



[2021] UKFTT 0293 (TC)

TC08235

DOTAS regime – application under section 314A whether notifiable – yes – whether arrangements - yes- whether premium fee – yes –whether standardised tax product- yes- whether a loss scheme – yes

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/04268

BETWEEN

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Applicants

-and-

REDBOX TAX ASSOCIATES LLP

Respondent

**TRIBUNAL: JUDGE IAN HYDE
JULIAN STAFFORD**

The hearing took place on 2 and 3 December 2020. With the consent of the parties, the hearing was held by way of video hearing on the Tribunal Tribunal video platform. A face to face hearing was not held because of the COVID 19 pandemic and because the matters at issue were considered appropriate to be dealt with by way of a video hearing.

The documents to which we were referred are to bundles of documents, relevant legislation, authorities, witness statements together with applications by the parties and further submissions made by the parties following the hearing. In total the bundles amounted to 1,198 pages.

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

Christopher Stone, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Applicant

Keith Gordon, counsel, instructed by RPC for the Respondent

DECISION

INTRODUCTION

1. This appeal concerns whether certain financial structures involving paired forward contracts to purchase and sell certain securities promoted by the Respondent are notifiable under the Disclosure of Tax Avoidance Scheme legislation in Part 7 of Finance Act 2004 (known as “DOTAS”) or should be treated as so notifiable.

THE APPLICATION

2. HMRC made an application to this Tribunal for an order under section 314A that the structures described as Volatility and set out in more detail in this decision are notifiable under DOTAS. In the alternative HMRC seek an order under section 306A that Volatility should be treated as notifiable.

3. As we are concerned with the setting up and participation in Volatility, rather than the actual tax effect of the structure, we have where relevant for simplicity of expression described the intended tax effect without reference to whether it was effective or not. References in this decision to obtaining tax losses or other tax results should be interpreted on that basis.

4. We will use the term “structure” in this decision to refer neutrally to any scheme or arrangement which may or may not be notifiable under DOTAS.

5. All references to legislation in this decision are to Finance Act 2004 (“FA 2004”) and to regulations are to the Tax Avoidance (Prescribed Descriptions of Arrangements) Regulations 2006 unless stated otherwise (“the Regulations”).

6. Relevant legislation and regulations are set out in the Appendix to this decision.

PADFIELD

7. In a separate appeal, *Simon Padfield and others v HMRC* [2020] UKFTT 513, the Tribunal considered the tax treatment of the participation by four lead taxpayers in Volatility. This appeal was heard on 24, 25, 26 and 27 November 2020 before Judge Beare in this Tribunal and the decision in that appeal, dismissing the taxpayer’s appeals was released on 23 December 2020, after the hearing in this appeal.

8. Following the release of the decision in *Padfield* we directed the parties to make submissions as to the relevance of *Padfield* to this appeal.

9. HMRC submitted that *Padfield* was relevant. Judge Beare’s conclusion at [276] – [277] that “the only main purpose of the arrangements” was “securing the allowable loss” was clearly relevant to this Tribunal in considering the main purpose and main benefit of the arrangements. Further, Judge Beare would be regarded as a “reasonable observer” who has made a study of the arrangements.

10. The Respondent argued that the *Padfield* appeal was brought by different taxpayers in respect of entirely different issues, namely the substantive tax effects of Volatility not whether it amounts to “arrangements” that fall to be disclosed under DOTAS. The statutory regimes and relevant tests are entirely different. In any event the decision in *Padfield* is not binding on this Tribunal.

11. In our view notwithstanding the relevant facts in this appeal and *Padfield* are presumably identical, save for the choice of test appellants in *Padfield* and sample participants in this appeal, this decision concerns separate issues arising under the DOTAS regime and different evidence as to the facts was put before the two Tribunals. It is tempting to adopt Judge Beare’s findings, reached as they were after a four day hearing and in a clear and thorough decision, but the evidence was in many respects different and has not been the subject of detailed

submissions by the parties in the context of the different issues we need to consider in this appeal. In this decision we have therefore noted aspects of the decision in *Padfield* where we consider it relevant but have otherwise come to our own conclusions.

THE FACTS

12. We heard witness evidence from Mr David Hole and Mr Paul Grainger.

13. Mr Hole is an officer in HMRC's Counter-Avoidance Directorate and a specialist investigator in HMRC's DOTAS enforcement team. Prior to May 2015 a Mr Alan Bell was the lead investigator but he retired. Mr Hole was then the lead investigator into Volatility from May 2015 to October 2016 but did not engage with the Respondents during this period. In October 2016 Mr Hole's colleague, a Mr Wood, took over as lead investigator but consulted Mr Hole from time to time. At the time of preparing witness evidence for this appeal Mr Wood was about to retire and so would have been unable to give evidence at the hearing. Accordingly Mr Hole reacquainted himself with the matter and gave evidence based on his historic knowledge and from the documents on the official files. Subject to that limitation, we accept Mr Hole's evidence.

14. Mr Grainger had no prior connection either with the Respondent or the structures which are the subject of this appeal. Mr Grainger has 30 years experience in providing financial advice and gave evidence as to the use of forward purchase contracts in finance and treasury functions generally. Mr Grainger was an honest witness seeking to assist the Tribunal, and, whilst he had not been tendered by the Respondent as an expert, gave evidence about in the market generally. However, it was difficult to see why it was relevant to the issues in this appeal. He was not aware of the facts of Volatility nor the terms of the relevant contracts and so was unable to give evidence as to issues of fact. Indeed, on the one point which might have been relevant, the evidence he appeared to provide in his witness statement that there was a 60% chance of a gain arising, Mr Grainger admitted in cross examination that the probability was provided to him by Reid & Co, a firm of solicitors associated with the Respondent. Accordingly, leaving aside our surprise that Mr Grainger's evidence was put before the Tribunal on this basis, we therefore ignore Mr Grainger's evidence.

15. No representative from the Respondent provided evidence to the Tribunal in this application. Mr Gordon for the Respondent took the view that it was simply for HMRC as applicant to satisfy the Tribunal on the balance of probabilities. Mr Stone for HMRC argued that the Respondent had not provided any witnesses because they would have been unable to deny the factual matters asserted by HMRC and set out in Mr Hole's evidence. Accordingly, the Tribunal should draw adverse inferences in accordance with the guidance of the Court of Appeal in *Wisniewski v Central Manchester Health Authority* PIQR 324 at 340;

"(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some

credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

16. Proudman J in *HMRC v Sunico A/s and others* [2013] EWHC 941 (Ch) [101], having adopted the test in *Wisniewski* summarised the methodology as follows:

"101. The effect of these authorities is that I must approach the conspiracy issue in these stages:

First, has HMRC shown a *prima facie* case to answer that Sunico was party to the unlawful means conspiracy, supported by some evidence?

Secondly, if I find there is a *prima facie* case to answer, should I draw adverse inferences against the Defendants from the failure of the Harwanis to give evidence in answer to that *prima facie* case?

Thirdly, if I do draw adverse inferences against the Defendants, do those inferences tip the balance in HMRC's favour and demonstrate that Sunico was party to an unlawful means on the balance of probabilities?"

17. It is therefore appropriate for the Tribunal to find that HMRC's case is strengthened from the deliberate decision of the Respondent not to lead relevant evidence.

18. We agree with HMRC that the principle in *Wisniewski* can in principle apply in this appeal. The Respondent as one of the main architects of Volatility might have been expected to have material evidence on the issues in this appeal. Accordingly, we will therefore consider whether it is appropriate to draw adverse inferences in respect of discrete issues where we consider the Respondent's failure to provide evidence where it might have been expected to provide evidence.

19. We accordingly find the facts in this appeal as set out below.

The investigation

20. On 6 September 2013 HMRC first discussed Volatility at a meeting with the Respondents and there then followed a sequence of correspondence with the Respondents and their advisers Smith & Williamson as to whether Volatility was notifiable under DOTAS.

21. On 9 October 2013 HMRC put some questions to Smith & Williamson but there was no reply.

22. On 25 November 2013 HMRC notified the Respondent that it was not pursuing the matter but reserved its position to reopen the DOTAS enquiry.

23. There then followed a period of inactivity due in part to Mr Hole being promoted to lead the DOTAS team and implement training across a new team.

24. The Volatility file was handed to Mr Wood in October 2016.

25. On 21 August 2017 Mr Wood wrote to the Respondents suggesting Volatility might be notifiable and asked a series of questions, indicating that if HMRC and the Respondents could not agree HMRC could apply to the Tribunal for an order under either section 314A or section 306A.

26. On 2 November 2017 the Respondent asked HMRC to postpone the DOTAS enquiry pending judicial review proceedings.

27. On 20 December 2017 HMRC refused to postpone the enquiry and repeated questions about the application of the DOTAS legislation.

28. On 9 November 2018 HMRC notified the Respondent of their intention to make an application to the Tribunal under sections 314A and 306A.

Volatility

The principles of Volatility

29. There were a number of versions of the arrangements that are the subject of this application but the submissions by the parties and the evidence produced to the Tribunal focused on the Capital Gains Tax (CGT) and Miscellaneous Income (MI) versions.

30. Under the general structure of Volatility each user simultaneously entered into a forward purchase and a forward sale contract from and to asset management group Schroders ("a Transaction"). The price payable and the type of security to be purchased or sold depended on whether the value of the FTSE 100 index at a date, normally between 10 and 15 days later, fell within upper and lower barriers.

31. If the FTSE 100 remained within the barriers, gilts were sold and purchased and there was a small gain for the user on both contracts.

32. If the FTSE 100 fell below the lower barrier;

(1) the forward purchase contract would produce a large loss for the user. In the CGT version, the securities purchased would be shares and in the MI version the securities would be certificates of deposit; and

(2) the forward sale contract would produce a similar gain and the securities sold would be gilts.

33. If the FTSE 100 rose above the upper barrier;

(1) the forward purchase contract would produce a large gain and the securities purchased would be gilts; and

(2) the forward sale contract would produce a similar loss. In the CGT version, the securities sold would be shares and in the MI version the securities were certificates of deposit.

34. In short, if the FTSE 100 moved either above or below the barriers in the 10 to 15 day period the user would make matching gains and losses but the loss was always in shares (in the CGT version) or in certificates of deposit (MI version). The gain was always in gilts.

35. The purpose of the CGT version, according to HMRC, was to create a capital loss on the transaction in shares and a tax exempt gain on the gilt transaction. The loss could then be set against gains made by the user.

36. The purpose of the MI version, again according to HMRC, was to create a miscellaneous loss on the transaction in the certificates of deposit and a tax exempt gain on the gilt transaction. The miscellaneous loss could then be set against miscellaneous income generated by the user.

37. In addition to the CGT and MI versions described above, over time Volatility included some or all of the following variations:

(1) For later arrangements the counterparty was changed from Schroders to Heronden.

(2) Instead of the two contracts being one forward purchase and one forward sale contract, there were two forward purchase contracts.

(3) The value and nature of the securities being transferred were established by the sterling/dollar or euro/dollar exchange rate rather than movements in the FTSE index.

(4) In the "long" Volatility model (as opposed to the "short" model described above), a loss was created even if the movement stayed within the upper and lower barriers.

38. It was agreed by counsel for both parties that none of these variations made any difference to the analysis, that the application covered all of these variations and they were content for the Tribunal to make a decision based on the CGT and MI models without any reference to the variations.

39. The upper and lower barriers were set by Schrodgers and varied between each Transaction. Somewhat surprisingly, little evidence was adduced by either side as to the likelihood of a user on any given Transaction generating a gain or a loss. We have decided to ignore Mr Grainger's evidence. However, in internal correspondence within Schrodgers in setting up the contracts for one user the chance of a gain had been set at 60%. This percentage was repeated by Smith & Williamson in correspondence with HMRC.

40. There was some debate in the course of the hearing as to the appropriate percentage chances of a gain or a loss. Further there was debate as to whether for users reaching the end of the financial year the percentages were adjusted to ensure a loss was generated in that year. Mr Gordon preferred Mr Grainger's evidence that the chance of a gain was 60% and a loss being 40%. Mr Stone suggested it might be a 50% chance of a gain or a loss. However, both parties agreed that whether there was a 50 or 60% chance of a gain and a corresponding chance of a loss did not make any difference to the issues in the appeal.

41. We agree that nothing turns on the difference between the parties on the point and note that Judge Beare in *Padfield* found at [144(7)] that there was a 50-60% chance of a gain. We make the same finding, that the probability of any Transaction resulting in a taxable loss, that is to say falling outside the upper and lower barriers, was deliberately set by Schrodgers on the instructions of the Respondent at 40% and the chance of a gain at 60%.

Repeat Transactions

42. It was a feature of the Volatility arrangements that users often participated in more than one Transaction.

43. HMRC provided evidence as to some 66 users of Volatility, with one user using it twice and seven participating through a nominee. The number of Transactions entered into by a user varied between one and five but in none of those 66 examples did the user stop trading before he or she made a taxable loss, whether in the CGT or MI version.

44. The Respondent did not produce its own evidence on the point but criticised HMRC's data as being necessarily based on those participants who had claimed a relief for a loss. The structure of the contracts did not even presuppose that contracts would be paired and the concept being sold was not for the possibility of an infinite number of Transactions but was time-barred after 180 days. Even if a participant did repeat the Transaction, as HMRC's evidence showed, the number of times any taxpayer would do so was inherently uncertain. Whilst multiple iterations would most likely result in a loss within the 180 days, the number of iterations required to do so was inherently uncertain. Further, on HMRC's evidence a number of users of the MI version, such as Mr McCloskey, generated losses but then did not generate enough miscellaneous income to use all their losses.

45. We find, based on HMRC's evidence, that the number of Transactions entered into by users was between one and five. Further, based on the evidence presented by HMRC (and not challenged by the Respondents) as to the structure of Volatility as a whole, that the participant would continue to enter into Transactions until a material tax loss was generated, albeit in a number of cases involving the MI version, not all the losses were eventually used.

46. In doing so we draw adverse inferences as permitted by *Wisniewski*, HMRC's evidence being the required *prima facie* evidence and the Respondent not having advanced any reasons why no evidence should be adduced. This is an issue upon which it might have been expected

that the Respondent would provide evidence. It holds the data on all Transactions carried out by participants but has not provided any assistance on this issue in circumstances where the Respondent's argument is to challenge the accuracy of the user data.

The Respondent and the development of Volatility

47. Whilst the full connection between these entities was not made clear to us, the Respondent is associated with Reid & Co, a firm of solicitors and VIS FF Limited ("VIS"), a company set up for the purpose of managing the fighting fund as set out below. A Mr Mark Reid is a common owner or part owner of all three and at various times has used the letterhead of both Reid & Co and the Respondent in correspondence during the planning and implementation of Volatility (for example the meetings with Schroders). Mr Reid, Reid & Co and the Respondent have been treated throughout the appeal as acting together and the Respondent did not take any point on whether actions of Reid & Co could be attributed to the Respondent. We find that in practice any actions by Mr Reid and Reid & Co can be treated as being on behalf of the Respondent in developing and implementing Volatility. We note however, that it is not HMRC's case that Reid & Co is a promoter for the purposes of DOTAS.

48. We were taken to a number of items of correspondence in the period from October 2009 when Reid & Co and Matrix Structured Finance approached Schroders to discuss what was to become Volatility. In an internal e mail dated 9 November 2009 to the Principal Risk Committee an Adrian Jones wrote:

"Schroder & Co ("S&Co") has been approached by Reid & Co and Matrix Structured Finance LLP to deliver investment structures to clients. Reid & Co is well known to S&Co and has introduced a series of strategies that have mitigated tax liabilities for the clients of Reid & Co. Matrix is another firm that is active in the tax planning sphere. As a result the committee should be aware that one of the possible results of the investment strategy is that the client can make both a small economic loss together with a much larger tax loss that the designers of the strategy have been advised is allowable against a certain type of income known as Miscellaneous Income. Furthermore it is expected that any clients introduced to this strategy will have carried out tax planning, in which S&Co has no involvement that will convert income into Miscellaneous Income for tax purposes.

The Strategy

...essentially the client will get a payout that is significantly above the return offered on cash deposits if the underlying (e.g. FTSE) remains within the predefined range over the life of the investment. If the underlying transactions outside the range a defined amount of the investors capital will be lost. This economic loss will be relatively small though and within acceptable parameters to the investor...

Reputational Risk

As stated in the introduction while the economics of this transaction are similar to other investment transactions that are available in the market and indeed that S&Co has structured in the past we are aware that for most participants there will be a tax benefit if the investment benefit fails to materialise. Indeed even if the investment pays off this has been structured , on the instructions of the promoters, such that it is delivered in the form of gilts and therefore outside the scope of taxation. This structure is fully supported by an opinion from Michael Sherry QC [sic] a signed copy which will be sent to us prior to the first transaction being executed

Furthermore it should be noted that the structure, in the opinion of counsel, is not disclosable under the DOTAS (Disclosure of Tax Avoidance Scheme) rules..."

Implementing Volatility

49. Volatility was marketed by the Respondent principally to tax advisers who would then recommend the arrangements to their clients.

50. We were taken in the hearing to the full documentation for four users (being, with the exception of Mr McCloskey, different from the appellants in *Padfield*) and reference made to other documents. We find that the documents were in reasonably standard form subject to the type of scheme and the differences described below. Necessarily the contracts varied to take into account the individual requirements for each user and the level of the lower and upper barriers, which necessarily varied depending the market at the time.

51. On that basis we find the standard form arrangements for the Volatility scheme were as set out below.

introductory services agreement

52. Upon first entering into Volatility, the user would enter into an introductory services agreement with the Respondent, under which the Respondent agreed to provide introductory services, including introducing the user to an independent financial adviser and possible counter parties who might offer indexed based transactions in underlying financial instruments.

53. As part of the introductory services agreement the user agreed to pay the Respondent as follows:

- (1) Between 4% and 5.5% of the notional amount by way of commission to the Respondent
- (2) 1% of the notional amount as a contribution to a fighting fund
- (3) £1,000 payable to the financial adviser

54. The fees were only payable once, being described in the introductory services agreement as payable on the notional amount "of the first in the series of Financial Instruments". It entitled the user to participate in up to 4 Transactions as the user wished within 180 days of the first Transaction.

The Schroders engagement letter

55. The user would also enter into an engagement letter with Schroders.

56. Schroders' fee was 2% of the notional amount and was payable on each Transaction charged by the price on the purchase contract being 2% higher than that on the sale contract. The Schroders' fee was therefore a cost on each Transaction, unlike the commission, the fighting fund contribution and the financial adviser fee.

57. Schroders would open an account for the user through which all payments were made.

58. The user was required to deposit into the account in advance the 2% fee and an amount representing Schroders' estimate of dealing costs.

IFA advice

59. For regulatory reasons it was a condition of entering into Volatility that the user obtained financial advice. This was arranged on an execution only basis with an independent financial adviser preselected by the Respondent or Reid & Co. The pre-agreed fee of £1,000 was collected by the Respondent from the user and paid on the user's behalf to the IFA.

The fighting fund

60. The contribution to the fighting fund was a requirement for all participants.
61. The contribution was paid to VIS FF Limited ("VIS"), a company set up for the purpose and owned by Mr Reid, and the arrangement governed by a contract signed by each user which set out the obligations of the users and those of VIS.
62. Under the terms of the fighting fund agreement users were required to;
- "(a) pay or procure the payment to the Fighting Fund of the sum detailed by Redbox Associates
 - (b) ...
 - (c)...
 - (d) provide the Supplier , in a timely manner, with a copy of all documents, letter, enquiries, claims or other correspondence sent to or received from HMRC by the Taxpayer or its agents...."
63. The agreement provided that;
- "8(4) The Services provided by the Supplier and its Affiliates are set out in Schedule 1Without limiting the meaning of Schedule 1, the Services may be summarised as the acceptance of cash contributions for and management of the Fighting Fund , the instruction of professional advisers to conduct the Test case and payment of such professionals for their work"
64. The initial services to be provided by VIS were set out in more detail in a schedule 1 to the agreement;
- "(a) VIS FF limited shall accept cash from individuals who have agreed to participate in the Fighting Fund...
 - (b) VIS FF limited shall deposit the Fighting Fund with Martineau, Solicitors...
 - (c) Appoint... BTG as taxation adviser in relation to the Fighting Fund...
 - (d) Instruct Reid [& Co] ...to prepare disclosure bundles detailing the volatility investment strategy planning for all persons participating in the Fighting Fund on the basis of advice from BTG as to the contents of the disclosure bundles"
 - (e) Instruct Reid [& Co] to send to each Taxpayer pro forma wording prepared by BTG to disclose the Tax Planning in their personal tax return"
65. Schedule 1 further provided that;
- "The Fighting Fund will pay all the costs of taking the test case to the First Tier or Second Tier Tribunal and then appealing (or fighting any appeal) until either the test case is successfully won or successfully settled by HMRC or until no further legal avenues remain or the Fighting Fund is exhausted or insufficient funds remain in the Fighting fund to enable an appeal to proceed to a full hearing of the same. Success for this purpose means that the Investment Planning achieves the tax reliefs envisaged for the Taxpayer by Michael Sherry in his Opinion dated 2nd November 2009"

The Transactions

66. The forward purchase and forward sale contracts were in standard form agreed in advance between the Respondent (and/or Reid &Co) and Shroders using standard International Swaps and Derivatives Association ("ISDA") templates provided by Shroders. The only

variations were as to the price, being the notional amount of losses the user wanted to realise, and the levels of the FTSE to be used for the upper and lower barriers.

67. As we have found, the upper and lower barrier were deliberately set at such a level that there was a 40-50% chance of the Transaction falling outside the upper and lower barriers and so resulting in a loss for the user with the chance of falling within the upper and lower barriers and so producing a gain at 50-60%.

Mr McCloskey's Transactions

68. Evidence was produced by HMRC to the Tribunal in respect of four users. The Respondent did not object to these users being sufficiently representative of users. We take the facts of these users and specifically for the purposes of this decision those of Mr McCloskey's participation as illustrative of the implementation and financial consequences of Volatility.

69. Mr McCloskey used the MI variant of Volatility in the 2011/12 tax year. The arrangements were based on a notional amount of £2m, that is to say the contract prices were based on that value;

(1)

(2) On 5 October 2011 Mr McCloskey entered into an introductory services agreement with the Respondent agreeing to pay the Respondent a commission of 5.5% of the notional amount "of the first in the series of Financial Instruments" being in aggregate £111,000 and representing:

(3) £90,000 commission being 4.5% of £2m.

(4) £20,000 being 1% of £2m as contribution to a fighting fund.

(5) £1,000 payable to the financial adviser.

(6) On 11 November 2011 Mr McCloskey signed an engagement letter with Schroders.

(7) On 24 November 2011 Ashfield Financial Planning ("Ashfield"), the financial adviser nominated by the Respondent, wrote to Mr McCloskey agreeing to provide execution only advice for a fee of £1,000 to be collected and paid on Mr McCloskey's behalf by the Respondent.

(8) The first Transaction:

(a) On 14 February 2012 Mr McCloskey entered into forward purchase and sale contracts, the sale contract being for £2m and the purchase contract for £2,040,000. The £40,000 difference represented Schroders' 2% fee.

(b) On 19 February 2012 Mr McCloskey deposited £44,000 with Schroders on account of Schroder's fees of £40,000 and £4,000 to cover anticipated dealing costs. The funds were paid into Mr McCloskey's Schroders account opened for him for the purposes of implementing the Volatility transactions

(c) On 28 February 2012 the FTSE 100 closed between the lower and upper barrier, both contracts fulfilled by the purchase and sale of gilts and Mr McCloskey made a gain on each contract of £5,236 being in total a gain of £10,472.

(9) The second Transaction:

(a) On 6 March 2012 Mr McCloskey entered into forward purchase and sale contracts, the sale contract being for £2m and the purchase contract for £2,040,000.

(b) On 20 March 2012 the FTSE 100 closed above the upper barrier and Mr McCloskey made a profit of £1,960,000 on the forward purchase contract for gilts and a loss of £2,000,000 on disposal of certificates of deposit under the forward sale contract. Again the £40,000 difference represented Schroders' 2% fee.

70. In the tax year 2012/13 Mr McCloskey also entered into some arrangements to generate miscellaneous income under which he procured that a company he controlled declared a dividend worth £650,000 but before it was paid assigned the right to receive the dividend in favour of a family life interest settlement for £650,000. The intended tax result was that the moneys received from the settlement would be treated as income from a settlement and so miscellaneous income. The miscellaneous loss generated by the Volatility transaction was purportedly available for carry forward from the 2011/12 tax year and could be offset against the miscellaneous income.

71. Mr McCloskey's facts are in our view also illustrative of the economic consequences of participation in Volatility:

(1) On the first Transaction Mr McCloskey made a gain on each contract of £5,236 being in total a gain of £10,472. In financial terms and ignoring the tax outcome, Mr McCloskey made a loss. He had paid £111,000 of fees and realised a gain of £10,472, so was in a net loss position of £100,528.

(2) On the second Transaction Mr McCloskey made a profit of £1,960,000 on the forward purchase contract for gilts and a loss of £2,000,000 on disposal of certificates of deposit under the forward sale contract. Whilst there was no fee payable to the Respondent Mr McCloskey made a further loss of £40,000, being the Schroders fee.

(3) The combined results of the two Transactions was that Mr McCloskey made an overall net economic loss of £140,528. Had the FTSE remained within the lower and upper barriers Mr McCloskey would have made a profit of £18,748.

(4) Some of the loss on the second Transaction was set against the £650,000 miscellaneous income generated in 2012/13.

THE ISSUES IN THIS APPLICATION

The DOTAS legislation

72. The DOTAS legislation in Part 7 of Finance Act 2004 provides that certain tax arrangements are notifiable to HMRC and parties to such arrangements including promoters are liable to penalties if they do not do so.

73. The starting point is section 306 which defines what are "notifiable arrangements" for the purposes of the DOTAS regime:

"(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)."

74. The Regulations, set out in the Appendix, provide discrete descriptions or hallmarks for the purposes of section 306(1)(a).

The applications

75. HMRC has made an application for an order under section 314A that the Volatility arrangements are notifiable under DOTAS and, in the alternative, sought an order under section 306A that they should be treated as notifiable. The nature of the application, the test to be applied and the consequences of a successful application are different under each section.

76. Under section 314A, considered in detail below, the Tribunal must be satisfied on a balance of probabilities that the conditions set out in section 306(1)(a) to (c) are met and any order made under section 314A declares that the arrangements have always been notifiable.

77. If we agree that Volatility is determined under section 314A to be notifiable then the promoter is liable to penalties under section 98C Taxes Management Act 1970. The parties in this application did not provide any calculation as to the amount of any penalty but it was agreed that it would be very significant.

78. Under the application under section 306A the Tribunal need not be satisfied that the conditions in section 306 are satisfied but that HMRC has taken all reasonable steps to establish whether the arrangements are notifiable and that HMRC have reasonable grounds for suspecting the arrangements are notifiable.

79. If the Tribunal grants an order under section 306A the arrangements are treated as being notifiable from the date of the order. No immediate penalties arise but the promoter would be required to notify arrangements after the date of the order.

80. Mr Gordon objected to HMRC making an application in the alternative but we consider that point below in the context of the section 306A application. We consider the section 314A application first.

THE SECTION 314A APPLICATION

81. Section 314A provides:

"(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."

82. HMRC have made an application and so, under section 314A(3), this Tribunal must determine whether, on a balance of probabilities, the conditions set out in section 306(1)(a) to (c) are met. The Respondent also raises issues as to whether HMRC's application satisfies the conditions in section 314A(2).

83. It is a condition of this application that there is a promoter as defined by section 307. The Respondent did not raise any arguments to the contrary so this issue was not considered in the hearing. Nevertheless, for completeness we find that the Respondent is a promoter.

84. The issues to be considered in the section 314A application are therefore as follows;

(1) whether the application satisfies the conditions in section 314A(2).

- (2) whether Volatility amounts to "arrangements" as defined by section 318(1).
- (3) whether the arrangements enable any person to obtain a tax advantage (section 306(1)(b)).
- (4) whether the arrangements are such that the main benefit, or one of the main benefits, that might be expected to arise is the obtaining of that advantage (section 306(1)(c)).
- (5) whether Volatility meets any of the descriptions or hallmarks in the Regulations (section 306(1)(a)). For the purposes of this application HMRC assert that the following hallmarks apply;
 - (a) Premium fee (Regulation 8)
 - (b) Standardised tax product (Regulation 10)
 - (c) Loss schemes (Regulation 12).

Whether Volatility amounts to "arrangements" and did HMRC properly specify them for the purposes of section 314A(2)

85. In order for a structure to be notifiable section 306(1) requires there to be "arrangements" which are defined by section 318:

""arrangements" includes any scheme, transaction or series of transactions"

86. Where HMRC makes an application under section 314A, section 314A(2) requires that;

"(2) An application must specify—

- (a) the proposal or arrangements in respect of which the order is sought, and
- (b) the promoter."

87. It is convenient to consider both of these points together.

88. In their application HMRC described the arrangements as including not only entering into a paired forward purchase and forward sale contracts but also, if a net gain is made on that Transaction, further iterations until such time as the tax-relievable loss arises.

89. It was accepted by the Respondent that a pair of forward purchase and forward sale contracts amounted to an arrangement. The only point of disagreement between the parties was whether the subsequent iterations of the Transaction after the first should be included within the same "arrangements".

HMRC's arguments

90. HMRC argued that arrangements should have a wide meaning to include Volatility and all the Transactions made by the user. The users entered into a specified series of Transactions supported by standardised documentation and on pre-arranged terms.

91. Further Volatility was marketed as a scheme. For example in the fighting fund contract there is a reference at 1.1 to "the volatility investment strategy (investment planning) by Redbox", in schedule 1 to "the Tax Planning" and "the volatility investment strategy".

92. The Transactions entered into by each user only varied to reflect the price of the securities sold, which reflected the tax loss the user wished to create, and the number of Transactions.

93. It is unrealistic to view the uncertainty as to how many Transactions there would be as preventing the totality from being seen as "arrangements". The definition of arrangements

allowed for a "series of transactions". Further, in *HMRC v Root2tax* [2017] UKFTT 696 at [6] the Tribunal noted that;

"it is in the nature of gambling that outcomes are not certain"

94. It was a fundamental characteristic of Volatility that the desired loss might be achieved by the first Transaction or it might take a number of Transactions. That is why the fee paid to Redbox allowed a user to repeat the transaction at least four times in a 180 day period. In any event the users always entered into Transactions until they realised the tax loss.

The Respondent's arguments

95. Mr Gordon for the Respondent accepted that "arrangements" have a wide meaning. However, HMRC's application sought to target something far too nebulous and imprecise to constitute "arrangements". Accordingly there were no arrangements beyond each pair of contracts and HMRC's application did not specify the arrangements as required by section 314A(2).

96. The taxpayer might pair two financial Transactions and might enter into a succession of similar Transactions but that series of Transaction is of an unknown length. No one can predict the number of Transactions that might be entered into. Indeed, as the outcome depends upon the market, a loss might never emerge.

97. Further, the Respondent simply made a concept available to its clients and they could implement as they saw fit. The contract between the Respondent and the user did not even have a supposition that the contracts would be paired and in any event was time limited to 180 days.

98. On the basis that there was a 60% chance of a gain arising on each occasion it is most likely that a loss would arise in the 180 day period but the number of iterations to achieve that result is wholly uncertain.

99. The DOTAS legislation is penal and so must be construed restrictively and the benefit of any doubtful interpretation given to the Respondent. In *HMRC v Hyrax Resourcing* [2019] UKFTT 175 536, an application under the DOTA regime, Judge Mosedale commented at [114];

“[114] In summary, legislation should be interpreted in line with Parliament’s presumed intent. The principle against doubtful penalisation is a part of that doctrine; it is not separate and superior to it. So I must bear in mind, when considering how Parliament intended the legislation the subject of this hearing to be understood, that Parliament would have intended a person’s duty to be clear to them from the words enacted. At the same time, I must also bear in mind that Parliament intended the legislation to be effective: and I agree with what was said in *Curzon Capital Ltd* [2019] UKFTT 65 (TC) (another case on these provisions) by Judge Poole at §33 that ‘it is appropriate when construing the legislation to lean against constructions which would undermine the effectiveness of the legislation in achieving that purpose’.

100. Further the proceedings are "criminal" within the meaning of the European Convention on Human Rights. The Respondent is therefore entitled as a minimum under Article 6.3(a) of the convention (as set out in Schedule 1 to the United Kingdom Human Rights Act 1998)

"to be informed promptly , in a language which he understand and in detail, of the nature and cause of the accusation against him".

101. HMRC's application does not do so and so fails for want of an arrangement.

Decision on arrangements

102. We agree with HMRC and find that the sequence of paired contracts amount to “arrangements” as defined by section 318. As illustrated by Mr Mcloskey’s facts, the nature of the structure is such that it made no economic sense for a user to drop out after the first pair of contracts or indeed, until he or she made an allowable loss.

103. The bulk of the cost was incurred on entering Volatility and thereafter the cost was limited to Shroders’ fees. We have found that all participants continued until they made substantive tax losses. It is true that a participant need not repeat the paired contract but that does not mean the sequence of paired contracts does not amount to “arrangements”.

104. Even if each pair of contracts could be described as a separate event so that the series was not one “transaction” for the purposes of section 318, upon which we are not persuaded, the definition of “arrangements” in section 318 includes a “series of transactions”, which in our view encompasses even the most optimistic construction of Vitality.

105. We reject the Respondent's argument that the application breaches the European Convention on Human Rights. The application is 23 pages long, including details around the uncertain number of Transactions, and in our view provides ample information to enable the Respondent to respond.

106. For similar reasons we also reject the Respondent’s argument that HMRC’s application failed to specify the arrangements which were notifiable, as required by section 314A(2).

Whether the arrangements enable any person to obtain a tax advantage (section 306(1)(b))

107. Section 306(1)(b) provides;

- "(1) In this Part “notifiable arrangements” means any arrangements which—
- (a)...
 - (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)..."

108. An “advantage” is defined by section 318 to include “the avoidance or reduction of a charge to tax” and “tax” defined to include capital gains tax and income tax.

HMRC’s arguments

109. HMRC argued that it was clear from the design of Volatility that the arrangements were intended to enable the user to generate a loss to be set against capital gains or miscellaneous income. The economics were such that no one would have entered into the Transactions without the motivation of securing a tax advantage, thus:

- (1) The choice of the variant – whether capital gains or miscellaneous income - was determined solely by the type of loss the user wanted to achieve
- (2) The level of fees made any gain from the FTSE remaining within the upper and lower boundaries illusory so it was not economically rational to participate in the scheme in order to receive a return on capital
- (3) The tax benefit would be many times greater than any investment return
- (4) The relative economic and tax benefit explains why everyone so far as HMRC was aware entered into further pairs of contracts until they achieved the desired tax loss and then stopped

110. HMRC used Mr McCloskey as an example to illustrate. He entered into contracts with a notional amount of £2m and paid in total £111,000 of fees to Redbox, the fighting fund and the IFA costs. The net economic outcome from the first pair of contracts he entered into when the FTSE remained between the lower and upper barriers was an anticipated gain of £10,472. Whilst the level of gain could vary, at that level it would have required Mr McCloskey to have entered into 11 pairs of contracts before the potential gain was greater than the fees. The chance that he would have not achieved a loss by then was infinitesimally small – indeed the maximum number of pairs of contracts entered into by any user on HMRC’s data was 5.

111. It was inconceivable that Mr McCloskey would have agreed to pay upfront fees of £111,000 in return for a potential profit in the region of £10,000. He would only have done so in the expectation of achieving the £2m of tax losses. The same is true of all users, although the precise numbers would vary.

112. It is not a defence to argue that there is uncertainty as to the outcome. In *Root2tax*, a case where there was uncertainty about the outcome of a put/call spread option hedge, the uncertainty did not prevent;

“the main benefit, or one of the main benefits, of the scheme (if it works) being the obtaining of the specified advantage”

113. A similar approach was taken by this Tribunal in *HMRC v Curzon Capital* [2019] UKFTT 0063(TC) at [49];

“If the arrangements are presented in such a way as to claim that a tax advantage will (or may) flow from using them, then unless the claim is clearly ridiculous, he can fairly be said that the arrangements “might be expected to enable” the advantage to be obtained”

114. The requirement in section 306(1)(b) is not that the arrangements guarantee the outcome.

The Respondent’s arguments

115. The Respondent argued that, whilst it might be assumed the net result of an indefinite series of paired contracts would be a tax loss, such a series will not “enable” a loss to arise. That outcome is entirely dependent on the market and requires volatility in the market at the right time. There is in any event a 180 day cap on the arrangements. Further, such an outcome cannot even be expected.

116. The word “enable” in section 306(1)(b) should be construed as “will enable” and as each iteration has less than a 50% chance of generating a loss this test cannot be met.

117. It cannot be said that the generating of a tax loss is a “tax advantage” as it is a contingent right that allows a taxpayer the possibility of reducing their tax liability.

118. Mr Gordon sought to distinguish *Root2Tax* on the basis that it was one predictable iteration. In this application the number of iterations cannot be predicted at all.

Decision on enabling any person to obtain a tax advantage

119. We find that section 306(1)(b) is satisfied. The test is not that there would be a tax advantage but that “might be expected to enable...any person to obtain [a tax] advantage”.

120. Further, as we have found that the “arrangements” include the envisaged or anticipated repeating of the pairs of contracts until a tax loss is realised, the test in section 306(1)(b) applies to the arrangements as a whole. On that basis the expectation must be that the arrangements would enable a user to obtain a tax advantage. There was no other rational explanation for Volatility and the Respondent’s submissions as to the uncertainty of the outcome do not defeat this conclusion.

121. Finally, we reject the argument that crystallising a loss is not a tax advantage both on the general reading of the legislation and also on the basis that to do so would nullify the purpose of description 6: loss schemes as set out in regulation 12.

Whether the main benefit is the obtaining of that advantage (section 306(1)(c))

122. Section 306(1)(c) provides;

"(1) In this Part "notifiable arrangements" means any arrangements which—

(a)...

(b)... 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."

123. Again the same definitions of tax and tax advantage apply.

HMRC's arguments

124. Mr Stone for HMRC treated it as self evident that at least one of the main benefits that might be expected to arise from Volatility was the obtaining of a tax advantage, given that the level of fees made any prospect of a commercial return from the FTSE remaining between the upper and lower boundaries illusory. Whilst it is not necessary for the purposes of section 306(1)(c), HMRC would argue the tax advantage was the only benefit arising from Volatility.

125. The importance of the tax advantage is demonstrated by the terms and conditions of the fighting fund contract all users were required to enter into. Thus;

(1) VIS would instruct solicitors to prepare pro forma wording for inclusion in each user's tax return.

(2) BGT Tax were to be appointed as tax advisers and in conjunction with the Respondent agree with HMRC "a test case to represent all the class of taxpayers in the Investment Planning...".

(3) The contributions into the fighting fund were described as coming from "individuals who have participated in the Tax Planning".

(4) Success for the test case was defined as "success for this purpose means that the Investment Planning achieves the tax reliefs envisaged for the Taxpayer by Michael Sherry in his opinion....".

126. The purpose can also be seen in internal Schroders e mails seeking approval for the strategy;

"While miscellaneous income is not something that affects most people it is my understanding that the developers of this strategy how only of converting income eating miscellaneous income and as a result will then execute the above planning"

"Schroder & Co ("S&Co") has been approached by Reid & Co and Matrix Structured Finance LLP to deliver investment structures to clients. Reid & Co is well known to S&Co and has introduced a series of strategies that have mitigated tax liabilities for the clients of Reid & Co. Matrix is another firm that is active in the tax planning sphere. As a result the committee should be aware that one of the possible results of the investment strategy is that the client can make both a small economic loss together with a much larger tax loss that the designers of the strategy have been advised is allowable against a certain type of income known as Miscellaneous Income. Furthermore it is expected that any clients introduced to this strategy will have carried out tax

planning, in which S&Co has no involvement that will convert income into Miscellaneous Income for tax purposes.”

127. The behaviour of users was consistent with obtaining the tax advantage being one of the main benefits that might be expected to arise from the scheme. In the sample cases produced to the Tribunal the users each chose either the miscellaneous income or capital gain version of Volatility and then were able to use those losses against the appropriate income or gain.

The Respondent’s arguments

128. Mr Gordon argued that a tax advantage was not the main benefit of the Transactions for several reasons.

129. First, the tax advantage was not guaranteed or expected.

130. Second, ultimately an investor was provided with an opportunity for making a small financial gain in the unlikely event of a relatively stable market but risked a more significant loss in the event of more volatility over the investment period. That does not distinguish Volatility from many financial derivatives available, and a risk of a loss on such Transactions will frequently be mitigated by the availability of tax relief but it would be a distortion of language to say that tax relief was the main benefit.

131. Third, it is recognised that were a tax loss to arise it would exceed the commercial loss suffered. However, this is as a result of the fact that the tax relievable commercial loss is itself mitigated by a tax-free gain on the corresponding hedge contract. That does not make the tax loss the main benefit of the contract, it is at most a compensation for a commercial loss that is suffered in particular market conditions whereas the more likely outcome would in fact be a commercial gain.

132. Fourth, as with any investment product the possible tax consequences would generally narrow down the likely market for the product. The product is therefore more likely to be attractive to investors who have capacity to obtain relief for the losses. Further, clients are unlikely to participate beyond their capacity to use the losses suffered.

Decision on main benefit

133. We find that that section 306(1)(c) is met. The economics of the arrangements together with the way in which it was structured and marketed point strongly to the tax advantage being “the main benefit, or one of the main benefits, that might be expected to arise from the arrangements”. Notwithstanding Mr Gordon’s attempts to persuade us otherwise, it appears to us plain that users participated in order to obtain a tax advantage. The economic gains were limited and it is not credible to suggest that it was a conventional investment product, that is to say one where the purpose is to generate economic returns.

Hallmarks: Premium fee

134. Section 306(1)(a) provides;

“(1) In this Part “notifiable arrangements” means any arrangements which—
(a) fall within any description prescribed by the Treasury by regulations,
(b) ...
(c)...”

135. For the arrangements to be notifiable they must satisfy one of the descriptions or “hallmarks” in the regulations. The first hallmark listed by HMRC in their application is under Regulation 8: premium fee;

“Description 3: Premium Fee

8(1) Arrangements are prescribed if they are such that it might reasonably be expected that a promoter or a person connected with a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements to disclose information under these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

But arrangements are not prescribed by this regulation if—

- (a) no person is a promoter in relation to them; and
 - (b) the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.
- (2) For the purposes of paragraph (1), and in relation to any arrangements, a “premium fee” is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises, and which is—
- (a) to a significant extent attributable to that tax advantage, or
 - (b) to any extent contingent upon the obtaining of that tax advantage.”

HMRC’s arguments

136. HMRC argue that Regulation 8 posits a hypothetical situation involving a notional promoter and a notional user - “a person experienced in receiving services of the type being provided” – so the question is whether it might be reasonably expected that the notional promoter would (but for the requirements of the 2006 Regulations) be able to obtain a premium fee from that notional user for making the arrangements available.

137. It is not a requirement that a premium fee is actually charged although in this case the Respondent charged a fee between 4 and 5.5% of the notional amount. The fact that users did pay a premium fee is a strong indicator that a notional promoter might be expected to obtain a premium fee (*Curzon Capital* at [58]).

138. The work done for each of the users was substantially the same, receiving substantially the same letters and entering into the same contracts. There was limited tailoring except for the choice of variant and the notional amount, that is to say the value of the Transaction. If the fee charged related to the work done the users would have all been asked for a similar absolute amount in fees. Instead, the fees differed radically by reference to the tax loss to be created.

139. The actual fees payable by users of Volatility were based on the notional amount, which was the tax loss the user intended to set off against tax. The fee was therefore referable to the tax advantage within Regulation 8(2)(a).

140. Further, it is reasonable to expect one or more of the following characteristics would enable a promoter to command a premium fee;

- (1) The ability to claim a tax loss significantly greater than the actual economic loss
- (2) The ability to select between chargeable gain and miscellaneous income variants
- (3) The fees being significantly cheaper than the payment of the relevant tax

141. HMRC did not rely upon Regulation 8(2)(b) as the fee was not contingent.

142. As there is no dispute as to the Respondent being a promoter the exclusion in Regulation 8(1) does not apply, notwithstanding that the users were individuals.

The Respondent's arguments

143. Mr Gordon argued that the test in Regulation 8 is in effect whether:

“it might reasonably be expected that a promoter or a person connected with a promoter of [broadly similar] arrangements ... would ... be able to obtain a premium fee from a person experienced in receiving services of the type being provided”

144. It was not concerned with the actual fee paid by users and so HMRC's reliance on the fees charged is misplaced. The fees were in fact commissions paid for introducing clients to the investment strategies, via an IFA.

145. Further, the definition of premium fee is itself predicated on the existence of an expected tax advantage which is inappropriate. Indeed, it is not possible to calculate the anticipated tax advantage without knowing each taxpayer's personal circumstances, including their future transactions.

146. In any event, HMRC's application relies upon the premium fee being “to a significant extent attributable to that tax advantage” (Regulation 8(2)(a)). HMRC argues that the fee was based on a fixed percentage and was thus a different absolute amount in different cases even though all involved the same amount of work. However, the fees for many financial transactions are based upon the value of the transaction not the time spent, for example stockbroker's fees and estate agent's fees for selling one's home. If in the case of an estate agent there is a tax exemption, there will be a clear correlation between the fee paid and the value of the tax exemption. It would be a clear mischaracterisation to consider the estate agent's fee a premium fee for the purposes of Regulation 8.

147. Finally, and more importantly, regarding the test in Regulation 8, HMRC have not produced any evidence as to what a promoter would be able to obtain for the services provided. In the absence of such evidence the Tribunal cannot safely conclude that this hallmark is satisfied.

Decision on premium fee

148. We find that Volatility satisfies the conditions in Regulation 8.

149. Applying the hypothetical test of a notional promoter and a sophisticated notional user we find that nature of the arrangements are such – and in particular the value of the potential tax advantage to users – that the promoter would be able to charge a premium fee.

150. We reject the Respondent's twin arguments, first, that HMRC has not produced any evidence as to what that premium fee would be and, second, that the Tribunal must ignore what the Respondent did in fact charge the users of Volatility. Further, we do not accept the comparison with stockbrokers or estate agents. Each set of facts needs to be considered on its own merits but we do not consider the comparison apposite.

151. In the absence of evidence to the contrary from the Respondent, we find based in the nature of the product and the values of the Transactions, that the users of Volatility would qualify as sophisticated purchasers for the purposes of the test in paragraph 8 and that the fee they paid is a useful comparator (*Curzon Capital* at [58]- [59]). Accordingly, we find that the promoter would in the hypothetical circumstances described in paragraph 8 be able to charge between 4 and 5.5% of the notional sum. Further, that fee is a premium fee as it is attributable to the tax advantage that might be obtained.

152. It is not necessary in our view for HMRC to find actual data on comparable products. A premium fee ought to be capable of being identified by promoters at the time they are

developing their product and, further, the evidential burden on HMRC should not be such as to emasculate the legislation (*Hyrax Resourcing* at [114]).

Hallmarks: Standardised tax product

153. The second hallmark that might satisfy the requirement in section 306(1)(a) is set out in Regulation 10 with exclusions set out in Regulation 11:

“Description 5: standardised tax products

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

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

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

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

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

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

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

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

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

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

Arrangements excepted from Description 5

11(1) The arrangements specified in this regulation are—

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

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

(2) The arrangements referred to in paragraph (1)(a) are—

(a)...”

HMRC’s arguments

154. Mr Stone argued that the documentation required to implement the arrangements were in standardised form, including;

- (1) the Respondent’s engagement letter.
- (2) The IFA engagement letter.
- (3) Shroders’ engagement letter.
- (4) The forward purchase and sale contracts.

155. The documents would be tailored only for the user's individual details, including the size of the loss required and in the case of the forward purchase and sale contracts, the price to be paid and the relevant levels of the underlying index.

156. It was wrong to say, as the Respondent asserted, that HMRC's case on Regulation 10 turns on "regulatory paperwork". HMRC's position is based on all the documentation which allowed the user to enter into the arrangements, not just the forward purchase and sale contracts. Regulation 10 is concerned with all the documentation "the purpose of which is **to enable** the implementation, by the client, of the arrangement" (emphasis added). Without the full suite of documents the scheme users could not have participated.

157. Other decisions of this Tribunal have taken a wide view of the breadth of the relevant documentation, see *Hyrax* (at [88] to [92]) and *Root2tax* (at [27]).

158. The purpose of the documentation was to enable users to participate in Volatility, the form was determined by the Respondent as promoter or otherwise standardised off the shelf documentation and the only tailoring beyond personal details such as name was that required to set the price according to the loss sought.

159. The users entered into specific series of transactions and it is not necessary for the purposes of Regulation 10(1)(b) that the number of transactions are known, just their nature and form.

160. Volatility is a tax product as, there being no economic reason to enter into it, the main purpose of the arrangement was to obtain a tax advantage and it would be reasonable for a well informed observer to so conclude.

161. As regards the exceptions in Regulation 11, the specific exemptions do not apply and to HMRC's knowledge the arrangements were not implemented before the 2010/11 tax year. Specifically, counsel's opinion was obtained by the Respondent on 2 November 2009 and in a meeting between HMRC and the Respondent on 6 September 2013 the Respondent's representatives said they had devised the structure during 2010/11. Volatility was not essentially original but the burden of showing Regulation 11 applies is on the Respondent. Relying on the long-standing practices of using paired financial futures or exploiting the tax exempt status of gilts was not enough.

The Respondent's arguments

162. Mr Gordon argued that HMRC's argument relied upon standardised regulatory paperwork rather than the actual documentation required to implement the strategy. As with preparing a client's tax return, whether it fell within regulation 10 depends on the service provided. The fact that the client entered into a standard engagement letter would be irrelevant.

163. The only relevant documentation was the forward purchase and sale contracts and these were drafted by Shroders and not "determined by the promoter" (regulation 10(2)(a)(ii)).

164. In any event as it was not possible to determine how many transactions will be entered into it cannot be said that the users enter into "specific" transactions (regulation 10(2)(b)).

165. Further the use of paired financial future long pre-dated 1 August 2006 as did the use of gilts to ensure gains would be exempt from CGT. Volatility is therefore exempt by virtue of regulation 11(1)(b).

Decision on standardised tax product

166. We find that Volatility is a standardised tax product within regulation 10.

167. The documents used in implementing Volatility, taken as a whole, were standardised as were the Transactions entered into. Whilst the forward purchase and sale contracts originated

from Schroders, their form was either industry standard or tailored to the Respondent's instructions. The purpose of these documents was to enable the implementation of Volatility

168. Further, it is no answer to say that the number of Transactions was uncertain. We have determined that the series of Transactions entered into by each user, even if of an uncertain number, amounts to arrangements for the purposes of section 318. Put another way, the concept was an arrangement even if in the implementation an uncertain number of Transactions needed to be entered into.

169. We have already found that the main benefit of Volatility was a tax advantage and here find that an informed observer would so conclude that the main purpose of Volatility was to enable users to obtain a tax advantage.

Hallmarks: Loss schemes

170. The final hallmark that might satisfy the requirement in section 306(1)(a) is set out in Regulation 12:

“Description 6: Loss schemes

12. Arrangements are prescribed if—

(a) the promoter expects more than one individual to implement the same, or substantially the same, arrangements; and

(b) the arrangements are such that an informed observer (having studied them) could reasonably conclude—

(i) that the main benefit of those arrangements which could be expected to accrue to some or all of the individuals participating in them is the provision of losses, and

(ii) that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax.”

HMRC's arguments

171. HMRC argued that the conditions in Regulation 12 were satisfied because:

(1) at least 140 individuals used Volatility so the Respondent must have expected more than one individual to implement the scheme.

(2) As with the standardised tax product hallmark (Regulation 10), it would be reasonable for a well informed observer to conclude that the main purpose of the arrangement was to obtain a tax advantage as there being no economic reason to enter into it.

(3) Individuals could reasonably be expected by an informed observer to use the loss to reduce their income tax or CGT liability as they had chosen the income tax or CGT version depending on their losses. Further, they had paid a substantial fee for Transactions that only made sense if a tax loss was realised and they used those losses. In fact all users did so.

The Respondent's arguments

172. Mr Gordon argued that the correct approach is to consider matters prospectively and objectively. HMRC's approach of considering what actually happened to address the statutory test with hindsight was incorrect.

173. The losses would only arise if the market was unstable so an objective observer could not conclude that the main benefit would be the accrual of losses.

174. In any event even if Volatility used such standardised financial products it is not possible to say an objective observer would conclude that users would be expected to use those losses to reduce their tax liability.

Decision on loss schemes

175. We find that Volatility satisfied the conditions for a loss scheme in Regulation 12.

176. The evidence produced at the Tribunal as to the development of Volatility , including for example correspondence with Shroders and the wording of the fighting fund arrangements, demonstrates that the Respondent clearly intended and expected more than one individual to participate in substantially the same arrangements.

177. An informed observer could reasonably conclude that the main purpose of Volatility was to enable users to obtain losses and that those individuals would be expected to use those losses to reduce their income tax or CGT.

DECISION

178. For the reasons set out above we find that the Volatility arrangements are notifiable under section 314A on the basis that:

- (1) The application meets the requirements of section 314A(2).
- (2) The Volatility scheme is an "arrangement" as defined by section 318(1).
- (3) Volatility enables a person to obtain a tax advantage (section 306(1)(b)).
- (4) The main benefit, or one of the main benefits, that might be expected to arise from Volatility is the obtaining of that advantage (section 306(1)(c)).
- (5) Volatility meets the descriptions of hallmarks set out in the Regulations being;
 - (a) Premium fee (Regulation 8).
 - (b) Standardised tax product (Regulation 10).
 - (c) Loss schemes (Regulation 12).

179. We therefore make the order under section 314A in accordance with HMRC's application.

180. Having made an order under section 314A we therefore do not need to consider whether an order should be made under section 306A and do not do so.

APPEAL RIGHTS

181. This document contains full findings of fact and reasons for the decision. By virtue of Article 3(i) of the Appeals (Excluded Decisions) Order 2009 SI 2009/275, no right of appeal arises in respect of this decision.

**IAN HYDE
TRIBUNAL JUDGE**

RELEASE DATE: 17 AUGUST 2021

Appendix

1. The Finance Act 2004 provides in so far as relevant;

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).

306A Doubt as to notifiability

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

- (a) a proposal is to be treated as notifiable, or
- (b) arrangements are to be treated as notifiable.

(2) An application must specify—

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

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

- (a) have taken all reasonable steps to establish whether the proposal or arrangements are notifiable, and
- (b) have reasonable grounds for suspecting that the proposal or arrangements may be notifiable.

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

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

- (a) the fact that the relevant arrangements fall within a description prescribed under section 306(1)(a);
- (b) an attempt by the promoter to avoid or delay providing information or documents about the proposal or arrangements under or by virtue of section 313A or 313B;
- (c) the promoter's failure to comply with a requirement under or by virtue of section 313A or 313B in relation to another proposal or other arrangements.

(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 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.

318 Interpretation of part 7

(1) In this Part—

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

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

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

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

2. The Taxes Management Act 1970 provides in so far as relevant;

“98C Notification under Part 7 of Finance Act 2004

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

(a) to a penalty not exceeding

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

(ii) in any other case, £5,000, and

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

(2) Those provisions are—

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

(b) section 309(1) (duty of person dealing with promoter outside United Kingdom),

(c) section 310 (duty of parties to notifiable arrangements not involving promoter)...”

3. The Tax Avoidance (Prescribed Descriptions of Arrangements) Regulations 2006 provide in so far as relevant;

Description 3: Premium Fee

8(1) Arrangements are prescribed if they are such that it might reasonably be expected that a promoter or a person connected with a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements to disclose information under these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

But arrangements are not prescribed by this regulation if—

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

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

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

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

(b) to any extent contingent upon the obtaining of that tax advantage.

Description 5: standardised tax products

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

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

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

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

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

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

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

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

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

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

Arrangements excepted from Description 5

11(1) The arrangements specified in this regulation are—

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

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

(2) The arrangements referred to in paragraph (1)(a) are—

(a) arrangements which consist solely of one or more plant or machinery leases (see regulation 14);

(b) an enterprise investment scheme (Chapter 3 of Part 7 of ICTA and Schedules 5B and 5BA to TCGA 1992);

(c) arrangements using a venture capital trust (see section 842AA of, and Schedule 15B to, ICTA and Schedule 5C to TCGA 1992);

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

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

(f) an account which satisfies the conditions in the Individual Savings Account Regulations 1998(7);

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

- (h) an approved share option scheme (see Chapter 7 of Part 7 of, and Schedule 3 to, ITEPA 2003);
- (i) an approved CSOP scheme (see Chapter 8 of Part 7 of, and Schedule 4 to, ITEPA 2003);
- (j) the grant of one or more qualifying options which meet the requirements of Schedule 5 to ITEPA 2003 (enterprise management incentives)—
 - (i) together only with such other steps as are reasonably necessary in all the circumstances for the purposes of facilitating it, or
 - (ii) which fall to be notified to the Board in accordance with Part 7 of that Schedule;
- (k) a registered pension scheme (see section 150(2) of FA 2004);
- (l) an overseas pension scheme in respect of which tax relief is granted in the United Kingdom under section 615 of ICTA (exemption from tax for superannuation payments in respect of persons not resident in the United Kingdom or in respect of trades carried on wholly or partly outside the United Kingdom);
- (m) a pension scheme which is a relevant non-UK pension scheme within the meaning given by paragraph 1(5) of Schedule 34 to FA 2004;
- (n) a scheme to which section 731 of ITTOIA 2005 applies (periodical payments of personal injury damages).

Description 6: Loss schemes

12. Arrangements are prescribed if—
- (a) the promoter expects more than one individual to implement the same, or substantially the same, arrangements; and
 - (b) the arrangements are such that an informed observer (having studied them) could reasonably conclude—
 - (i) that the main benefit of those arrangements which could be expected to accrue to some or all of the individuals participating in them is the provision of losses, and
 - (ii) that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax.