appeal is focused on the allocation of the reference number and not on its notification. I therefore do not consider it appropriate to address matters concerning the notification of the reference number in this case, because they are not matters that I consider to be within the permitted grounds for this appeal.

Requirements of section 311 - conclusion

129. I therefore consider the requirements of section 311 to have been met and the decision to allocate the SRN to have been properly made.

CONCLUSION

130. I have stated at [29] above that I consider the burden of proof to rest with Greenwich in this appeal. I do not consider Greenwich to have discharged that burden and I accordingly dismiss the appeal. If I am wrong and the burden rests with HMRC, on the basis of my consideration of the evidence, my conclusions on the law and my findings of fact, I would consider HMRC to have discharged their burden of proof in respect of this appeal and I would still find in their favour.

131. For the reasons set out above, I dismiss this appeal and affirm HMRC's decision to allocate the SRN.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

132. 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.

KIM SUKUL
TRIBUNAL JUDGE

Release date: 12 October 2023

APPENDIX

Extracts from Finance Act 2004

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).

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, as defined by section 1120 of the Corporation Tax Act 2010, or by a securities house, as defined by section 1009(3) of that Act.

(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.

(4A) For the purposes of this Part a person makes a firm approach to another person in relation to a proposal if the person makes a marketing contact with the other person in relation to the proposal at a time when the proposed arrangements have been substantially designed.

(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.

(4C) For the purposes of subsection (4A) proposed arrangements have been substantially designed at any time if by that time the nature of the transactions to form part of them has been sufficiently developed for it to be reasonable to believe that a person who wished to obtain the advantage mentioned in subsection (4B)(c) might enter into -

(a) transactions of the nature developed, or

(b) transactions not substantially different from transactions of that nature.

(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.

310D Notice of potential allocation of reference number: arrangements and proposals suspected of being notifiable

(1) This section applies where -

(a) HMRC have become aware that -

(i) a transaction forming part of arrangements has been entered into,

(ii) a firm approach has been made to a person in relation to a proposal for arrangements, with a view to making the proposal available for implementation, or

(iii) a proposal for arrangements is made available for implementation, and

(b) HMRC have reasonable grounds for suspecting that the arrangements are notifiable, or the proposal is notifiable.

(2) HMRC may issue a notice to a person explaining that, unless the person is able to satisfy HMRC, before the end of the notice period, that the arrangements are not notifiable or (as the case may be) the proposal is not notifiable, HMRC may allocate a reference number to the arrangements or (in the case of a proposal) the proposed arrangements.

(3) But HMRC may not issue a notice under this section before the end of the period of 15 days beginning with the day on which they first become aware that the condition in paragraph (a)(i), (ii) or (iii) of subsection (1) is met.

(4) A notice under this section must be issued to any person who, on the day the notice is issued, HMRC reasonably suspect to be a promoter in relation to the arrangements or proposal.

(5) A notice under this section may be issued to any other person who HMRC reasonably suspect to be involved in the supply of the arrangements or proposed arrangements.

311 Allocation of reference number to arrangements

(1) This section applies in -

(a) a subsection (2) case, or

(b) a subsection (3) case.

(2) A "subsection (2) case" is a case where a person complies, or purports to comply, with section 308(1) or (3), 309(1) or 310 in relation to a notifiable proposal or notifiable arrangements.

(3) A "subsection (3) case" is a case where -

(a) notice in relation to arrangements or a proposal has been issued in accordance with section 310D (notice of potential allocation of reference number),

(b) the notice period has expired, and

(c) the person to whom the notice was given has failed to satisfy HMRC, before the expiry of the notice period, that the arrangements are not notifiable or (as the case may be) that the proposal is not notifiable.

(4) "The notice period" means -

(a) the period of 30 days beginning with the day on which the notice under section 310D is issued, or

(b) such longer period as HMRC may direct.

(5) HMRC may allocate a reference number to the arrangements or, in the case of a proposal, the proposed arrangements, subject to subsection (6).

(6) HMRC may not allocate a reference number to arrangements or proposed arrangements after the time limit for doing so.

(7) The time limit for allocating a reference number is -

(a) in a subsection (2) case, the end of the period of 90 days beginning with the compliance, or purported compliance, with section 308(1) or (3), 309(1) or 310, as the case may be;

(b) in a subsection (3) case, the end of the period of one year beginning with the day after the end of the notice period (see subsection (4)).

(8) HMRC may at any time withdraw a reference number allocated to arrangements in a subsection (3) case.

(9) The allocation of a reference number to arrangements or proposed arrangements is not to be regarded as constituting an indication by HMRC that the arrangements could as a matter of law result in the obtaining by any person of a tax advantage.

311A Duty of HMRC to notify persons of reference number

(1) If a reference number is allocated in a case within section 311(2), HMRC must notify the following of the number -

(a) the person who has complied, or purported to comply, with section 308(1) or (3), 309(1) or 310, and

(b) where the person has complied, or purported to comply, with section 308(1) or (3), any other person -

(i) who is a promoter in relation to the proposal (or arrangements implementing it) or the arrangements (or a proposal implemented by them), and

(ii) whose identity and address have been notified to HMRC by the person who complied, or purported to comply, with section 308(1) or (3).

(2) If a reference number is allocated in a case within section 311(3), HMRC must notify the following of the number -

(a) any person who HMRC reasonably suspect to be, or to have been, a promoter in relation to the arrangements or the proposed arrangements, and

(b) any other person who HMRC reasonably suspect to be, or to have been, involved in the supply of the arrangements or the proposed arrangements.

(3) The duty in subsection (2) applies irrespective of whether the notice under section 310D as a result of which the reference number was allocated has been issued to the person concerned.

311B Right of appeal: section 311(3) case

(1) This section applies where HMRC have allocated a reference number to arrangements or proposed arrangements in a case within section 311(3).

(2) A person who has been notified of the reference number may appeal to the tribunal against its allocation.

(3) An appeal under this section may be brought only on the following grounds -

(a) that, in issuing the notice under section 310D as a result of which the reference number was allocated, HMRC did not act in accordance with that section;

(b) that, in allocating the reference number, HMRC did not act in accordance with section 311;

(c) that the arrangements are not in fact notifiable arrangements or, in the case of proposed arrangements, that the proposal for the arrangements is not in fact a notifiable proposal.

(4) Notice of appeal under this section must be given to the tribunal in writing before the end of the period of 30 days beginning with the day on which the person is notified of the number by HMRC.

(5) Notice may be given after that time if the tribunal give permission.

(6) The notice of appeal must specify the grounds of appeal.

(7) On an appeal under this section, the tribunal may affirm or cancel HMRC's decision.

(8) If the tribunal cancel HMRC's decision, HMRC must withdraw the reference number.

(9) Bringing an appeal under this section does not prevent -

(a) a power conferred by this Part from being exercised, or

(b) a duty imposed by this Part from continuing to apply.

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).

318 Interpretation of Part 7

(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;

Extracts from the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements)

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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].

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.

18 Description 8: Employment income provided through third parties

(1) Arrangements are prescribed if -

(a) Conditions 1 and 2 are met and Condition 3 is not met; or

(b) Conditions 1, 2 and 3 are met and at least one of Conditions 4 and 5 is met.

(2) Condition 1 is met if the arrangements involve at least one of the following -

(a) a relevant third person taking a relevant step under section 554B;

(b) any person taking a relevant step under section 554C or 554D; or

(c) B taking a step under section 554Z18 or 554Z19.

(3) Condition 2 is met if the main benefit, or one of the main benefits, of the arrangements is that an amount that would otherwise count as employment income under section 554Z2(1) is reduced or eliminated.

(4) Condition 3 is met if, by reason of at least one of sections 554E to [554XA]2 or regulations made under section 554Y, Chapter 2 of Part 7A does not apply.

(5) Condition 4 is met if the arrangements involve one or more contrived or abnormal steps without which the main benefit in paragraph (3) would not be obtained.

(6) Condition 5 is met if the arrangements involve -

(a) a relevant step being treated as taking place; and

(b) Chapter 2 of Part 7A applying as a consequence of sub-paragraph (a).

(7) In this regulation -

(a) references to sections or Parts are to those in ITEPA unless otherwise stated;

(b) “B” has the meaning given for Part 7A by sections 554A(1)(a) and 554Z17(7) read together;

(c) “contrived or abnormal” has the same meaning as in section 207 of the Finance Act 2013; and

(d) “relevant third person” has the same meaning as in section 554A(7).