Neutral Citation: **[2022] UKUT 00353 (TCC)**

Case Number: UT-2022-000003

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
Fetter Lane
London
EC4A 1NL

Part 7 Finance Act 2004 – DOTAS provisions – notifiable arrangements – section 308 FA 2004 – duties of promoter – whether duty to notify arises on each implementation of notifiable arrangements or on awareness of the first transaction implementing the notifiable arrangements

Heard on: 2 November 2022
Judgment date: 20 December 2022

Before

The Honourable Mr Justice Zacaroli
Judge Jonathan Cannan

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

ROOT2 TAX LIMITED

Respondent

Representation:

For the Appellants: Aparna Nathan KC and Georgia Hicks, counsel instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: No appearance

DECISION

INTRODUCTION

1. This is an appeal by HM Revenue & Customs ("HMRC") against a decision of the First-tier Tribunal dated 22 September 2021 ("the FTT Decision"). The FTT Decision has reference [2021] UKFTT 0346 (TC). The appeal concerns the Disclosure of Tax Avoidance Schemes ("DOTAS") provisions which are contained in Part 7 Finance Act 2004 ("FA 2004"). The DOTAS provisions require those who promote and use certain tax avoidance arrangements to provide information to HMRC about the arrangements.

2. In a previous decision, the FTT had held that certain arrangements known as the "Alchemy Scheme" in respect of which the respondent ("Root2") was a promoter, were 'notifiable arrangements' for the purposes of DOTAS – see *Root2 Tax Ltd and Root3 Tax Ltd v HM Revenue & Customs* [2017] UKFTT 696 (TC) ("the DOTAS Decision"). As such, Root2 was required to provide information in relation to the arrangements to HMRC.

3. Section 98C Taxes Management Act 1970 ("TMA 1970") makes provision for penalties where a promoter fails to comply with the information requirements in FA 2004. HMRC considered that Root2 had failed to provide information in relation to the arrangements as required by FA 2004. In the circumstances, HMRC applied to the FTT for the FTT to determine a penalty for non-compliance pursuant to section 100C TMA 1970 ("the Penalty Application"). Root2 opposed the Penalty Application on various grounds, including that the application was made out of time and should be dismissed.

4. The FTT directed that the following issue be determined as a preliminary issue:

> Whether the application made by the Applicants, under section 100C of the Taxes Management Act 1970 ('TMA'), for a penalty to be imposed by the Tribunal on the Respondent, which application was filed and served by the Applicants on 22 May 2019, was commenced in time, with the parties agreeing that the relevant time limit is that prescribed by section 103(4) TMA, namely 'at any time within six years after the date on which the penalty was incurred or began to be incurred.'

5. In determining the preliminary issue, the FTT had to identify the date on which the penalty for failing to provide information required by the DOTAS provisions was incurred or began to be incurred. The FTT helpfully provided an Appendix of relevant legislation to the FTT Decision and for convenience we gratefully adopt it as an Appendix to this decision with a few minor additions. The provisions are in the form at the time the penalty was said to be incurred, and do not take into account amendments in Finance Act 2021.

6. The principal section with which this appeal is concerned is section 308 FA 2004 which in so far as relevant provides as follows:

> 308(1) A person who is a promoter in relation to a notifiable proposal must, within the prescribed period after the relevant date, provide the Board with prescribed information relating to the notifiable proposal.
>
> (2) In subsection (1) the relevant date means the earliest of the following
>
> > (za) the date on which the promoter first makes a firm approach to another person in relation to a notifiable proposal,

(a) the date on which the promoter makes the notifiable proposal available for implementation by any other person, or

(b) the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements implementing the notifiable proposal.

(3) A person who is a promoter in relation to notifiable arrangements must, within the prescribed period after the date on which he first becomes aware of any transaction forming part of the notifiable arrangements, provide the Board with prescribed information relating to those arrangements, unless those arrangements implement a proposal in respect of which notice has been given under subsection (1).

…

(5) Where a person is a promoter in relation to two or more notifiable proposals or sets of notifiable arrangements which are substantially the same (whether they relate to the same parties or different parties), he need not provide information under subsection (1) or (3) if he has already provided information under either of those subsections in relation to any of the other proposals or arrangements.

7. For present purposes, the prescribed period referred to in section 308(3) is defined by Regulation 5(4) Tax Avoidance Schemes (Information) Regulations 2012. It is a period of 5 days after the date on which a promoter "first becomes aware of any transaction forming part of the notifiable arrangements". In the event of non-compliance, a penalty is incurred or begins to be incurred on the first day after the prescribed period. The penalty is a daily penalty not to exceed a certain amount, initially £600 per day whilst the failure continues.

8. The FTT succinctly summarised the issues before it at [10] to [12] of the FTT Decision:

10. The only issue in [the] preliminary hearing is whether Root2 was required by section 308(3) FA 2004 to provide HMRC with prescribed information within five days of the date of:

(1) the first occasion on which it became aware of any transaction forming part of the Alchemy scheme; or

(2) each occasion on which it became aware of a transaction forming part of any implementation of the Alchemy scheme.

11. HMRC maintain that each time that a person implements the Alchemy scheme is a new instance of notifiable arrangements and that a new duty to notify arose each time that Root2 first became aware of a transaction which was part of that implementation.

12. Root2 maintains that the notifiable arrangements for the purposes of section 308(3) are the Alchemy scheme and not each separate implementation of it and therefore the duty to notify arose only once.

9. The FTT determined the preliminary issue in favour of Root2. It stated at [55]:

55. For the reasons set out above, I have decided that Root2 was required by section 308(3) FA 2004 to provide HMRC with prescribed information on the first occasion on which it became aware of any transaction forming part of the Alchemy scheme. As that was before 16 May 2013, the Penalty Application was made out of time.

10. Having determined the preliminary issue in favour of Root2, the FTT dismissed the Penalty Application.

11. HMRC appeals against the FTT Decision with permission of the FTT. They were represented before us by Aparna Nathan KC, who appeared before the FTT, and Georgia Hicks. We are grateful for their detailed written arguments and oral submissions. Root2 opposed the appeal and submitted a Response to the Notice of Appeal, drafted by Hartley Foster of Counsel. Shortly before the hearing, the Upper Tribunal was informed that Root2 was not able to attend the hearing or instruct representatives on its behalf. Root2 asked us to dismiss the appeal and relied on the reasons given in the FTT Decision. In the circumstances, while we were assisted by its Response to the Notice of Appeal, we did not have the benefit of any skeleton argument or oral submissions on behalf of Root2.

12. The preliminary issue and the issue on this appeal concern the construction of section 308(1), (2), (3) and (5) FA 2004. There are three grounds of appeal but, essentially, HMRC contend that the FTT wrongly construed section 308(3) as requiring a promoter to provide information only on the first occasion on which it became aware of a transaction forming part of the notifiable arrangements. It ought to have found that a promoter had an obligation to provide that information each time that it first became aware of a transaction forming part of a particular scheme user's implementation of a set of notifiable arrangements, unless that duty had been relieved by a previous notification.

13. We shall refer in this decision to the obligation of a promoter to provide information to HMRC in connection with notifiable arrangements as a "duty to notify", adopting the terminology of the parties and the FTT.

THE DOTAS PROVISIONS

14. We will consider the relevant DOTAS provisions in detail when we come to consider HMRC's grounds of appeal in more detail. At this stage we can give a brief summary.

15. The DOTAS provisions are concerned with notifiable arrangements. Section 318 FA 2004 provides that "arrangements" includes "any scheme, transaction or series of transactions". It is important to note that the term can include a single transaction or several transactions which together form a series of transactions. It also includes a scheme.

16. Part 7 FA 2004 starts at section 306 with a definition of the terms "notifiable arrangements" and "notifiable proposal". Notifiable arrangements must fall within a description provided by the Treasury by regulations. For present purposes we are concerned with Regulation 10 Description 5 of the *Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006*, which refers to standardised tax products. In brief, they are arrangements which enable or might be expected to enable any person to obtain a tax advantage where the main benefit or one of the main benefits that might be expected to arise is the obtaining of that tax advantage.

17. A notifiable proposal is a proposal for arrangements which would be notifiable arrangements if the proposal is entered into. Chronologically, a proposal will precede the implementation of the arrangements.

18. Duties to notify for the purposes of the DOTAS provisions fall on promoters of a notifiable proposal and promoters of notifiable arrangements. Section 307(1)(a) defines a promoter for the purposes of a notifiable proposal and section 307(1)(b) defines a promoter for

the purposes of notifiable arrangements. In broad terms, promoters might be involved in designing or marketing the arrangements, or in organising or managing the arrangements when they are implemented by a particular taxpayer.

19. Section 308, set out above, describes the duties of promoters. Section 308(1) and (2) concern the duty to notify in relation to a notifiable proposal. Section 308(3) describes the duty to notify in relation to notifiable arrangements.

20. The prescribed information which a promoter must provide in relation to both a notifiable proposal and notifiable arrangements is set out by Regulation 4 Tax Avoidance Schemes (Information) Regulations 2012. It is "sufficient information as might reasonably be expected to enable an officer of HMRC to comprehend the manner in which the proposal or arrangements are intended to operate". It must include information such as the promoter's name and address, a summary of the arrangements or proposed arrangements, the name (if any) by which they are known, an explanation of the tax advantage which is expected to be obtained and the statutory provisions on which the tax advantage is based.

21. Where a promoter complies with a duty to notify then section 311 FA 2004 provides that HMRC may allocate a reference number to the notifiable arrangements or the proposed notifiable arrangements. In practice, HMRC describe this as a Scheme Reference Number or "SRN". Section 312 provides that a promoter in relation to notifiable arrangements must within a prescribed time provide that reference number and the information prescribed in Regulation 6 Tax Avoidance Schemes (Information) Regulations 2012 to any client to whom it is providing services in connection with the notifiable arrangements, or arrangements which are substantially the same as the notifiable arrangements.

22. Section 313 provides that any person who is a party to notifiable arrangements, including the taxpayer, must provide certain prescribed information to HMRC, which may include the requirement to provide the information in a tax return.

23. It is worth noting at this stage that the DOTAS provisions also deal with the position where there is doubt as to whether arrangements are notifiable arrangements or whether a proposal is a notifiable proposal. In cases of doubt, HMRC can apply to the FTT for an order under section 306A FA 2004 or section 314A FA 2004. An order under section 306A is that a proposal or arrangements are to be treated as notifiable. It is made where HMRC have reasonable grounds for suspecting that the proposal or arrangements are notifiable. An order under section 314A is that a proposal or arrangements are notifiable. It is made where the FTT is satisfied that the relevant arrangements are notifiable arrangements under section 306(1).

THE FTT'S FINDINGS OF FACT

24. The FTT made various findings of fact for the purpose of determining the preliminary issue. Many of the findings were agreed between the parties. We can state the relevant facts quite briefly. They are relevant to the issue of construction we must determine only in the sense that they give context to the issues that arise.

25. Root2 became aware of transactions being undertaken by various individuals using the Alchemy Scheme between April 2011 and August 2017. Those individuals included directors of Root2 and employees of other companies not connected to Root2.

26. The Alchemy Scheme is described at [3] – [6] of the DOTAS Decision. Very broadly, it involves an employee entering into a spread bet with an established spread betting business.

The bet relates to the performance of a basket of hedge funds over a period of time. If the funds rise to a stated level at the end of the period, the bet wins. If not, the bet loses. At the same time the employee enters into a hedging contract with the spread betting business. The hedging contract mirrors the spread bet but in reverse. If the employee wins on the spread bet, he will lose on the hedging contract and vice versa. There is a small built-in loss which is the fee of the spread betting business. Soon after the spread bet and hedging contract are made, the employer relieves the employee of the hedging contract by way of novation. At that stage, the outcome of the two contracts is uncertain. The spread bet has a modest positive value and the hedging contract a modest negative value. When the employer relieves the employee of the hedging contract an employment-related benefit is conferred on which the employee pays tax. When the contracts mature a few months later, ideally the employee will have won the spread bet and the employer will have lost the hedging contract. The employer therefore makes a payment to the spread betting business, which in turn makes a payment to the employee. It is intended that the employee should receive that payment as betting winnings which are not taxable. On some occasions the spread bet would be lost, in which case the employee would suffer an economic cost and the employer a corresponding gain. We need not be concerned as to how that is dealt with in the Alchemy Scheme.

27. The DOTAS Decision also found that Root2 was a promoter in relation to the Alchemy Scheme. It did not say on precisely what basis Root2 was a promoter, but it is not suggested that anything turns on that for the purposes of this appeal.

28. On 13 July 2015, HMRC wrote to Root2 setting out their understanding of the Alchemy Scheme. The letter stated that HMRC had reason to believe that Root2 had a duty to notify the Alchemy Scheme pursuant to section 308.

29. In June 2016, HMRC applied to the FTT for an order pursuant to section 314A FA 2004, alternatively under section 306A, that the Alchemy Scheme constituted or should be treated as notifiable arrangements within section 306(1). The application was heard by the FTT in March 2017. The DOTAS Decision was released on 11 September 2017. The FTT granted HMRC's application for an order under s.314A in respect of the Alchemy Scheme. There are no rights of appeal against such decisions, and Root2 sought permission to commence judicial review proceedings. They were refused permission by the High Court, and permission was refused by the Court of Appeal in January 2019.

30. Root2 had not provided information to HMRC in relation to the Alchemy Scheme until it made certain disclosures on 21 September 2017, 13 October 2017 and 5 April 2019. HMRC did not consider that those notifications satisfied Root2's duty to notify pursuant to section 308(3) FA 2004. HMRC considered that in relation to one taxpayer who had implemented the Alchemy Scheme, Root2 first became aware of a transaction forming part of the notifiable arrangements on or shortly before 20 June 2013. HMRC therefore made the Penalty Application on 22 May 2019. Root2 considered that it first became aware of a transaction forming part of the notifiable arrangements on 15 April 2011, when another taxpayer had first taken steps to implement the Alchemy scheme.

DISCUSSION

31. The DOTAS provisions have previously been considered by the Administrative Court in judicial review proceedings. Firstly, in *R (otao Walapu) v HM Revenue & Customs* [2016] EWHC 658 (Admin) and then in *R (otao Graham and others) v HM Revenue & Customs* [2016] EWHC 1197. For reasons stated below, in agreement with HMRC, we do not consider that

either of these cases are authoritative on the particular point of construction we must determine. We therefore address the issue from first principles, as a matter of statutory construction. It is not controversial that we must take a purposive approach and construe the provisions so as to give effect to the purpose of the provisions. The relevant principles were recently restated by the Supreme Court in *Hurstwood Properties (A) Ltd v Rossendale BC* [2021] UKSC 16:

> 10. There are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. Two examples will suffice. In R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687, para 8, Lord Bingham of Cornhill said:
>
> > 'Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'
>
> In Bloomsbury International Ltd v Department for Environment, Food and Rural Affairs [2011] 1 WLR 1546, para 10, Lord Mance JSC stated:
>
> > 'In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance . . . In this area, as in the area of contractual construction, the notion of words having a natural meaning is not always very helpful (Charter Reinsurance Co Ltd v Fagan [1997] AC 313, 391C, per Lord Hoffmann), and certainly not as a starting point, before identifying the legislative purpose and scheme.'

32. In the words of Lord Dunedin in *Whitney v IRC* [1926] AC 37 at 52:

> A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.

33. The purpose of the DOTAS provisions was described by Green J as he then was in *Walapu* at [152]:

> 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 purpose is so that HMRC can then analyse the arrangements from a substantive legal perspective (through an enquiry) and, if appropriate, issue [Accelerated Payment Notices] to the participants. The essence of the scheme is thus to enable HMRC to apply the law to new types of arrangements as they emerge.

34. HMRC's case is that the statutory scheme recognises a distinction between a duty to notify, which arises on each occasion when a promoter first becomes aware of a transaction implementing the arrangements by each scheme user, and actual notification. Whilst a duty to notify may arise on many occasions, actual notification of the arrangements or a previous proposal to HMRC is only required once. Ms Nathan submitted that the FTT wrongly held that the duty to notify only arose once, on the first occasion that a promoter becomes aware of a transaction implementing the scheme. She submitted that the FTT Decision was wrong because:

(1) It is inconsistent with the purpose of the DOTAS regime;

(2) It runs contrary to the detailed statutory scheme for notification of notifiable arrangements; and

(3) It undermines the proper functioning of the DOTAS penalty scheme, thus rendering that scheme ineffective.

35. Section 307 defines who is a promoter for the purposes of the DOTAS provisions as follows:

> 307(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.

36. It is not controversial that the DOTAS provisions identify at least two separate occasions on which a duty to notify arises. The first occasion is the duty to notify that arises under section 308(1) in relation to a notifiable proposal. That is a proposal for arrangements which, if entered into, would be notifiable arrangements. The meaning of promoter in this context is set out in section 307(1)(a), and includes persons responsible for the design and marketing of the proposed arrangements and persons who make the notifiable proposal available for implementation by others.

37. The second occasion is the duty to notify that arises under section 308(3), when the arrangements are implemented. The meaning of promoter in this context is set out in section 307(1)(b) and includes persons who are promoters in relation to a notifiable proposal which is implemented by the arrangements, and someone who is responsible for the design, organisation or management of the arrangements.

38. There is a clear proviso to section 308(3) which excludes the duty (or duties) to notify arising on the implementation of arrangements where those arrangements implement a proposal which has already been notified pursuant to section 308(1).

39. Ms Nathan submits that the DOTAS provisions focus on implementation of the arrangements by particular taxpayers, and that there is a duty to notify on each occasion that notifiable arrangements are implemented by a taxpayer. However, she acknowledges that one would then expect to see an exclusion of the duty to notify later implementations of the arrangements when an earlier implementation has been notified. Ms Nathan submits that this is the purpose, or at least one of the purposes of section 308(5).

40. We do not accept Ms Nathan's construction of section 308(3) and 308(5) for the following reasons.

41. First, the relevant wording in section 308(3) ("the date on which [the promoter] first becomes aware of any transaction forming part of the notifiable arrangements") is exactly the same as that in section 308(2)(b) in relation to the duty to notify a proposal. We would expect that carefully chosen phrase to have the same meaning in both provisions.

42. Section 308(2) is identifying the relevant date by reference to which the duty to notify a proposal arises. It does so by reference to the earliest of three dates set out in sub-paragraphs (za), (a) and (b). HMRC accept that in section 308(2)(za), "the date" refers to a single date, namely "the date on which the promoter first makes a firm approach to another person ...". It is not each date on which the promoter first approaches another person. Similarly, in section 308(2)(a), "the date" again refers to a single date, "the date on which the promoter makes the notifiable proposal available for implementation by any other person". Again, HMRC accept that it is not each date on which the promoter makes the notifiable proposal available. However, HMRC say that section 308(2)(b) catches multiple dates, whenever a promoter first becomes aware of a transaction implementing the notifiable arrangements.

43. The fact that "the date" in each of section 308(2)(za) and section 308(2)(a) refers to a single date supports the conclusion that "the date" in section 308(2)(b) is also intended to refer to a single date, that is "the date on which the promoter first becomes aware of any transaction … implementing the notifiable proposal".

44. Ms Nathan suggested that it would only be a designer of the arrangements who would be likely to fall within section 308(2)(b). It is not clear to us that is the case, but in any event it does not seem to be relevant to the point in issue.

45. Our view as to the meaning of section 308(2)(b) is reinforced by the fact that section 308(2) is all about identifying a single date, which is "the relevant date" for the purposes of section 308(1). It does so by reference to the earliest of the three dates in sub-sections (za), (a) and (b). The problem with HMRC's construction is that it makes section 308(2) unworkable wherever two or more dates in (b) span the date in either or both of (za) and (b). This can be illustrated as follows:

> (1) Suppose that the promoter first makes a firm approach to another person in relation to a notifiable proposal on 1 May 2022. That is the date identified by sub-section (za);
>
> (2) Suppose that the promoter first becomes aware of a transaction by taxpayer X implementing notifiable arrangements on 1 April 2022; and then first becomes aware of a transaction with taxpayer Y also implementing notifiable arrangements on 1 June 2022;

46. It is then impossible to answer the question which is the earliest of the dates in (za) and (b) because there are two dates falling within (b), one of which is before the date in (za) and one of which is after it. The problem does not arise if "the date" in (b) refers only to a single date by reference to the promoter's awareness of the first implementation of the arrangements. Parliament would have referred to "the dates" or "the earliest date" in subsection (b) if it intended the construction relied upon by HMRC.

47. If the date in section 308(2)(b) means a single date when the promoter becomes aware that the notifiable proposal has been implemented, then it is difficult to see why precisely the same wording in section 308(3) should bear a different meaning.

48. Second, HMRC's case involves the proposition that where section 308(3) refers to "notifiable arrangements" in the phrase "any transaction forming part of the notifiable arrangements", it is referring to each implementation of the relevant scheme by separate taxpayers. This would lead to the unworkable conclusion that a duty to notify in relation to the scheme arose on each implementation of the scheme by successive taxpayers. The proviso at the end of subsection (3) only removes the duty if the *proposal* has been earlier notified. There is nothing within section 308(3) itself which removes the duty to notify an implementation of the scheme if an earlier implementation has been notified.

49. HMRC say that the answer to that problem is found in section 308(5). But that provision does not help. It is premised upon there being two or more "sets of notifiable arrangements" (or two or more notifiable proposals). On the present facts, HMRC say that each time a taxpayer implements the Alchemy Scheme, that is a "set of notifiable arrangements". Thus, there will be two or more such sets of notifiable arrangements once two taxpayers have implemented the scheme. That cannot be right, for a number of reasons.

50. Section 308(3) draws a distinction between the notifiable arrangements (a transaction, series of transactions or scheme) and a transaction forming part of those arrangements.

51. We understood Ms Nathan to submit that the notifiable arrangements in this case consisted of a series of transactions, comprising the spread bet, the hedging contract and a novation with the employer, and that each of those steps was itself a transaction forming part of those arrangements for the purposes of section 308(3). If that is right, she submits that each implementation of the Alchemy Scheme is a "set of notifiable arrangements", so that there are two or more sets of notifiable arrangements for the purposes of section 308(5). We do not accept that submission. In the context of the Alchemy Scheme, each implementation by a taxpayer would be of the same scheme involving the same series of transactions. The implementation by an individual taxpayer would amount to notifiable arrangements as defined in s 306(1). It would not be a "set" of notifiable arrangements. On HMRC's case, s 308(5) would have the same effect even if the words "sets of" were omitted. In our view a "set" of notifiable arrangements is intended to refer to what in this case is the Alchemy Scheme as a whole. Section 308(5) is removing the duty to notify that would otherwise arise where there is a variation in the overall scheme but the new variant is substantially the same as the original scheme. It goes no further than that.

52. Moreover, the whole purpose of the notification procedure is to give HMRC advance warning of tax avoidance schemes so that it can allocate an SRN pursuant to section 311. The promoter must then give the SRN and certain prescribed information to each taxpayer that implements the scheme, so that they can make disclosures in their tax returns. The prescribed information in Regulation 6 includes the name or a brief description of the arrangements. HMRC is therefore alerted to the existence of the scheme, and separately to the fact that individual taxpayers have utilised the scheme. Defining the notifiable arrangements in section 308(3) as the series of transactions each taxpayer enters into on implementing the Scheme does not best accord with that purpose.

53. HMRC rely on the words in parentheses in section 308(5), namely "whether they relate to the same parties or different parties". The "they" in question is the notifiable proposals or the sets of notifiable arrangements. Those words do not in our view favour either of the competing constructions.

54. We consider that our reading of sections 308(3) and 308(5) is consistent with the purpose of the DOTAS provisions. There is an obligation on promoters to provide early information to HMRC about tax avoidance schemes when, to the knowledge of a promoter, they are first proposed or first implemented. That obligation is a continuing obligation.

55. This reading of sections 308(3) and 308(5) does not undermine the proper functioning of the penalty provisions. Nor as Ms Nathan suggests does it "open the door to non-compliance". She submitted that the penalty regime would not have any teeth if the FTT's interpretation is correct. A promoter could choose not to notify and let the 6 years run knowing that at that stage there could be no penalty.

56. We do not accept these submissions. Where a promoter fails to provide information about the implementation of a scheme, it is liable to a penalty. However, that liability to a penalty is not open ended. Parliament clearly intended the liability should cease after a period of time. On our reading of the provisions, liability ceases 6 years after the prescribed period. Namely, 6 years and 6 days after the promoter first became aware of a transaction implementing the notifiable arrangements. HMRC say that a longer limitation period would be more consistent with the overall scheme of the legislation. That is a period which effectively expires 6 years after the promoter first becomes aware of the last transaction implementing the notifiable arrangements. HMRC say that would be a more effective limitation period because until notification they are likely to be in the dark about the existence of a scheme. A promoter might take the risk of incurring a penalty in the period of 6 years and 6 days from the first transaction where it would not take the risk if time ran from the last transaction. We do not find that persuasive. Parliament has chosen to define the commencement of the limitation period by reference to the date on which a promoter acquires knowledge of a relevant transaction, not by reference to the date when HMRC becomes aware of the promoter's default. It is that choice which means there is always a risk that HMRC will not become aware of the fact that the promoter has incurred a potential penalty liability until after the limitation period has expired, whether the limitation period commences upon the promoter first becoming aware of a transaction, or upon the promoter becoming aware of the last transaction implementing a scheme.

57. Ms Nathan also submits that once HMRC become aware of the existence of a scheme it may take time to establish whether the scheme is notifiable. That may be true, but it does not mean that the penalty regime is without teeth or ineffective. Nor does it cause us to consider that the otherwise clear language of sections 308(3) and (5) can be construed to give the result favoured by HMRC.

58. In the context of penalties for breach of a duty to notify, HMRC accept that with multiple duties to notify, in principle there would be multiple breaches and multiple penalties. In practice however, they accept there would only be one penalty. Effectively, the requirement for HMRC to apply to the FTT to impose a penalty acts as a limitation in this regard and there would only be one application for a penalty. It seems to us that the fact Parliament did not specifically deal with the possibility of multiple penalties is also a pointer to the fact that only one duty to notify arises on a promoter first becoming aware of a transaction forming part of the notifiable arrangements.

59. Even if the language were not as clear as we consider it to be, we would not construe the provisions in the way HMRC invites us to. The principle of doubtful penalisation would be engaged. That principle was described by Sales J as he then was in *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB):

> 47. The principle that penal legislation is to be construed strictly is a long-standing one, of recognised constitutional importance … The rationale for this principle is that it is presumed within our constitutional system that the legislator intends that a person subject to a penal regime should have been given fair warning of the risks he might face of being made subject to a penalty.
>
> 48. But it is not an absolute principle. The overarching requirement is that a court should give effect to the intention of the legislator, as objectively determined having regard to all relevant indicators and aids to construction. The principle of strict interpretation of penal legislation is one among many indicators of the meaning to be given to a legislative provision. It is capable of being outweighed by other objective indications of legislative intention, albeit it is itself an indicator of great weight … If other objective indicators of legislative meaning and intent are sufficiently clear, and it is obvious to the requisite degree that the draftsman has made a slip in the language he has used, a person subject to a penal regime may be taken to have been given fair warning even though the interpretation adopted by the court involves some implication of terms in, or substitution for, the text of a relevant legislative provision.

60. This would be a further factor in an overall consideration of the provisions which would cause us to arrive at the same conclusion on the point of construction.

61. While acknowledging that they did not address the question of construction we are faced with, Ms Nathan relied upon *Walapu*, *Graham* and a decision of the FTT in *HM Revenue & Customs v Premiere Picture Limited* [2021] UKFTT 58 (TC) as supporting HMRC's construction of section 308(3) FA 2004. At the same time, Ms Nathan submitted that the FTT in the present case had wrongly interpreted those decisions as supporting its conclusions on the true construction of section 308(3). We can deal with these points relatively briefly.

62. *Walapu* involved a judicial review of HMRC's decision to issue an accelerated payment notice ("APN") to the taxpayer. One of the issues was whether the relevant scheme was a "DOTAS arrangement" for the purposes of section 219 Finance Act 2014. A DOTAS arrangement in this context is notifiable arrangements in respect of which HMRC have issued an SRN or arrangements where there is a duty to notify because they are substantially similar to such notifiable arrangements. The scheme in question was described as "the Syndicate Scheme". The taxpayer argued that the Syndicate Scheme was not a notifiable arrangement and therefore no APN could be issued.

63. A previous scheme on which the Syndicate Scheme was based known as "the Partnership Scheme" had been rendered ineffective by anti-avoidance legislation. The Partnership Scheme had been notified. A proposal for the Syndicate Scheme was also subsequently notified by a promoter. Despite this, the taxpayer argued that the Syndicate Scheme was substantially the same as the Partnership Scheme which had already been notified and hence there was no requirement to notify the Syndicate Scheme as a result of section 308(5).

64. Green J noted at [144] that the proviso to section 308(3) removed the duty to notify when the Syndicate Scheme was implemented because the proposal had previously been notified. He found that section 308(5) therefore had no application because it only applies where there is a duty to notify under section 308(3):

> 144. I start with my conclusions on the analysis of s 308(5). Section 308(1) is the provision which applies the duty on the promoter to notify in the present case because Mercury (the Promoter) was concerned with the Syndicate Schemes which were proposals at the time the 2006 DOTAS Regulations first applied (see paras [156]—[160], below). Section 308(3) was capable of applying to the schemes which implemented the notified Syndicate Scheme but the promoter was relieved from the duty to notify the implementations because (see paras [130]–[133], above) the

> duty does not apply where the subsequent arrangement implements a proposal in respect of which notice has been given under sub-s (1). It follows that there was no duty in this case imposed by s 308(3) for the specific Syndicate Scheme entered into by the claimant to be notified. Section 308(5) therefore does not apply because it has application only where there is a duty imposed upon a promoter by s 308(3) but it necessarily follows that if there is no duty imposed by s 308(3) then there is nothing to be relieved from by the operation of s 308(5).

65. In case he was wrong on that point, Green J went on to consider whether the duty to notify on implementation of the Syndicate Scheme was excluded by the application of section 308(5) because the Syndicate Scheme was substantially the same as the Partnership Scheme which had previously been notified. He found that the Syndicate Scheme was not substantially the same as the Partnership Scheme.

66. Ms Nathan says that there are passages in the judgment of Green J that support HMRC's submissions in the present appeal. In particular she refers to the reference in [144] to section 308(3) being capable of applying to "schemes which implemented the notified Syndicate Scheme". Ms Nathan submitted that use of the plural "schemes" must have been a reference to individual implementations of the Syndicate Scheme. Further, the reference to there being no duty for "the specific Syndicate Scheme entered into by the claimant to be notified" supports a construction which requires notification of arrangements entered into by individual taxpayers.

67. Ms Nathan also relied on [148] in *Walapu* where Green J referred to there being no obligation to notify the "particular" scheme implemented by the claimant:

> 148. In relation to the Syndicate Schemes the Promoter notified the proposed arrangements on 20 March 2007 and the SRN 55413422 was allocated by HMRC to the proposed scheme. The claimant entered into a subsequent iteration of the proposal (Liberty Syndicate 21). However, there was no obligation for that 'particular' scheme to be notified because it was the implementation of a prior proposal in respect of which a notice had been sent to the Revenue and therefore the s 308(3) duty did not apply.

68. Since *Walapu* was not concerned with the issue in the present appeal, we consider that in these passages Green J was merely setting the context for the issues he was considering. It does not carry HMRC's case any further forward.

69. We note that the FTT in this appeal considered that *Walapu* was authority which supported Root2's submissions on the issue of construction. The FTT said as follows at [46]:

> 46. It is clear from *Walapu* that the effect of the legislation, particularly section 308(3) and (5), is that the obligation to notify arises in respect of the scheme and not the individual implementations of its arrangements. Further, variations in a scheme which do not change the analysis for tax purposes are immaterial and do not create a new obligation to notify. It seems to me that *Walapu* is authority, which is binding on me, for the proposition that a tax avoidance scheme which is implemented on several occasions with only immaterial changes need only be notified once.

70. We do not think that *Walapu* went as far as that, and we cannot identify passages in the judgment in *Walapu* which support those propositions. We disagree to this extent, therefore, with the reasoning of the FTT.

71. Put simply, the reasoning in *Walapu* does not support the case of either party on this appeal.

72. As far as *Graham* is concerned, this was another judicial review by taxpayers concerning the validity of APNs issued in relation to the partnership schemes referenced in *Walapu*. The taxpayers all participated in one set of partnership schemes known as the Liberty Partnerships. Each partnership raised capital from individual taxpayers who subscribed as partners. The taxpayers contended that none of the partnership schemes being considered were notifiable arrangements.

73. HMRC's contentions and the taxpayer's contentions were noted by Sir Kenneth Parker as follows:

> 33. … HMRC contends that, for the purposes of section 308(3), the relevant notifiable arrangements were the particular arrangements for each specific Partnership. On that footing, the promoter had a duty to notify when he became aware of any transaction forming part of the particular arrangements for each specific Partnership. For each of Partnerships 5-8 that date inevitably fell after 1 August 2006, because no relevant transactions in respect of any of these Partnerships had been implemented before August 2006. The condition in section 308(3) was also satisfied, because *ex hypothesi* no notice had been given, or could have been required to be given, in respect of the relevant notifiable proposal.
>
> 34. Mr Southern QC resists that conclusion by submitting that "in reality" there was just one set of "arrangements" in this case, namely, the arrangements for the Liberty Partnerships...

74. Again, HMRC do not say that *Graham* was concerned with the issue in the present appeal. In that case, the partnerships were the relevant entities which implemented the arrangements and any tax advantage to the individual taxpayers arose as a result of the partnership's transactions. It was held at [35], [36] and [43] that each partnership was a separate set of notifiable arrangements under section 308(3) because each partnership had its own particular components including, in particular, the alleged tax advantage. In the circumstances of that case therefore, the relevant arrangements for the purposes of section 308 were the specific arrangements for each particular partnership. There was no justification for sweeping all the individual partnerships under a single "umbrella" arrangement.

75. In relation to *Graham*, the FTT said at [48]:

> 48. It is clear from *Graham* (see [31], [32] and [37]) that the relevant notifiable arrangements were those relating to the specific partnership. The promoter had a duty to notify when he first became aware of any transaction forming part of the particular arrangements for each specific partnership but not on each occasion that an individual joined the specific partnership. The 'notifiable arrangements' were the specific partnership structure and not each individual's use of it and, in *Graham*, HMRC did not contend to the contrary.

76. It is not clear what support, if any, the FTT found in *Graham* for the proposition that a tax avoidance scheme which is implemented on several occasions with only immaterial changes need only be notified once. If the FTT did treat *Graham* as authority for that proposition then with respect, it was wrong to do so. Again, the reasoning in *Graham* does not support the case of either party on this appeal.

77. The same point can be made in relation to reliance in the FTT Decision at [53] on what was said in the DOTAS Decision.

78. Finally, Ms Nathan relied on a decision of the FTT in *Premiere Picture*, which involved investment by taxpayers in various film schemes, one involving a general partnership, the other

involving an LLP. HMRC applied for orders under either Section 314A or Section 306A FA 2004. Overall, the appeal concerned whether the schemes comprised "notifiable arrangements" which raised 5 issues. The first issue was whether there were "arrangements" falling within section 318(1). The FTT dealt with this at [44]:

> 44. I can dispense with this issue briefly given that it is common ground. On each occasion that the Sovereign Individual Scheme was implemented, the transactions which occurred in the course of its implementation constituted 'arrangements' and the same was true on each occasion that the Sovereign Corporate Scheme was implemented.

79. The FTT went on to say that "each implementation of the scheme gave rise to arrangements which were separate and distinct from the arrangements which arose when the same scheme was implemented on another occasion". Those findings are not surprising given the limited nature of the first issue. There were clearly arrangements, which was common ground. We do not consider that the FTT in *Premiere Picture* made any finding that each implementation of the schemes amounted to notifiable arrangements giving rise to a separate duty to notify. It was not concerned with the duty to notify. Nothing said by the FTT in that case causes us to depart from the conclusions we have reached on the construction of section 308(3).

CONCLUSION

80. For all the reasons given above we dismiss the appeal. We are satisfied that the FTT correctly construed section 308(3) FA 2004 for the purposes of the preliminary issue. We do not agree in all respects with the analysis of the FTT, but we are satisfied that it was right to dismiss HMRC's Penalty Application.

MR JUSTICE ZACAROLI
JUDGE JONATHAN CANNAN

Release date: 20 December 2022

APPENDIX
LEGISLATION

TAXES MANAGEMENT ACT 1970

Part X Penalties, etc

98C Notification under Part 7 of Finance Act 2004

(1) A person who fails to comply with any of the provisions of Part 7 of the Finance Act 2004 (disclosure of tax avoidance schemes) mentioned in subsection (2) below shall be liable –

(a) to a penalty not exceeding

(i) in the case of a provision mentioned in paragraph (a) … of that subsection, £600 for each day during the initial period (but see also subsections (2A), (2B) and (2ZC) below), and

(ii) in any other case, £5,000, and

(b) if the failure continues after a penalty is imposed under paragraph (a) above, to a further penalty or penalties not exceeding £600 for each day on which the failure continues after the day on which the penalty under paragraph (a) was imposed (but excluding any day for which a penalty under this paragraph has already been imposed).

(2) Those provisions are

(a) section 308(1) and (3) (duty of promoter in relation to notifiable proposals and notifiable arrangements),

…

(2ZA) In this section the initial period means the period

(a) beginning with the relevant day, and

(b) ending with the earlier of the day on which the penalty under subsection (1)(a)(i) is determined and the last day before the failure ceases;

and for this purpose 'the relevant day' is the day specified in relation to the failure in the following table.

Failure	*Relevant day*
Any other failure to comply with subsection (1) of section 308	The first day after the end of the period prescribed under that subsection
Any other failure to comply with subsection (3) of section 308	The first day after the end of the period prescribed under that subsection

(2ZB) The amount of a penalty under subsection (1)(a)(i) is to be arrived at after taking account of all relevant considerations, including the desirability of its being set at a level which appears appropriate for deterring the person, or other persons, from similar failures to comply on future occasions having regard (in particular)
(a) in the case of a penalty for a promoter's failure to comply with section 308(1) or (3) or section 310A, to the amount of any fees received, or likely to have been received, by the promoter in connection with the notifiable proposal (or arrangements implementing the notifiable proposal), or with the notifiable arrangements,
…
(2ZBA) In subsection (2ZB)

(a) 'promoter' has the same meaning as in Part 7 of the Finance Act 2004, and (b) …

…
(2B) Where a failure to comply with a provision mentioned in subsection (2) concerns a proposal or arrangements in respect of which an order has been made under section 314A of the Finance Act 2004 (order to disclose), the amounts specified in subsection (1)(a)(i) and (b) above shall be increased to the prescribed sum in relation to days falling after the prescribed period.
(2C) In subsection (2A) and (2B)

(a) 'the prescribed sum' means a sum prescribed by the Treasury by regulations, and

(b) 'the prescribed period' means a period beginning with the date of the order under section 306A or 314A and prescribed by the Commissioners by regulations.

(2D) The making of an order under section 306A or 314A of that Act does not of itself mean that, for the purposes of section 118(2) of this Act, a person either did or did not have a reasonable excuse for non- compliance before the order was made.
(2E) Where an order is made under section 306A or 314A of that Act then for the purposes of section 118(2) of this Act

(a) the person identified in the order as the promoter of the proposal or arrangements cannot, in respect of any time after the end of the period mentioned in subsection (2B), rely on doubt as to notifiability as an excuse for failure to comply with section 308 of that Act, and

(b) any delay in compliance with that section after the end of that period is unreasonable unless attributable to something other than doubt as to notifiability.

100 Determination of penalties by officer of Board]

(1) Subject to subsection (2) below and except where proceedings for a penalty have been instituted under section 100D below … an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate. (2) Subsection (1) above does not apply where the penalty is a penalty under …

(f) section 98C(1)(a) above

…

100C Penalty proceedings against First-tier Tribunal

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

(2) The person liable to the penalty shall be a party to the proceedings.

(3) Any penalty determined by the First-tier Tribunal in proceedings under this section shall for all purposes be treated as if it were tax charged in an assessment and due and payable.

…

103 Time limits for penalties]

…

(4) A penalty to which subsection (1) does not apply may be so determined, or proceedings for such a penalty may be commenced before the [tribunal] or a court, at any time within six years after the date on which the penalty was incurred or began to be incurred.

FINANCE ACT 2004

Part 7 Disclosure of Tax Avoidance Schemes

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).

306 A Doubt as to notifiability

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

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

(b) arrangements are to be treated as notifiable.

(2) An application must specify

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

(b) the promoter.

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

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

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

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

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

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

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

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

(6) Where an order is made under this section in respect of a proposal or arrangements, the prescribed period for the purposes of section 308(1) or (3) in so far as it applies by virtue of the order

(a) shall begin after a date prescribed for the purpose, and

(b) may be of a different length than the prescribed period for the purpose of other applications of section 308(1) or (3).

(7) An order under this section in relation to a proposal or arrangements is without prejudice to the possible application of section 308, other than by virtue of this section, to the proposal or arrangements.

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 (c 12) 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 notifiable proposal if the person makes a marketing contact with the other person in relation to the notifiable 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.

308 Duties of promoter

(1) A person who is a promoter in relation to a notifiable proposal must, within the prescribed period after the relevant date, provide the Board with prescribed information relating to the notifiable proposal.

(2) In subsection (1) the relevant date means the earliest of the following

(za) the date on which the promoter first makes a firm approach to another person in relation to a notifiable proposal,

(a) the date on which the promoter makes the notifiable proposal available for implementation by any other person, or #

(b) the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements implementing the notifiable proposal.

(3) A person who is a promoter in relation to notifiable arrangements must, within the prescribed period after the date on which he first becomes aware of any transaction forming part of the notifiable arrangements, provide the Board with prescribed information relating to those arrangements, unless those arrangements implement a proposal in respect of which notice has been given under subsection (1).

(4) Subsection (4A) applies where a person complies with subsection (1) in relation to a notifiable proposal for arrangements and another person is

(a) also a promoter in relation to the notifiable proposal or is a promoter in relation to a notifiable proposal for arrangements which are substantially the same as the proposed arrangements (whether they relate to the same or different parties), or

(b) a promoter in relation to notifiable arrangements implementing the notifiable proposal or notifiable arrangements which are substantially the same as notifiable arrangements implementing the notifiable proposal (whether they relate to the same or different parties).

(4A) Any duty of the other person under subsection (1) or (3) in relation to the notifiable proposal or notifiable arrangements is discharged if

(a) the person who complied with subsection (1) has notified the identity and address of the other person to HMRC or the other person holds the reference number allocated to the proposed notifiable arrangements under section 311, and

(b) the other person holds the information provided to HMRC in compliance with subsection (1).

(4B) Subsection (4C) applies where a person complies with subsection (3) in relation to notifiable arrangements and another person is

(a) a promoter in relation to a notifiable proposal for arrangements which are substantially the same as the notifiable arrangements (whether they relate to the same or different parties), or

(b) also a promoter in relation to the notifiable arrangements or notifiable arrangements which are substantially the same (whether they relate to the same or different parties).

(4C) Any duty of the other person under subsection (1) or (3) in relation to the notifiable proposal or notifiable arrangements is discharged if

(a) the person who complied with subsection (3) has notified the identity and address of the other person to HMRC or the other person holds the reference number allocated to the notifiable arrangements under section 311, and

(b) the other person holds the information provided to HMRC in compliance with subsection (3).

(5) Where a person is a promoter in relation to two or more notifiable proposals or sets of notifiable arrangements which are substantially the same (whether they relate to the same parties or different parties), he need not provide information under subsection (1) or (3) if he has already provided information under either of those subsections in relation to any of the other proposals or arrangements.

(6) The Treasury may by regulations provide for this section to apply with modifications in relation to proposals or arrangements that

(a) enable, or might be expected to enable, a person to obtain an advantage in relation to stamp duty land tax, and

(b) are of a description specified in the regulations.

…

310 Duty of parties to notifiable arrangements not involving promoter

Any person who enters into any transaction forming part of notifiable arrangements as respects which neither he nor any other person in the United Kingdom is liable to comply with section 308 (duties of promoter) or section 309 (duty of person dealing with promoter outside the United Kingdom) must at the prescribed time provide the Board with prescribed information relating to the notifiable arrangements.

…

310C Duty of promoters to provide updated information

(1) This section applies where

(a) information has been provided under section 308 about any notifiable arrangements, or proposed

notifiable arrangements, to which a reference number is allocated under section 311, and

(b) after the provision of the information, there is a change in relation to the arrangements of a kind mentioned in subsection (2).

(2) The changes referred to in subsection (1)(b) are

(a) a change in the name by which the notifiable arrangements, or proposed notifiable arrangements, are known;

(b) a change in the name or address of any person who is a promoter in relation to the notifiable arrangements or, in the case of proposed notifiable arrangements, the notifiable proposal.

(3) A person who is a promoter in relation to the notifiable arrangements or, in the case of proposed notifiable arrangements, the notifiable proposal must inform HMRC of the change mentioned in subsection (1)(b) within 30 days after it is made.

…

311 Arrangements to be given reference number

(1) Where a person complies or purports to comply with section 308(1) or (3), 309(1) or 310 in relation to any notifiable proposal or notifiable arrangements, the Board

(a) may within 90 days allocate a reference number to the notifiable arrangements or, in the case of a notifiable proposal, to the proposed notifiable arrangements, and

(b) if it does so, must notify that number to the person and (where the person is one who has complied or purported to comply with section 308(1) or (3)) to any other person

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

(ii) whose identity and address has been notified to HMRC by the person].

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

(3) In this Part 'reference number', in relation to any notifiable arrangements, means the reference number allocated under this section.

312 Duty of promoter to notify client of number]

(1) This section applies where a person who is a promoter in relation to notifiable arrangements is providing (or has provided) services to any person (the client) in connection with the notifiable arrangements.

(2) The promoter must, within 30 days after the relevant date, provide the client with prescribed information relating to any reference number (or, if more than one, any one reference number) that has been notified to the promoter (whether by HMRC or any other person) in relation to

(a) the notifiable arrangements, or

(b) any arrangements substantially the same as the notifiable arrangements (whether involving the same or different parties).

(3) In subsection (2) 'the relevant date' means the later of

(a) the date on which the promoter becomes aware of any transaction which forms part of the notifiable arrangements, and

(b) the date on which the reference number is notified to the promoter.

(4) But where the conditions in subsection (5) are met the duty imposed on the promoter under subsection (2) to provide the client with information in relation to notifiable arrangements is discharged.

(5) Those conditions are

(a) that the promoter is also a promoter in relation to a notifiable proposal and provides services to the client in connection with them both,

(b) the notifiable proposal and the notifiable arrangements are substantially the same, and

(c) the promoter has provided to the client, in a form and manner specified by HMRC, prescribed information relating to the reference number that has been notified to the promoter in relation to the proposed notifiable arrangements.

(6) HMRC may give notice that, in relation to notifiable arrangements specified in the notice, promoters are not under the duty under subsection (2) after the date specified in the notice.

…

313 Duty of parties to notifiable arrangements to notify Board of number, etc.

(1) Any person who is a party to any notifiable arrangements must provide the Board with prescribed information relating to —

(a) any reference number notified to him under section 311 by the Board or under section 312 by the promoter, and

(b) the time when he obtains or expects to obtain by virtue of the arrangements an advantage in relation to any relevant tax.

(2) For the purposes of subsection (1) a tax is a "relevant tax" in relation to any notifiable arrangements if it is prescribed in relation to arrangements of that description by regulations under section 306.

(3) Regulations under subsection (1) may—

(a) in prescribed cases, require the number and other information to be included in any return or account which the person is required by or under any enactment to deliver to the Board, and

(b) in prescribed cases, require the number and other information to be provided separately to the Board at the prescribed time or times.

314A Order to disclose

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

(a) a proposal is notifiable, or

(b) arrangements are notifiable.

(2) An application must specify

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

(b) the promoter.

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

…

318 Interpretation of Part 7

(1) In this Part

…

'arrangements' includes any scheme, transaction or series of transactions;

…

'notifiable arrangements' has the meaning given by section 306(1);

…"

TAX AVOIDANCE SCHEMES (PRESCRIBED DESCRIPTIONS OF ARRANGEMENTS) REGULATIONS
2006 (SI 2006/1543)

Regulation 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."

TAX AVOIDANCE SCHEMES (INFORMATION) REGULATIONS 2012 (SI 2012/1836)

Regulation 4 Prescribed information in respect of notifiable proposals and arrangements

"(1) The information which must be provided to HMRC by a promoter under section 308(1) or (3) (duties of promoter) in respect of a notifiable proposal or notifiable arrangements is sufficient information as might reasonably be expected to enable an officer of HMRC to comprehend the manner in which the proposal or arrangements are intended to operate, including

(a) the promoter's name and address;

(b) details of the provision of the [the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006] … by virtue of which the arrangements or the proposed arrangements are notifiable;

(c) a summary of the arrangements or proposed arrangements and the name (if any) by which they are known;

(d) information explaining each element of the arrangements or proposed arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained under those arrangements arises; and

(e) the statutory provisions, relating to any of the prescribed taxes, on which that tax advantage is based."

Regulation 5 Time for providing information under section 308, 308A, 309 or 310

"(1) The period or time (as the case may be) within which

(a) the prescribed information under section 308, 309 or 310, and

(b) the information or documents which will support or explain the prescribed information under section 308A (supplemental information),

must be provided to HMRC is found in accordance with the following paragraphs of this regulation.

(2) Where a proposal or arrangements (not being otherwise notifiable) is or are treated as notifiable by virtue of an order under section 306A(1) (doubt as to notifiability) the prescribed period is the period of 10 days beginning on the day after that on which the order is made.

…

(4) In any other case of a notification under section 308(1), the prescribed period is the period of 5 days beginning on the day after the relevant date.

(5) In any other case of a notification under section 308(3), the prescribed period is the period of 5 days beginning on the day after that on which the promoter first becomes aware of any transaction forming part of arrangements to which that subsection applies."

Regulation 6 Prescribed information under sections 312 and 312A

For the purposes of sections 312(2) and (5) (duty of promoter to notify client of number) and 312A(2) (duty of client to notify parties of number) the prescribed information is—

(a) the name and address of the promoter;

(b) the name, or a brief description of the notifiable arrangements or proposal;

(c) the reference number (or if more than one, any one reference number) allocated by HMRC under section 311 (arrangements to be given reference number) to the notifiable arrangements or proposed notifiable arrangements;

(d) the date that the reference number was—

(i) sent by the promoter to the client; or (as the case may be)

(ii) sent to any other person by the client under section 312A(2).