Neutral Citation Number: [2023] EWHC 1191 (Admin)

Case No: CO/699/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19th May 2023

Before :

MR JUSTICE CONSTABLE

- -

Between :

THE KING on the application of AIRLINE PLACEMENT LIMITED

Claimants

- and -

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Defendants

- -
- -

Nicola Shaw KC (instructed by Macfarlanes LLP) for the Claimants
Howard Watkinson and Ishaani Shrivastava (instructed by HMRC) for the Defendants

Hearing dates: 10-11 May 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 19th May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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Mr Justice Constable:

Introduction

1. This is an application by the Claimant ('APL') for judicial review to quash (1) the decision of the Defendants ('HMRC') dated 26 November 2021 ('the Decision') confirming their view previously expressed in a letter dated 26 January 2021 ('the Liability Letter') relating to the tax treatment of security bonds and that APL had no legitimate expectation in relation to a Non-Statutory Clearance ('NSC') by HMRC dated 17 July 2009 ('the Clearance Letter'), and (2) the consequential assessment to Value Added Tax ('VAT') that HMRC issued for VAT periods 03/17-12/20 ('the Assessment Period'), in the sum of £10,717,426.00 ('the Assessment').

2. The basis of the application is that the Decision and consequent Assessment are said to be in breach of APL's legitimate expectation that the VAT treatment set out in the Clearance Letter would apply for the duration of the Assessment Period and would not be withdrawn without fair notice and with retrospective effect. In response, HMRC contend that the request for NSC by APL ('the NSC Request') was materially inaccurate and misleading, and there was not full and frank disclosure such that no legitimate expectation arises. HMRC accepts that if the NSC Request was not materially inaccurate and misleading and there was full and frank disclosure, then a legitimate expectation will have arisen and that they would not be entitled to levy VAT retrospectively and would be required to allow a reasonable time for APL to re-organise its affairs.

3. APL advance an alternative position that even if no legitimate expectation arose, it was nevertheless unreasonable and/or an abuse of power to withdraw the Clearance Letter without fair notice and with retrospective effect in light of what it says was its long-standing treatment that HMRC has either agreed or implicitly accepted.

4. APL rely upon the witness evidence of Messrs Crawford, Steele, Whitehouse and Orpwood and HMRC relies upon the evidence of Mr McBride.

Factual Background

5. APL is a member of the CTC Aviation Group Plc ('CTC Group') which, in May 2015, was acquired by the L3Harris Technologies, Inc. corporate group ('L3'), a provider of global aerospace and defence technology services. The VAT treatment issue relates to a training programme for cadet pilots which became called the 'Wings Programme' ('the Programme'). The Programme was initially established in 2003 as a joint venture between CTC Aviation Training (UK) Limited ('CTC'), also a member of the CTC Group, and McAlpine Aviation Training ('McAlpine').

6. Prior to the introduction of the Programme, by a letter dated 6 August 2002, McAlpine sought NSC from HMRC's predecessor body, the Commissioners of Customs & Excise, in relation to the VAT treatment of fees for flying training. The letter stated

that a new company had been formed with the intention of offering airlines an alternative to the traditional method of sponsoring future pilots through their training and subsequently employing them as pilots. It stated that the most significant difference between the proposed scheme and what was described as the traditional sponsorship model was that finance was being offered from a bank, rather than the airlines being expected to directly fund the programme. Appended to the letter were two appendices setting out diagrams of the arrangements. The final bullet point of the description of the proposed scheme stated that:

> '*It is usual for airlines to tie in newly qualified pilots for a minimum period, so that the airlines can recoup the costs that they have incurred in training the pilots. Consequently, the new product also aims to place the entire financial risk of pilots prematurely leaving their contracts of employment with the employee. This should be achieved by the proposed loan arrangements as illustrated in the appendices.*'

7. Although the models were slightly different, the second (which Mr Toby Steele, former Finance Director of CTC Aviation Group plc at the relevant time, gives evidence at paragraph 3.2 of his statement was the only one put into effect) involved:

    (1) The receipt by the JV of supplies of subcontracted aviation training and aviation training from the parties to the JV;

    (2) The provision of 'training product' by the proposed JV to the 'Recruitment Company';

    (3) The grant of a loan to the trainee by a bank. The loan is made to the trainee and is a professional development loan with repayments not commencing until six months following completion of training;

    (4) The trainee granting a loan to the Recruitment Company;

    (5) A fee for providing the pool pilot (to the Recruitment Company) for completion of final stage training;

    (6) The Recruitment Company repaying the loan from the trainee in full;

    (7) The granting of the loan by the trainee to the airline, which becomes repayable over a period of time following the trainee's training. At the same time the trainee enters into a separate agreement that entitles the airline to compensation should the trainee fail to complete a minimum term of employment, and that this compensation should be equal to and set off against the outstanding loan repayments;

    (8) Repayment of the loan to the bank over a period of minimum employment. '*This may be by way of 'salary sacrifice*"; and

    (9) Repayment of the loan to the bank over a period of time.

8. On 15 August 2002, in response, the Commissioners of Customs & Excise indicated:

> '*Based on my understanding of the situation the joint venture will be receiving supplies from the two parties and providing onward supply of training to the airline industry within the United Kingdom*'

9. Between August 2002 and March 2009, HMRC conducted at least four audit visits of UK members of the CTC Group and no issues with the VAT treatment of arrangements were raised. By 2006, the internal memo of Pete Burrell of HMRC shows that, in terms of describing the scheme, the language of 'bond' was utilised. The note states amongst other things that HMRC's understanding was that '*No charge is made to the pilot for any of the training*' and:

   '*the bond is returned to the pilot upon completion of training. It is then passed on to the airline as 'security' for continued employment, and the airline repays is to the pilot over an agreed period of time*'.

10. Following CTC Group's acquisition of McAlpine's interest in the joint venture, a review of the Programme was carried out by Deloitte in November 2007. Deloitte were asked to comment on the VAT treatment of the Programme, and provide recommendations for any appropriate next steps. In its consideration of 'Background', the Deloitte report specifically noted:

   '*During their employment with the partner airline, the cadet may receive a reduced salary to take account of the fact that the partner airline has paid a placement fee to APL for the provision of the cadet. However, these arrangements are made between the sponsor airline and the cadet without APL being party to the agreement.'*

11. The Deloitte report identified that an area of likely challenge from HMRC included the following:

   '*The deposit of a bond by the cadet with APL is consideration for a supply of training made by APL[….]they may argue that the only supply is one made of training and that this is made to the cadet. This would have a two fold impact. Firstly, APL would have to account for VAT much earlier than it currently does, and secondly the pricing of the Wings programme will be affected from the perspective of the cadet as a result of the irrecoverable VAT it will suffer.*'

12. As explained by Mr Crawford, the VAT treatment under the security bond arrangement was essential to CTC because it impacted directly on pricing. CTC's competitors operated their training programmes in jurisdictions where VAT (or equivalent taxes) did not apply to training fees and so they could charge lower prices. For example, the closest like for like competitor that had an easyJet programme was FTE Jerez who operated out of Spain and, thus, did not apply VAT to training services.

13. In recommending that APL seek a Ruling from HMRC, Deloitte advised:

   '*For a ruling to be binding, HMRC must be in possession of the complete facts and context of the issues of uncertainty. Therefore the following information needs to be provided:*

   A clear explanation of the points that require HMRC's guidance;

   The reason for uncertainty;

A brief indication of alternative tax treatments that have been considered;

[…]

Copies of any other documents APL considers to be relevant [sic] to the issue in question

[…]

Details of any related transactions or contracts.'

14. Prior to provision to HMRC of its request for clearance, pursuant to the advice from Deloitte, a draft of the proposed request was circulated for comment by Deloitte to APL in February 2009. The track-changed draft contained the following sentences:

> '*During their employment with the sponsor airline, the cadet may receive a reduced salary to take account of the fact that the sponsor airline has paid a placement fee to APL for the provision of the cadet. However, these arrangements are made between the sponsor airline and the cadet without APL being party to the agreement.'*

The first of these two sentences is repeated in a later part of the same draft.

15. In the track-changed draft, these sentences are struck through, with a comment inserted by Toby Steele to Andrew Dalah of Deloitte. The comment states:

> '*Andrew – we would like to remove this paragraph as it might indicate that the Cadet is paying for the training they received from CTC by way of taking a reduced salary once employed and therefore in effect the Cadet is paying for their training.'*

16. By letter dated 4 March 2009, APL submitted its NSC Request for clearance. The NSC Request did <u>not</u> include the sentences referring explicitly to the fact that the cadet may receive a reduced salary with the sponsor airline, in accordance with Mr Steele's suggestion that these should be removed from the letter.

17. The NSC Request stated:

> '*During 2002, McAlpine Aviation Training ('MAT') and CTC Aviation Group plc were contemplating setting up a joint venture to run what is today known as the Wings Programme. In anticipation of the introduction of the Wings programme, in August 2002, MAT sought and obtained a ruling from HMRC on the VAT treatment of the Wings programme. Subsequent to receiving that ruling from HMRC, in May 2004 CAG bought MAT out of its share of the business and progressed with the Wings programme of its own accord.*
>
> *CTC requests clearance regarding the VAT treatment of :*
>
> *(1) The retention of security bonds deposited by cadets with APL on joining the Wings Programme; and*
>
> *(2) The amounts of security bonds forfeited by cadets as compensation to APL as a result of early termination.'*

18. The NSC Request then described how the CTC Group provided aviation training to airlines and aspiring pilots via various wholly owned subsidiary companies, including APL. The Programme was stated as being fully sponsored by APL, stating in terms that '*cadets do not pay for their training to become an airline pilot*'. The Programme was then described as follows:

> '[...]*when Cadets join the Wings Programme they must each deposit a security bond of £60,000 with APL. This bond acts as security during the training programme in the event that the Cadet does not complete the training or chooses not to be placed into employment with a sponsor airline. Following an initial instalment of £5,400, the balance of the security bond is deposited in equal instalments over a period of 13 months.*
>
> *Following completion of the training programme and upon employment of the Cadet by a sponsor airline, APL transfers the security bond, at the Cadet's direction, to the Cadet's sponsor airline. This is repaid to the Cadet over an agreed period of time by the sponsor airline and is intended to discourage the Cadet from seeking employment elsewhere, thus enabling the sponsor airline to benefit from their investment in having paid the placement fee. The airline then pays a placement fee of £60,000 plus UK VAT to APL for the provision of the fully trained Cadet.'*

19. Under the heading 'VAT Analysis – Security Bond', the NSC Request included the following statement:

> '*Under the Wings Programme, the deposit of a security bond by the Cadet with APL should not be treated as a supply for VAT purposes, on the basis that APL earns its fees from (and hence provides services to) the sponsor airline and not the Cadet. In facilitating its training, APL is sponsoring the Cadet.'*

20. The NSC Request thereafter points to supporting information, namely the Wings Agreement, the Programme website, and the Programme brochure. The Wings Agreement and the Wings Programme brochure were appended to the NSC Request.

21. The Programme brochure states:

> '*Sponsorship*
>
> *We operate an innovative financing solution designed to make the programme open to applications from all walks of life, ensuring that talented individuals don't fall through the net.*
>
> *We and your partner airline will sponsor your training and associated costs. You will, however, be required to deposit a training bond as security, but it's not payment for training. We initially hold the bond, which is then passed to the airline when you start work. The airline will then return the bond to you over a defined period, providing you remain employed with that airline[...].*
>
> *On employment, you will normally be paid a cadet entry salary. In addition, you will receive a monthly repayment of the training bond'*

22. The Programme website at the relevant time included the following:

> '*How much does the Foundation Course cost?*
>
> *This is the only part of the training that you are required to pay for. The current cost of the Foundation Course is [£7,000]*
>
> *[...]*
>
> *When do I start earning a salary? How much will that be?*
>
> [...]
>
> *Each airline has its own terms and conditions applicable to pilot employment. If you are pre-selected by an airline and enter the programme as a pre-selected cadet pilot, you will normally be paid a cadet entry salary for the first seven years of employment with month repayments of your bond to you for the same period. Obviously pay rates are up to the individual airline and set by market expectations and conditions. Basic starting salaries for newly qualified pilots in their first airline job are generally around £18,000 - £25,000[...] Each airline may have slightly different terms and conditions applying to pre-selected CTC Wings Cadet pilots and you should refer to their websites for full details.'*
>
> *[...]*
>
> *Who pays interest on my loan?*
>
> *If you borrow money to provide the bond, you are liable to repay the loan and interest, normally with repayments deferred until you are employed. As a cadet pilot, during employment the airline will repay your bond on a monthly basis to enable you to make repayments on your bank loan.*
>
> *[...]*
>
> *How much would it cost me to train to be airline pilot through a 'traditional' route?*
>
> *You would need to find £60,000 or more, just for basic training. If you took out a loan, arranged your own training, and were able to find employment which would allow you to repay your loan at £600 per month, it would take about 14 years to repay the loan. You would need to dedicate about £150,000 of your future salary before tax to pay for your basic training. That's assuming all goes well.. In this unique programme, your future employer will sponsor the majority of your training (excluding the Foundation Course). The package provided for you is comprehensive and covers the unexpected. The total value of the programme exceeds £100,000[...]*'

23. On 12 March 2009, following receipt of the NSC Request, Christine Bellamy of HMRC who was assigned to deal with the matter contacted Helen Fawthrop of 'Large and Complex' within HMRC seeking an opinion on any possible 'TA' (tax avoidance) issues. The initial view of Ms Bellamy was that '*I think in essence there is a supply to the trainee by the trader for a consideration from the trainee[.,,,,]I think maybe the*

implications of the airline repaying its employee are that there is no taxable supply and ultimatey the training is therefore being given VAT free?'

24. On 17 March 2009, Gillian Sells of HMRC responds to Ms Bellamy, also expressing initial disagreement with Deloitte's view on the basis that the bond is, in reality, a pre-payment for the training. She also noted:

> '*Deloittes refer to a previous ruling given to MAT. I cannot trace this ruling as MAT (811 8582 29) does not appear to have been VAT registered at the time the ruling was supposedly given. This VRN is now redundant.'*

25. On 18 March 2009, Ms Bellamy acknowledged the NSC Request, stating that the application would be submitted to the policy unit for consideration. No doubt in light of the point made by Ms Sells in her email, the letter then stated:

> '*[…] please would you supply the following additional information:*
>
> 1. *You refer to a ruling given to McAlpine Aviation Training in 2002 in respect of the Cadets training programme but I can find no record of this. It would be helpful to see a copy of any relevant correspondence and documentation.*
>
> ...'

26. On 15 April 2009, Officer Steve Smith of HMRC conducted a routine visit to APL. The visit had been booked on 23 February 2009 and was unrelated to the NSC Request. The scheduled booking of 30-31 March had been rescheduled.

27. The relevant parts of the notes made by Officer Smith on HMRC's electronic file state:

> '*Prior to visit informed that there was an on going query concerning the 'bonds' lodged with the company from the students. In brief the issue is that the company is maintaining the initial receipt of the £60,000 bond (received over a period of time) is a security deposit in case the student terminates the course prematurely or opts to not be employed in a sponsor airline. In both cases either the full amount or a portion of the bond is kept by APL as a form of compensation and thus argued as outside the scope of Vat.*
>
> *The company have been operating this system from inception of this company and prior to this company through Airline recruitment limited.*
>
> *[…]*
>
> *The issue of bonds is elaborated on further with emails and correspondence and I deliberately avoided to* [sic] *much in depth discussion on the subject [other] than to outline (see letter) that a variation has occurred recently when 6 pilots were given a temporary placement which necessitated the issuing of a sales invoice from APL[…]*
>
> *[…]*
>
> *Interesting to note on the bond scenario is that Monarch airlines offered placement cadets a choice of lower salary and refund of the bond or higher salary and no*

refund. Mr Steele maintained that all 9 cadets involved took up the first option. I commented that if the second had been chosen this may have a significant impact on the treatment of the bonds.'

28. On 5 May 2009, Deloitte responded to Ms Bellamy's acknowledgement and request for documentation and correspondence relating to the previous ruling by providing the Ruling itself. It did not supply the Ruling request (which contained the reference to salary sacrifice arrangements, as set out above).

29. Ms Bellamy submits a policy advice request on 11 June 2009, internally within HMRC.

30. In setting out the facts of the case, Ms Bellamy notes her understanding that, '*The airline repays the £60,000 to the pilot over a period of time as he/she continues in employment'*. As part of the section in which Ms Bellamy sets out 'HMRC Arguments Advanced So Far or Being Contemplated', she notes:

> '[…] *Definition of consideration and the indicators listed in 7.3 would seem to apply: without the payments from the trainee APL will not supply the training package and there is a contract in place.*
>
> *[…]*
>
> *Despite what is stated in the contract, we must consider what is actually happening (reference Reed Personnel STC 588). If the monies paid are funding the training as it progresses, then when any monies are retained by APL this is not as outside the scope compensation because a taxable supply has been made.*
>
> *[…]*
>
> *The costs are reimbursed to the pilot in the position of employee but over a period of time but conditions apply and there is the possibility that not all of the bond will be repaid. This would indicate that money will be retained to cover costs already incurred for training and therefore a supply has been made.*
>
> *Please also see audit report on EF dated 30/3/09.*'

31. 'Audit report on EF dated 30/3/09' is a reference to the notes from Officer Smith referred to above.

32. On 25 June 2009, a Mr Wright from the Transport sector of HMRC answers a further request for information or advice from Ms Bellamy, who had described the scheme in outline. The description included the fact that, '*during the course of employment, the pilot is gradually repaid the bond money*'. Mr Wright responded that the practice of training bonds is widespread within the industry: '*the essence is that the airline does not want to pay for the very expensive training of a pilot without some sort of financial tie to the airline. The bond system tries to ensure that they will get a return for their investment in the trainee pilot'*.

33. On 13 July 2009, Ms Best of the Supply of Services and Public Bodies Team provided her policy advice to Ms Bellamy. Much of the content of the document ultimately formed part of the Clearance Letter, which was subsequently issued on 17 July 2009. The advice noted various parts of the information within the Wings Agreement,

Programme brochure and website, including the statement that '*The airline will then return the bond to you over a defined period, providing you remain employed with that airline'*. When then considering the scheme, Ms Best wrote:

> '*It is made clear from the start in the Programme brochure that the payment made by cadets is not payment for training[…]*
>
> *…Another incentive for cadets is the prospect of getting the cost of training back which happens which all CTC cadets can expect if they go through the programme and accept placement.*
>
> *[...]*
>
> *APL will sponsor and procure training and provide placement and pass the bond paid by cadets to sponsor airlines to be repaid to the cadets through salary over an agreed period. APL, which essentially seems to act as an employment agency, makes its money by placing trained individuals with airlines for which it charges a fee of £60,000[…]Under this business model APL receives only one fee i.e. the placement fee paid by the airline; it has no entitlement to retain the bond paid by 'placed' cadets but is obliged by its agreement with a cadet to pass this to the airline which in turns pays it back to the cadet through salary. APL requires a bond because, one assumes, it's providing (or paying for) very expensive training and its means of recouping the cost of that and making a profit is by placing a cadet with an airline and charging the airline a fee for that placement.*
>
> *The bond, and in particular the prospect of being repaid it through salary seems to me to be the incentive for the cadet to stay with APL. A cadet could obtain training anywhere presumably but the advantage with APL is the probability of getting the cost of training back as well as a placement with an airline.'*

The conclusion then stated:

> *'This is not a straightforward case – frankly I have wavered between one view and another. However, on balance, I think the payment of the 'bond' by successful cadets is not consideration for any supply by APL to cadets.'*

34. The Clearance Letter which followed therefore confirmed that HMRC was in agreement with APL's proposed VAT treatment, in that the payment of the bond by successful cadets is not consideration for any supply by APL to the cadets, and that retention of the bond by APL upon early termination of the agreement between the parties is not consideration for any supply by APL to the cadets. The Clearance Letter explained the basis for this conclusion. It pointed out that the clearance was based upon the information provided, including the Programme brochure and the information on the CTC Wings website. HMRC pointed out that:

> '*We have been given no documentation concerning, or explanation of, APL's relationship with 'sponsor' airlines – this is relevant as we are told that APL passes the bonds over to these airlines, that APL is paid an amount equivalent to the bond*

> *by these airlines and because APL do not, as far as we see, guarantee to place a cadet with an airline.'*

35. The Clearance Letter set out HMRC's understanding of the facts. It quotes from the Programme brochure, including the sections set out above. The discussion which follows then includes in identical terms the passages quoted above from Ms Best's advice, save that the conclusion under the relevant section merely stated that '*the payment of the bond by successful cadets is not consideration for any supply by APL to the cadets'*.

36. Later that year, in a letter dated 20 November 2009, the CTC Group sought confirmation from HMRC that the VAT treatment confirmed by the Clearance Letter would also apply in the case of "FlexiCrew". HMRC responded by a letter dated 17 December 2009 and declined to provide such confirmation because the request for confirmation did not identify any area of uncertainty as to the appropriate VAT treatment. However, HMRC did reiterate that they accepted that the Security Bond was not consideration for a supply by APL to the Cadet and that:

> '*the [Security Bond] is transferred to the sponsor airline employing the newly-qualified pilot on completion of training and is then refunded by that airline to the pilot over the course of their employment. In effect the airline is covering the training costs*'

37. HMRC also confirmed the advice contained in the Clearance Letter in a letter dated 20 August 2015. This explained HMRC's understanding of the situation as including the following:

> '*Once the Cadet has completed the programme and is placed into employment with an airline which has entered into an agreement with APL (a Sponsor Airline) for the provision of trained pilots, the security bond is returned to the Cadet. The Cadet then passes this security bond to the Sponsor Airline they have been placed with and this is repaid to the Cadet in instalments via the Airline over a defined period of time.'*

38. By a letter dated 10 November 2016, HMRC notified the CTC Group that it was opening an enquiry into the VAT treatment of the Programme. As set out in a document produced by the Anti-Avoidance Board in 2020, it appears that this was prompted by the fact that in 2016 a competitor, who provides similar pilot training, tried to obtain a similar tax result using a slightly difference mechanism and submitted a clearance request which was rejected. When HMRC considered the competitor's arrangements, the rulings provided to APL were reviewed and doubts were expressed regarding the supply analysis applied to the bond structure. There was concern that the arrangements could be used in any business providing high value training for potential employees of a third party business.

39. At a meeting on 18 and 19 September 2018, HMRC indicated that the Clearance Letter had been issued without HMRC knowing the "full picture". This was repeated in HMRC's letter dated 14 January 2019, in which HMRC confirmed their initial view that when the Clearance Letter was issued they were not aware of the full facts and that there had been changes to the arrangements in the intervening period from 2009. The letter also stated that "*this does not mean that the [Clearance Letter was] wrong, rather*

that the clearance decision cannot be relied upon" and advising APL not to rely on the Clearance Letter "*from the current prescribed VAT accounting period onwards*".

40. In a letter dated 6 February 2019, APL explained the difficulty it would have in changing the VAT treatment with immediate effect and noted that HMRC had not yet indicated how they considered the transactions should be treated for VAT purposes.

41. In the Liability Letter, HMRC confirmed their view that the security bonds paid by cadets to APL constituted consideration for taxable supplies of training from APL to cadets and advised that the NSC provided by HMRC on 17 July 2009 would be withdrawn and assessments issued.

42. HMRC then issued the Assessment in respect of the periods 03/17-12/20.

Legitimate expectations: the Law

43. I have been greatly assisted by the agreed list of legal principles which set out the considerable common ground between the parties. There is no real dispute as to the applicable legal principles governing when a legitimate expectation may arise, and the circumstances in which, in the context of tax, it would nonetheless be fair to allow the HMRC to depart from it. For present purposes, it is sufficient to summarise the relevant principles as follows:

(1) A legitimate expectation arises in circumstances where:

(a) the claimant has an expectation of being treated in a particular way favourable to the claimant by the defendant public authority;

(b) the authority has caused the claimant to have that expectation by words or conduct;

(c) the claimant's expectation is legitimate; and

(d) it would be an unjust exercise of power for the authority to frustrate the claimant's expectation.

See R (on the application of GSTS Pathology LLP) and others v. HMRC [2013] STC 2017 ("***GSTS***") at [72]-[73].

(2) Whether HMRC have created an expectation is to be objectively assessed and does not depend upon their intention: see R v. Barking and Dagenham LBC ex parte Lloyd [2001] LGR 86 at [31]-[35] and R (oao Vacation Rentals (UK) Limited) v. HMRC [2019] STC 251 at [60]-[62].

(3) For a legitimate expectation to arise in relation to an HMRC non-statutory clearance:

(a) the communication from HMRC should be clear, unambiguous and devoid of relevant qualification: see R v. IRC ex parte MFK Underwriting Agents Limited [1990] 1 WLR 1545 at p.1569G.

(b) the taxpayer must show that he has put all his cards face up on the table by giving full details of the specific transaction on which a ruling is sought. The taxpayer is to treat HMRC with complete frankness and make full disclosure of all the material facts known to him. The situation calls for utmost faith on the part of the taxpayer: see MFK at p.1569E, p.1575B.

(c) full disclosure will not have been made where statements made in the clearance request are materially inaccurate or misleading. It does not follow that full disclosure has been made because sufficient information was disclosed to enable inference to be drawn therefrom. Where a piece of information essential to the deliberations required of HMRC by the taxpayer was not furnished to them there is no unfairness in revoking a clearance: see R v. IRC (ex parte Matrix Securities Limited) [1994] 1 WLR 334 at p.342B, p.352B, p.354B & H and p.356A & G.

(d) the requirement for full disclosure will be especially difficult to satisfy if there has been a purely oral exchange with a tax official. Full disclosure requires the taxpayer to disclose the perceived problem which the taxpayer wishes to have addressed: see Corkteck Ltd v HMRC [2009] STC 1681, at [30]-[31].

(4) Where a clear and unambiguous undertaking has been made in a Clearance Letter it must be shown that it would nonetheless be fair to allow HMRC to depart from it: see In the matter of an application by Geraldine Finucane for Judicial Review for Judicial Review (Northern Ireland) [2019] 3 All ER 191 at [62].

(5) In a tax context it is for the taxpayer to demonstrate a high degree of unfairness in order to override the public interest in HMRC collecting taxes in accordance with the law: see R (oao Aozora GMAC Investment Ltd) v. HMRC [2020] 1 All ER 803 at [52].

(6) Where the taxpayer has a legitimate expectation as to a particular tax treatment, they also have a legitimate expectation that it will not be withdrawn retrospectively and that any withdrawal will be managed fairly. Reasonable notice of any withdrawal should be given so as to allow the taxpayer time to make any necessary adjustments to its affairs: see R (on the application of Cameron v Ors) v HMRC [2012] STC 1691 at [71] and GSTS at [96]-[101].

(7) Where the taxpayer has a legitimate expectation from a Clearance Letter it is unfair for HMRC to depart from it retrospectively in circumstances where the Claimant has relied upon it in carrying on its business and has no mechanism for recovering the VAT now retrospectively demanded: see GSTS at [99] and in contrast to R (oao Dixons Retail plc) v. HMRC [2018] EWHC 2556 (Admin) at [67].

(8) It is unreasonable and/or an abuse of power for HMRC to depart from a long-standing treatment of a taxpayer that HMRC has either agreed or implicitly accepted: see R v. IRC ex parte Unilever [1996] STC 681 at p.690-692.

44. It is also relevant to consider the law relating to the underlying VAT Framework. There is no dispute between the parties as to the following principles:

(1) VAT is generally charged on supplies of services (ss.1 & 4 Value Added Tax Act 1994 ('VATA')). A supply for VAT purposes is anything done for a consideration (s.5(2) VATA).

(2) A supply is effected for consideration only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance. Consideration of economic realities is a fundamental criterion. The starting point is to consider the effect of the contractual documentation and assess that against the economic and commercial reality: see Adecco (UK) Limited and others v HMRC [2018] EWCA Civ 1794, [2019] 1 All ER 615 at [38].

(3) The VAT system, both European and domestic, is also subject to the principle of abuse of law: see Halifax plc v Customs and Excise Commissioners (Case C-255/02) [2006] Ch. 387, Revenue and Customs v Pendragon plc & Ors (Rev 1) [2015] UKSC 37, [2015] 1 WLR 2838 ('Pendragon') at [7]–[8]. An abusive practice can only exist where the transactions result in the accrual of a tax advantage the grant of which would be contrary to the purpose of the taxation provisions, and the essential aim of the transactions is to obtain a tax advantage. Identifying the "essential aim" depends on an objective analysis of the method used to achieve the commercial purpose. It is necessary to analyse each transaction by which it is achieved. Because the purpose of each step will generally be to contribute to the working of the whole scheme, the effect of the whole scheme has also to be considered: per Pendragon at [12], [13], [31].

45. To the extent necessary, I return to consider any nuances in relation to this agreed legal landscape in the relevant context below.

Full and Frank Disclosure

46. The principal issue in this is case is the factual question of whether there was full and frank disclosure within the NSC Request in 2009. If there was not, no legitimate expectation can arise, and subject to APL's alternative case, HMRC were entitled to issue the Decision and Assessments.

47. HMRC contend that they were not provided with information essential to their clearance decision and that, to the contrary, the NSC Request was materially inaccurate and misleading. The matters HMRC says APL did not disclose when it made the NSC Request are:

(1) That when the cadets transferred their bonds with APL to their employer airlines, their salaries may (i) be reduced by reference to the value of the 'security bond', or (ii) if the 'security bond' was forfeited, they may receive a higher salary;

(2) APL's perceived problem with what the fact of the cadet's salary being adjusted by reference to the 'security bond' might lead HMRC to conclude;

(3) The easyJet contract showing that the payment of reduced salaries was in fact an integral part of the scheme devised by those in the claimant's corporate group;

(4) That the salary arrangements vis-à-vis the 'security bond' repayment were different depending on the airline involved and that there were also different types of cadets; and

(5) The contents of the NSC request made in 2002 in relation to a previous iteration of the arrangement by McAlpine, which specifically referred to the potential use of a 'salary sacrifice' arrangement in relation to the repayment of the 'security bond'.

48. APL raise the following points to rebut HMRC's case:

(1) The NSC Request was not materially inaccurate or misleading;

(2) HMRC were perfectly well aware of the fact that Cadets' salaries might be reduced to reflect the repayment of Security Bonds, because:

(a) it could in any event be inferred from the Programme brochure that some sort of salary sacrifice arrangement was in place to reflect the fact that sponsor airlines were, in effect, paying for the cadet's training;

(b) HMRC had been informed in 2002 as part of the clearance of a predecessor scheme that repayment of the bond (then called a loan) could be made by way of salary sacrifice; and

(c) Officer Smith had been informed of the fact that some cadets had been offered a choice of lower salary and refund of the bond or higher salary and no refund at the visit to APL on 15 April 2009, and that Ms Bellamy was aware of the report (and brought it to the attention of Ms Best) as part of the NSC Request consideration;

(3) In any event, this was not something which HMRC in fact considered was relevant to the VAT analysis (and nor was it, in fact, relevant to the analysis). HMRC simply changed its mind about the VAT treatment in 2016, which it was entitled to do providing it was not applied retrospectively and revoked with reasonable notice so as not to produce unfairness;

(4) It was not necessary to provide the easyJet contract, as this did not add to what HMRC was already aware of; and

(5) The issues relating to different approaches by different airlines and/or cadet status were not material.

49. Whilst it is necessary for me to consider the relevance, or potential relevance, of the reduced salary arrangements for me to determine the materiality of that information in the context of determining whether full and frank disclosure had been provided and whether the NSC Request was materially misleading or inaccurate, neither side invite me to, and I agree it is not necessary or desirable for me to, determine what the true VAT treatment of the arrangement in law should be. That question is presently before the First-tier Tribunal (Tax Chamber) and is a matter to be determined by them in the first instance.

Was the NSC Request and its attachments materially inaccurate and/or misleading?

50. The starting point is there is no dispute that at the material time in 2009 and thereafter, at least one of the sponsor airlines, easyJet, was recruiting cadets on the basis that if they were to be in receipt of a bond 'repayment' over a period of years, their salary was reduced. As explained by Mr Crawford at paragraph 3.4 of his evidence, the partnership that was in place with easyJet was of particular importance to the business. EasyJet was CTC's largest customer and made up approximately 20-30% of its business.

51. The Court has been provided with a draft of the easyJet Loan Agreement, and easyJet Pilots Pay and Benefits schedule dated 1 October 2015. Although the numbers involved are different to those which would have been relevant before 2009 (for example, the 'bond' in 2015 is for £69,000, increased from £60,000 referred to in the 2009 material) it is likely that this is generally reflective of the scheme as it existed at the time. The precise figures, as Ms Shaw KC for APL points out, are not relevant in circumstances where it is accepted that APL were aware, at the date of the NSC Request that at least easyJet, their biggest customer, was operating a salary sacrifice scheme.

52. By way of illustration of the salary sacrifice scheme, the 2015 documents show that the Senior First Officer (75% Flexible Roster) would receive £44,952 as the Basic Salary '*without Loan Agreement*'. The Basic Salary '*with the Loan Agreement*' was £33,729. Equivalent deductions were made at other levels, as set out in the following schedules:

easyJet Pilots' Pay and Benefits
effective from 01 October 2015

Basic Salary by Roster without Loan Agreement

	Roster Pattern		
	Flexible Roster 75%	Flexible Roster 100%	Fixed Pattern
Senior First Officer	£44,952	£59,936	£59,936
First Officer	£36,618	£48,824	N/A
Second Officer	N/A	£41,320	N/A

Basic Salary for Pilots with the Loan Agreement

Whilst under the Loan Agreement pilots will be on the following salary rate for the first seven years. After seven years' service on a UK contract (from the date the agreement comes into effect) pilots will move to the appropriate standard salary scale.

£69k Scheme	Roster Pattern		
	Flexible Roster 75%	Flexible Roster 100%	Fixed Pattern
Senior First Officer	£33,729	£48,713	£48,713
First Officer	£25,395	£37,601	N/A
Second Officer	N/A	£30,097	N/A

53. As explained in the easyJet Loan Agreement:

'*3. [...] you agree that the Bond you entered into with CTC in the sum of £69,000 will be transferred to easyJet.*

4. Upon commencing employment with easyJet and as a condition of you commencing employment, you are required to lend easyJet £69,000 (the Loan). easyJet shall repay you the Loan at the rat of £11,223 per year for seven years (totalling repayments of £78,564, which includes an amount in respect of interest, that will be paid net i.e. after basic rate tax) providing you remain in employment with easyJet [...]'

54. Thus, it can be seen that the Basic Salary for someone starting employment with easyjet having been trained through APL and having 'loaned' the bond monies to APL, is reduced by the value of the bond (as at 2015, amounting to £69,000) together with an amount for interest. The Basic Salary for a person employed in precisely the same position with equivalent level of training and experience but who had not trained through APL, earned £11,223 more a year. The difference in salary over 7 years was exactly commensurate with the value of the bond, plus interest. This is what is referred to, both in the various documents before me and in this judgment, as 'salary reduction' or 'salary sacrifice' arrangements.

55. Thus, in relation (at least) to easyJet, APL, who have provided the training to the cadet, gets paid a placement fee of an amount equivalent to the bond, which is then paid (via the cadet) to the airline as a 'loan' from the cadet. But the airline effectively keeps the loan/bond amount (equivalent to the sum they paid APL), by reducing the pilot's salary commensurately when compared with a pilot of the same level and experience but who was trained elsewhere. It is abundantly clear, therefore, that in relation to easyJet, the cadet in fact pays for their own training through a salary sacrifice and no part of the bond is, in reality, repaid to it. This much was accepted, rightly, by Ms Shaw.

56. As Ms Shaw rightly also accepted, there was no express identification of the fact of the salary sacrifice arrangements within the NSC Request. Indeed, the fact of the salary sacrifice arrangement was, as set out above, contained in two places within the draft of the NSC Request, but this fact was deleted from the version as ultimately submitted to HMRC at the request of Mr Steele because he thought (correctly) that it might indicate that *'in effect the Cadet is paying for their training'*.

57. I come to the clear conclusion that the NSC Request and the documents accompanying it, read together, were inaccurate and misleading in light of the reality of the easyJet arrangement, which formed a major part of APL's business. The following statements give the clear and unambiguous impression to the reader of the material that the scheme was such that cadet ultimately has its bond repaid to it in full, in a real rather than illusory way, and that the cadet was not therefore the one who (in reality) paid for their own training:

(1) The statement within the body of the NSC Request that, '*[The bond] is repaid to the cadet over an agreed period of time by the sponsor airline*'.

(2) The statements within the Programme brochure that '*The airline will then return the bond to you over a defined period, providing you remain employed with that airline*' and, '*on employment, you will normally be paid a cadet entry salary. In addition you will receive a monthly repayment of the training bond.*'. The use of

the phrase '*in addition'* is designed to give the impression that the bond re-payment is on top of their salary. I reject as wholly implausible the suggestion by APL that any reasonable reader of this would read into the phrase '*cadet entry salary*' (whether in the brochure or on the website) the existence of a scheme whereby the amount of their starting salary was determined not by the level of their training, qualification and experience but by the fact of whether they had trained through the APL programme and had therefore to sacrifice part of their salary in order to pay for the training they had received.

(3) The statements within the website that the Foundation Course is *'the only part of the training that you are required to pay for*' and '*In this unique programme, your future employer will sponsor the majority of your training (excluding the Foundation Course)*'. Both these give the clear impression that the cadet's training costs are met by the 'sponsor', rather than the cadet. In reality, this was not the case. The 'sponsor' was not paying for the training: the cadet was paying for all their own training in circumstances where its bond was not meaningfully returned to it.

58. It is completely insufficient to counter the inaccurate and misleading impression given by the statements above that, as Ms Shaw points out, the website also says at one point '*Each airline may have slightly different terms and conditions applying to pre-selected CTC Wings Cadet pilots and you should refer to their websites for full details'*. This statement cannot sensibly be advanced as alerting the cadet (or HMRC, for that matter) to the fact that, in reality, their bond would not meaningfully be repaid.

59. It is in these circumstances entirely understandable that Mr Steele had formed the impression that the fact of the salary sacrifice arrangement, '*might indicate that the Cadet is paying for the training they received from CTC by way of taking a reduced salary once employed and therefore in effect the Cadet is payment for their training*.' This comment hits the nail on the head – although the word 'might' is something of an understatement. In his witness evidence before the Court Mr Steele plays down the comment, emphasising instead that (as part of the deleted text states) the subsequent arrangements between the cadet and the sponsor airline are nothing to do with APL. However:

(1) Mr Steele's comment in my judgment merely reflects the obvious reality that if the cadet's salary is reduced by a similar amount to the 'repayment' of the bond when compared to those who either forfeited the bond or are being recruited unencumbered by a bond, there is no real repayment of the bond to the cadet at all. In these circumstances, one obviously legitimate conclusion is that the cadet has paid for his or her own training through the vehicle of the bond coupled with the salary sacrifice arrangement;

(2) It is not an answer to assert merely that the arrangements between the airline and the cadet are either out of APL's control or none of its concern: APL effectively makes a positive representation in the NSC Request as to what in fact happens to the security bond after it is paid across to the airline. APL might have said, simply and accurately (for example) that '*The arrangement as to whether and if so how the bond is then repaid by the airline to the cadet is a matter for those parties*'. Even this might legitimately be criticised for failing to include positive disclosure about the known fact of salary sacrifice arrangements. In any event, APL chose to

make a positive statement which, in the context of the salary sacrifice arrangement, was plainly inaccurate; and

(3) Moreover APL cannot distance themselves from the importance of the salary sacrifice arrangement as part of the overall arrangement in circumstances when it was CTC itself that provided the predecessor scheme (which APL correctly asserts is materially similar to the 2009 Programme) and which, as set out in the 2003 easyJet contract, is stated as having been '*devised by CTC comprising all of the following elements':*

> '*The transfer of the bond to the airline on completion of pilot training*
>
> *The payment by the airline of a reduced salary scale*
>
> *The repayment by the airline of the bond to the pilot over a period of employment'*

60. Having found that the NSC Request and the supporting information, when considered within its four corners, was inaccurate and misleading, (and before turning to APL's case that nonetheless HMRC was aware of the fact of the salary sacrifice scheme), I consider APL's contention that even if it was misleading and inaccurate, it was not *materially* so.

61. Both counsel addressed me, initially without authority, as to what the test of materiality is in the context of this case. Ms Shaw contended that a matter was material if it '*would have had an effect on the decision that was reached'*. Mr Watkinson stated that the test was whether the matter '*could*' have had an effect on the decision, and drew a comparison with those public law cases concerning a failure to take account of a relevant consideration. Helpfully, on the second day of argument, Ms Shaw drew the Court's attention to the Court of Appeal's decision in Bolton Metropolitan Borough Council v Secretary of State for the Environment and Greater Manchester Waste Disposal Authority (1991) 61 P.& C.R. 343 at p.352-353, in which Glidewell LJ set out (amongst other things) the following statements of principle:

> '*2. The decision maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. Such a matter is relevant to his decision making process. By the verb 'might' I mean where there is a real possibility that he would reach a different conclusion if he did take that consideration into account.*
>
> *[…]*
>
> *6. If the judge concludes that the matter was 'fundamental to the decision' or that it is clear that there is a real possibility that the consideration of the matter would have made a difference to the decision, he is thus enabled to hold that the decision was not validly made.*'

62. Drawing on these statements of principle by analogy, it was submitted by Ms Shaw, and accepted and averred by Mr Watkinson, that I should consider that a matter is

'material' if '*there is a real possibility that the consideration of the matter would have made a difference to the decision*'.

63. Ms Shaw additionally submitted that, when considering this question, I should have regard to the fact that in Bolton, the upshot of the Court's determination was that the matter could be remitted to the decision maker, but in the present case the determination of materiality may have the much more serious consequence that HMRC would be permitted to resile from their ruling, with significant financial consequences for APL. Whilst accepting that the standard of proof required to establish whether there was a real possibility that the consideration of the matter would have made a difference to the decision was the balance of probabilities, Ms Shaw submitted that – given the serious outcome – the Court has to be '*confident*' that '*there has to be really good evidence to discharge that or to make out that there is a real possibility*' (i.e. a high degree of certainty on balance of probabilities).

64. Mr Watkinson, in reply on this point, correctly identified that the basis of Ms Shaw's submission was the dicta of Lord Hoffman in Secretary of State For the Home Department v Rehman [2001] UKHL 47 at paragraph [55] where Lord Hoffman stated:

> '*But, as Lord Nicholls of Birkenhead explained in In re H (Sexual Abuse: Standard of Proof) (Minors) [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. In this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.*'

65. Mr Watkinson, however, pointed out that things moved on from 2001. In Re B [2008] UKHL 35, Lord Hoffman stated at [13]:

> '*I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.*'

66. Baroness Hale also stated:

> '*64. My Lords, Lord Lloyd's prediction proved only too correct. Lord Nicholls' nuanced explanation left room for the nostrum, "the more serious the allegation, the more cogent the evidence needed to prove it", to take hold and be repeated time and time again in fact-finding hearings in care proceedings (see, for example, the argument of counsel for the local authority in Re U (A Child) (Department for Education and Skills intervening) [2004] EWCA Civ 567, [2005] Fam 134, at p 137. It is time for us to loosen its grip and give it its quietus.*
>
> *[…]*
>
> *70. My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare*

> *considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.*
>
> *71. As to the seriousness of the consequences, they are serious either way. A child may find her relationship with her family seriously disrupted; or she may find herself still at risk of suffering serious harm. A parent may find his relationship with his child seriously disrupted; or he may find himself still at liberty to maltreat this or other children in the future.*
>
> *72. As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.'*

67. This was confirmed by the Supreme Court in In Re SB [2009] UKSC 17 (see paragraph [10]).

68. Therefore, in order to determine whether the inaccuracy in the NSC Request was 'material', the Court must consider on the ordinary standard of balance of probabilities, had the NSC Request not been inaccurate, whether there is a real possibility that consideration of the matter as corrected would have made a difference to the decision.

69. I have no hesitation on the evidence before me in concluding that the inaccurate and misleading nature of the NSC Request was material.

70. First, as a matter of law and drawn from the principles set out above, in considering the VAT treatment of a particular arrangement:

    (1) consideration of economic realities is a fundamental criterion (Adecco); and

    (2) in considering the question of abuse, the effect of the whole scheme has to be considered (Pendragon).

71. In this context, the question of whether the cadet actually ended up paying for their own training would plainly be a relevant factor within the overall consideration of the arrangement. It is notable that the Programme brochure almost goes out of its way to state that the security deposit is *not* payment for training. In circumstances where the

bond is ultimately returned to the cadet, this, at least superficially, appears to be a justifiable statement which does not of itself merit further scrutiny. By contrast, in circumstances where it is known that ultimately the bond money is never meaningfully returned to the cadet such that the cadet has in fact paid for their own training, the reality of this statement is much more readily open to question, and frank disclosure should plainly have put HMRC on notice of the fact.

72. Second, it is clear to me on the evidence that, contrary to Ms Shaw's submissions, HMRC did consider as a matter of fact that (save in certain defined situations) the bond monies would be meaningfully repaid to the cadet by the sponsor airline, and importantly this factor was expressly relevant to and featured in its conclusions in coming to the 2009 ruling:

(1) in setting out the facts of the case in the policy advice request on 11 June 2009, and in the internal email seeking advice from Mr Wright, Ms Bellamy included both times that her understanding was that during the course of employment, the pilot is gradually repaid the bond money;

(2) Mr Wright understood that the bond arrangement replicated others in which '*the airline does not want to pay for the very expensive training of a pilot without some sort of financial tie to the airline*'. This was a clear misunderstanding: in the easyJet arrangement, the airline did not want to pay for the very expensive training *at all*;

(3) Ms Best expressly noted in her policy advice, which led to the 2009 ruling, those parts of the Programme brochure stating, '*The airline will then return the bond to you over a defined period, providing you remain employed with that airline.';"*

(4) Ms Best plainly considered that the feature in which the bond was repaid to the cadet was an important part of the overall arrangement, not least in the last paragraph of her advice before her conclusion:

> *'The bond, and in particular the prospect of being repaid it through salary seems to me to be the incentive for the cadet to stay with APL. A cadet could obtain training anywhere presumably but the advantage with APL is the probability of getting the cost of training back as well as a placement with an airline.'*

In this regard, I reject the submission of Ms Shaw that the reference within Ms Best's advice and the Clearance Letter that the phrase, '*to be repaid to the cadets through* salary over an agreed period' (emphasis added) was recognition by the HMRC of the existence of a salary sacrifice arrangement. This cannot be possibly correct where Ms Best also uses the phrase 'through salary' in the short paragraph quoted above whilst, in the same breath, goes on to confirm her understanding that there exists '*the probability of getting the cost of training back....*'. The effect of the salary sacrifice arrangement is that the cadet does not get the cost of training back. Moreover, use of the phrase '*repaid to the cadet*' is wholly inconsistent with the reality that nothing is meaningfully repaid to the cadet. Use of the phrase '*through salary*', simply means something along the lines of '*through payroll*' or '*as part of your salary*'. I therefore do not accept that the inaccurate impression given by the NSC Request and attached documentation that the bond money is

repaid from the airline to the cadet as part of the arrangement is capable of being upturned to mean precisely the opposite (i.e. the bond money is ultimately paid from the cadet to the airline by a salary sacrifice) simply by use of the phrase '*through salary*', and HMRC plainly did not read it in the way Ms Shaw submits at the time; and

(5) that HMRC's misunderstanding was material is also evidenced in communications which followed the 2009 Ruling, as well. For example, in her letter of 17 December 2009, Ms Bellamy stated:

> '*On consideration of the earlier clearance, HMRC accepted that the security bond paid to APL by the trainee pilot is not a consideration for supply by APL. A major factor in reaching this decision is that the bond is transferred to the sponsor airline employing the newly qualified pilot on completing of training and is then refunded by that airline to the pilot over the course of the employment. In effect, the airline is covering the training costs.*'

I reject Ms Shaw's suggestion in argument that what Ms Bellamy is conveying in this paragraph is the importance of the fact that the bond is not retained by APL. She is doing no such thing: instead she is plainly saying that a '*major factor*' in the decision to give the ruling in APL's favour was HMRC's understanding that the bond was refunded to the pilot over the course of their employment, such that '*in effect, the airline is covering the training costs*.' The reality is precisely the opposite. HMRC's inaccurate impression, generated by the NSC Request and attachments, was stated to be (long before the present dispute arose) a '*major factor*' in granting the ruling.

73. Third, HMRC did in fact rely, in part, upon the fact that in reality the cadet was paying for its own training as part of its reasoning within the Liability Letter in 2021. Just because this formed part of the 'first alternative' argument (dealing with economic reality) rather than the primary position does not detract from this fact.

74. Finally, Ms Shaw was keen, and correct, to emphasise in the context of a different aspect of her argument that the 2009 ruling was considered by HMRC to be finely balanced. This is plain from the concluding remarks of Ms Best which lead to clearance being given that, '[t]*his is not a straightforward case – frankly I have wavered between one view and another.*' It is particularly in the context of a finely balanced decision that it may safely be concluded, on balance of probabilities and in light of the matters set out above, that the reversal of a single, but legitimately relevant, fact going to the question of the economic reality of the arrangement as a whole has a real possibility of making a difference to the decision.

75. As to the matters which Ms Shaw relied upon to argue that any inaccuracy within the NSC Request and attachments was immaterial:

(1) it is right that in the 2002 ruling the fact that salary sacrifice would play a part in the overall arrangement was identified as part of the Ruling Request, and the ruling accepted that the '*joint venture will be receiving supplies from the two parties and providing an onward supply of training to the airline industry within the United Kingdom*'. However, the outcome of the 2002 request (particularly in circumstances where there is no documentation that sheds light on the reasoning)

cannot assist when considering whether the fact of salary sacrifice may have been material to those considering the 2009 ruling request. On the basis of the evidence above, the misunderstanding was not just material in 2009 but 'a major factor';

(2) Ms Shaw argues that the fact *was* disclosed to Officer Smith and asserts that Officer Smith did not regard it as material. However, Officer Smith plainly was not called upon to put his mind in any focussed fashion to the question of the bond arrangement, which was simply not a question which was before him. What Officer Smith did or did not think is not relevant (and certainly not determinative of) whether the inaccurate and misleading description of the bond arrangement was 'material' to those whose job it was in fact to consider the bond arrangement;

(3) It is said that Officers Bellamy and Best had regard to the report of Officer Smith when considering the 2009 ruling, in reliance on the evidence of Mr McBride. At paragraph 43 he states:

> '*The report shows that Christine Bellamy and Anne Best did look at Officer Smith's audit report, although I cannot say whether they considered the whole report or simply looked at the front page,'*

Even assuming they looked at the full report, it is plain (as I have found as a fact) that on the basis of all the information before them, Ms Bellamy and Ms Best plainly believed that, in accordance with the misleading impression generated by the NSC Request and the documents it attached, the arrangement involved the cadet having their bond meaningfully returned to them, and that as a result the cadet did not generally therefore pay for their own training. I will consider the Smith report further below in the context of full and frank disclosure, but in the context of the present question of materiality, reference to the Smith report does not advance APL's argument; and

(4) Finally, reliance is placed on the fact that the salary sacrifice point only played a 'minor' part of the alternative decisions on economic reality and abuse in the Liability Letter of January 2021. This point has been considered already: the fact that the salary sacrifice issue formed some material part of the later HMRC decision on the basis of the first alternative position relating to economic reality is a proper basis to conclude, not least in conjunction with the other relevant matters I have identified, that there is a real possibility that had the NSC Request and attachments not given an inaccurate and misleading impression of the bond arrangement in relation to cadet repayment, it would have made a difference to the decision.

76. I therefore conclude that the NSC Request and the materials attached to it was materially inaccurate and misleading: it gave the reasonable reader the clear impression that (save in certain defined and identified circumstances) cadets would ultimately have the bond monies that they had paid to APL meaningfully repaid to them through the sponsor airline such that they were not paying for their own training. As APL well knew, given that CTC had originally devised the scheme, this was simply not correct in relation to the easyJet arrangement (its largest client).

Was there full and frank disclosure?

77. It is contended for by Mr Watkinson that a finding that the NSC Request was materially inaccurate and misleading is sufficient for me to conclude that there was not full and frank disclosure, and therefore no legitimate expectation has arisen. There is considerable force in this submission. As stated by Judge J in MFK, '*In those cases where the taxpayer has approached the revenue for guidance the court will be unlikely to grant judicial review unless it is satisfied that the taxpayer has treated the revenue with complete frankness about his proposals.*' I consider that it will generally not be possible for a party who has submitted a materially inaccurate or misleading request for a ruling to point to other material not specifically referred to within the request in order to show that, notwithstanding the materially inaccurate and misleading nature of the request, it has '*treated the revenue with complete frankness*'. To find otherwise would place an unfair burden on those considering the request: HMRC should generally be entitled to proceed on the basis that (taking Bingham LJ's phraseology from MFK) the taxpayer placed all his cards face upwards on the table within the four corners of the request and the materials attached. If other material is relied upon, it should be specifically appended to or identified within the Request.

78. Nevertheless, it is right that I should, notwithstanding Mr Watkinson's submission, go on to consider whether, as contended for by APL, the fact of the disclosure within the ruling request in 2002, and/or the audit report of Officer Smith, mean that I should conclude that in all the circumstances APL did in fact treat HMRC with complete frankness because it had disclosed (through means other than the NSC Request) the fact of the salary sacrifice arrangement.

79. In relation to the 2002 material, it is correct that the documented easyJet/CTC arrangement provided to HMRC provided as part of the 2002 ruling request refers to the existence of a salary sacrifice element within the overall 'scheme devised by CTC' or by 'CTCMcAlpine'. It might be considered that this, of itself, somewhat undermines APL's submission before me that the salary sacrifice arrangement was immaterial to proper consideration of the overall arrangement for provision of training: by contrast it was an explicit aspect of the predecessor scheme devised by CTC.

80. Putting that aside, however, APL relies on the following part of Bingham LJ's judgment in MFK:

> '*This means that he must give full details of the specific transaction on which he seeks the revenue's ruling unless it is the same as an earlier transaction on which a ruling has already been given*'

81. APL suggests that, therefore, because APL made reference to the 2002 ruling in its 2009 NSC Request, all the details submitted for the earlier ruling may be effectively taken as having been imported into the 2009 NSC Request. This argument is unsustainable:

(1) There will be situations (as rightly identified by Ms Shaw in argument) where the specific transaction in respect of which a ruling is sought is identical to a previously ruled upon transaction but, for example because of a change of relevant company, a further ruling is required. In these circumstances, as Bingham LJ makes clear, a party need only identify the previous ruling, identify any material difference, and request the new ruling. It will not have to rehearse all the details again;

(2) This is entirely different from the scenario where, as here, whilst reference is made to a previous ruling, APL and its advisors considered it necessary to set out in detail what it considered to be all the relevant aspects of the new scheme (even if materially similar to an earlier one) for the purposes of seeking the new ruling. In these circumstances, HMRC is reasonably entitled to assume that in setting out all the details of the new arrangement, the taxpayer has done this fully and accurately; and

(3) Even if this were not generally the position, in the present case, APL's submission is particularly unattractive in circumstances where, upon receipt of the NSC Request, HMRC specifically told APL that it could find no record of the 2002 ruling and requested APL to provide '*a copy of any relevant correspondence and documentation*'. The 2002 ruling request now relied upon by APL is plainly '*relevant […] documentation*' and should have been provided in response to this request. APL provided the 2002 ruling itself but, although it was in possession of the ruling request (it was disclosed in the course of this dispute), APL did not provide it. It is not necessary for me to determine whether, consistent with the comment in the draft NSC request relating to the removal of any reference to salary sacrifice, this was a conscious decision or merely an oversight. However, in my view it does not lie well for APL now to place reliance upon the contents of a document that it was asked to provide, and did not. I also reject the contention advanced by Ms Shaw that HMRC has a burden to prove that it did not have a copy of the ruling request, but even if it does I am satisfied on the basis of the internal contemporaneous communication dated 17 March and quoted at paragraph 23 above that HMRC took reasonable efforts to locate the 2002 documents at the time but they could not be found for the reasons stated at the time.

82. As to the audit note from Officer Smith, this note does not assist APL's case either, for the following reasons:

(1) It is, at best, double edged for APL. Even in the context of limited discussion which took place on 15 April 2009, it is plain that APL were not being completely frank with Officer Smith. The salary sacrifice scheme was not limited to 9 cadets from Monarch: it was an integral part of how the scheme was initially devised by CTC for easyJet, APL's biggest customer. This fact was not, but should have been, disclosed;

(2) The note also demonstrates that the fact of some link between salary levels and bond forfeiture could have a '*significant impact*' on the treatment of the bond arrangement by HMRC. Bond forfeiture was an option under the easyJet arrangement, even if not generally taken up, and yet (even after the conversation with Officer Smith), APL did not then bring this to HMRC's attention;

(3) Whilst I confess I do not necessarily understand the distinction Officer Smith draws between what appear to me to be two sides of the same coin, the exchange can in no way be said to constitute the correction of a material inaccuracy on the face of the NSC Request or somehow the fulfilment of APL's duty of complete frankness with regard to the existence of salary sacrifice arrangements; and

(4) Furthermore, it was not, in any event, for HMRC to 'piece together' the correct picture from different sources of information provided at different times and in

different contexts: Officer Smith's visit and oral discussion was part of a general audit and not specific to the bond investigation. HMRC would have been entitled to assume that if anything material had been said, it would be said expressly and in the NSC Request. Whilst as I have identified above, the evidence is that Officers Bellamy and Best were aware of and opened the audit report, the evidence is also clear that – even having done so – they relied wholly or principally upon the description of the scheme as set out within the NSC Request and the attached documents, and this approach was entirely reasonable. It is clear that they were, as a result, under the misapprehension that cadets were meaningfully repaid.

83. I therefore reject APL's contention that, by reference to either the 2002 ruling request or Officer Smith's audit report, APL satisfied its obligation to give full and frank disclosure when seeking HMRC's ruling in 2009. On the contrary, I conclude that the conscious decision not to refer to the existence of salary sacrifice arrangements in place with APL's main sponsor airline was a failure to fulfil APL's duty of complete frankness. Moreover, this led to the NSC Request being materially inaccurate when stating positively that the security bonds were repaid by the airlines when this did not, or did not meaningfully, happen where the salary sacrifice arrangements were in place.

84. Although it is not necessary for me to do so in light of this conclusion, I briefly set out my conclusions in relation to the other aspects of HMRC's case that there was not full and frank disclosure:

(1) I conclude that APL should not only have disclosed the fact of salary sacrifice arrangements, but also the fact that this was an integral part of the scheme as it was initially devised by CTC and 'sold' to easyJet. Whether they did this in narrative form or by providing the easyJet contract which makes this clear is immaterial.

(2) Implicit in providing full details of the salary sacrifice arrangements with sponsor airlines would have been the disclosure of the fact that different arrangements existed with different sponsor airlines, which I accept would also have been material to HMRCs consideration of VAT treatment of the arrangement: for example, it might conclude that different VAT treatment is appropriate depending upon what ultimately happens to the bond monies.

(3) I do not accept that the distinction between 'whitetails' and 'tagged' cadets would have been material and not bringing this distinction to HMRC's attention was probably not a failure on APL's part.

(4) Failure to provide the 2002 ruling request is not a valid ground of complaint in its own right, and does not materially add to my conclusion relating to the failure to have disclosed the salary sacrifice arrangements. If APL wanted to rely upon the contents of that ruling request, however, they should have identified this specifically and ensured HMRC had it.

(5) There will be some circumstances where a failure to identify the particular problem a taxpayer perceives may exist will be regarded as a failure to have been completely frank with the HMRC (as indeed was the case in R (on the application of Corkteck Ltd) v Revenue and Customs Commissioners [2009] EWHC 785 per Sales J as he then was at [30(b)]). In the present case, APL should have, as I have found, fully

and frankly described the nature and extent of the salary sacrifice arrangements, their integral role in the easyJet contract, and APL should have corrected the misleading impression clearly given by the materials that the cadets' bond monies would be repaid by (all) the sponsor airlines. Doing this clearly identifies the facts which give rise to the perceived problem. As Deloitte correctly advised, some description of the '*the reason for uncertainty'* should be included within a fully frank request. In this case, Deloitte flagged that the area of uncertainty was whether the deposit of a security bond by the Cadet with APL should, or should not, not be treated as a supply for VAT purposes. The identification of the issue was sufficient. What was problematic was the inaccurate and misleading representation of the overall arrangement, rather than in failing to alert HMRC to the perceived problem with more specificity.

85. Therefore, I conclude that in light of the fact that the ruling request was materially inaccurate and misleading, that there had not been full and frank disclosure, and therefore that APL had no legitimate expectation that the ruling would not be revoked by HMRC.

APL's Alternative Case

86. APL allege that even in circumstances where I find that no legitimate expectation exists, I should still find that it was an unjust exercise of HMRC's power to resile from the Clearance Letter retrospectively on the grounds that:

(1) APL operated the Programme and accounted for VAT on the basis that the bonds were not consideration for taxable supplies of training for a period of approximately 17 years;

(2) By making the NSC Request, APL sought reliable confirmation as to the VAT treatment of the bonds and in fact relied upon it;

(3) At no point did HMRC indicate that they require more information in order to provide the confirmation, and prior to the meeting in September 2018 there was no reason to doubt the correctness of the Clearance Letter;

(4) The long-standing treatment of the bonds in accordance with the Clearance Letter can be compared with the practice at issue in R v IRC ex parte Unilever [1996] STC 681.

87. Unilever does not give APL any basis to contend that HMRC's resiling from the Clearance Letter retrospectively is abusive in circumstances where no legitimate expectation arises precisely because, in seeking the ruling which HMRC has resiled from, APL did not give full and frank disclosure. Unilever, which Ms Shaw accepts was an exceptional case and which Sir Thomas Bingham MR described as '*unique*' is readily distinguishable. It involved a clear, consistent and consensual procedure which worked harmoniously between Unilever and HMRC for many years, which both parties viewed as very satisfactory and which operated to the mutual benefit of both Unilever and the taxpayer. The Court considered that the Revenue's decision revoking the procedure fell into the category of one so outrageously unfair that it should not be allowed to stand. This is plainly not the case in circumstances where, whilst the practice of VAT treatment was longstanding, that treatment had been since 2009

predicated on a specific ruling which had been given pursuant to a materially inaccurate and misleading request, and in respect of which APL had not placed all its cards face up on the table. Indeed, as I have pointed out above, in the communications which followed the ruling and in which HMRC explained the basis of its decision, it should have become more than clear to APL that HMRC was labouring under the misapprehension that the effect of the arrangement was that the airlines were paying for the training when, at least in relation to its biggest customer, this was plainly wrong. APL did not seek to correct the obvious misapprehension at any time. MFK is clear that in the absence of a legitimate expectation, HMRC is entitled to resile from its ruling. In circumstances where the ruling was obtained by omitting material facts and giving a materially inaccurate impression of the overall arrangement, the Decision is in no way unfair or otherwise an abuse of power.

88. In the circumstances, APL's alternative case fails.

Conclusion

89. APL's application to quash the Decision and/or the consequential Assessments is dismissed.