



Neutral Citation: [2023] UKFTT 99 (TC)

Case Number: TC08721

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Location: Decided on the papers

Appeal reference: TC/2021/02349

*Application that arrangements should be treated as notifiable within the meaning of s306(1)
FA 2004*

Judgment date: 02 February 2023

Decided by:

TRIBUNAL JUDGE ALLATT

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Applicants

and

HAMILTON BRADBURY LTD (IN LIQUIDATION)

Respondent

The Tribunal determined the application on 18 October 2022 without a hearing under the provisions of Rule 26 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (default paper cases) having first read the HMRC's application, the witness statement of Robert Jones (with enclosures) and HMRC's Skeleton Argument (with enclosures).

DECISION

INTRODUCTION

1. The Application is for an order under section 314A (or in the alternative, section 306A) of the Finance Act 2004 (“FA 2004”) that the arrangements specified and described (“the arrangements”) are (or, in the alternative, should be treated as) notifiable arrangements within the meaning of section 306(1) FA 2004.
2. HMRC originally made an application on 25 May 2021, and the respondents to that application were Hamilton Bradbury Limited, a company incorporated and resident in the UK (“HBL”) and HBC Limited, a company incorporated in the Isle of Man and trading as Hamilton Bradbury Consulting (“HBC”).
3. HMRC has subsequently withdrawn the application against HBC, which was dissolved on 4 February 2021.
4. HBL is in liquidation, and the liquidators stated that they consent to the matter being dealt with on the papers, they do not wish to file a skeleton argument and they are taking a neutral position on the matter.

NOTIFIABLE ARRANGEMENTS

5. The relevant provisions of Part 7, Finance Act 2004 provide:

Section 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).

314A Order to disclose

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

- (a) a proposal is notifiable, or
- (b) arrangements are notifiable.

(2) An application must specify—

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

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

THE ARRANGEMENTS

6. The arrangements were implemented in the tax years 2013/2014 to 2018/2019.
7. Individuals ('the user(s)') found work via an arms-length UK agency or intermediary ('the UK agency') and agreed to work for the end user client or customer ('the end user(s)') in return for a particular rate of pay.
8. The following steps were implemented:
 - a. The user received email correspondence from HBL regarding account set up and separate emails from "Hamilton Bradbury Consulting via Signable <document@signable.co.uk>" with links to an online portal to sign the requisite contract of employment and loan agreement.
 - b. The user entered into a contract of employment with HBC.
 - c. HBL entered into a contract for services with the UK agency for the provision of the user's services to an end user. HMRC understand that the UK agency then entered into a contract with the end user for the provision of the user's services, although a copy of such a contract has not been provided to HMRC.
 - d. The user entered into a commercial loan agreement with HBC ("the lender") by which the user ("the borrower") was provided with an unsecured loan ("the loan agreement"). The loan agreement provided that interest shall accrue on the loan at "the fixed and invariable rate" of 4.0% calculated on a daily basis and that the loan is repayable upon receipt of a written demand by the lender on the 10th anniversary of the date of the agreement, unless extended at the lender's discretion.
9. There is no evidence of interest actually being charged or repayment of loans actually being required or made, although it should be noted that the 10th anniversary of the loan has not yet passed.
10. It appears that the amounts paid to the user under the loan agreement are calculated by reference to the amounts invoiced by HBC to HBL for the provision of the user's services to the end user, which effectively constitutes around 75% of the user's income generated from the provision of their services.
11. Multiple examples of each of the steps a, b and d above were contained in the evidence bundle.
12. Evidence obtained from HMRC's enquiries indicate that monies were received and paid as follows:
 - a. HBL issued the UK agency with invoices for gross amounts for the provision of the user's services to end users
 - b. The UK agency made payment to HBL.
 - c. The user subsequently received two separate payments from HBC on the same day constituting their take home pay, the smaller of those being the user's national minimum wage ("NMW") from HBC's PAYE system reference 120/MA86049 and the larger being payments under the loan agreement. Users' bank statements showed the two separate payments and payslips confirm the NMW payments from HBC.
 - d. The take home pay received by the user constituted approximately 82% to 86% of the gross invoice value.

Do the arrangements fall within any description prescribed by the Treasury by regulations?

13. HMRC contends that the arrangements meet section 306(1)(a) by virtue of falling within one or more of the following descriptions in The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006, SI 2006/1543 (“the 2006 Regulations”).

14. The arrangements need only fall within one of the descriptions for the requirement in section 306(1)(a) to be met.

(i) Regulation 8, description 3: Premium Fee

15. The premium fee hallmark provides that a promoter or person connected with a promoter of the arrangements, or arrangements which are substantially similar thereto, would be able to obtain a premium fee from a person experienced in receiving services of the type provided.

Regulation 8, description 3: Premium fee

- (1) Arrangements are prescribed if they are such that it might reasonably be expected
- (2) that a promoter or a person connected with a promoter of arrangements that are the same as, or substantially similar to, the arrangements in question, would, but for the requirements of these Regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided. But arrangements are not prescribed by this regulation if—
 - (a) no person is a promoter in relation to them; and
 - (b) the tax advantage which may be obtained under the arrangements is intended to be obtained by an individual or a business which is a small or medium-sized enterprise.
- (2) For the purposes of paragraph (1), and in relation to any arrangements, a “premium fee” is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which the tax advantage expected to be obtained arises, and which is—
 - (a) to a significant extent attributable to that tax advantage, or
 - (b) to any extent contingent upon the obtaining of that tax advantage as a matter of law.

16. In the recent decision of *HMRC v Smartpay Ltd and another [2022] UKFTT 146 (TC)*, Judge Malek considered the premium fee hallmark and stated at paragraph 22: “The hallmark requires one to envisage a hypothetical promoter of an arrangement which is the same or substantially similar to the arrangement in question and then to ask oneself whether it would be reasonable to expect that such a promoter would be able to obtain a premium fee. It is, therefore, an objective test applied to a hypothetical promoter. The test does not require an examination of the subjective condition of the promoter. The fact that UKCO does not receive a premium fee is neither here nor there. It is equally irrelevant that it would be unreasonable to expect that UKCO as promoter would be in a position to obtain a premium fee for the services that it provided. Both considerations go to the subjective condition of UKCO and are, accordingly, irrelevant.”

17. HMRC contends that in relation to these arrangements, the premium fee is to be a fee chargeable by virtue of the loan element of the arrangements, which accounts for the tax advantage expected to be obtained from using the arrangements. The arrangements here involve an amount being loaned to the user by HBC, in addition to an amount equal to the NMW being paid to the user. The purported effect of the arrangements was that the amount loaned would not be charged to income tax or national insurance contributions (“NICs”). The

NMW wage element would be chargeable, if and insofar as it exceeded the individual's personal allowance. The reduction in income tax and/or NICs is an "advantage" as defined in section 318 under sub-paragraph (a) as a reduced charge to tax which would have otherwise been payable by users.

18. The avoidance by an employer of an obligation to deduct and account for income tax under PAYE procedures and to deduct and account for employee NICs is also a tax advantage within sub-paragraph (c) of the definition of "advantage" in section 318.

19. HMRC have obtained from users "personal illustrations" which were provided to them, indicating the arrangements offered take home pay of 85%. The increase in take home pay referred to in the illustrations is a direct result of the purported reduction in charge to income tax and NICs on the loan element of their earnings. Therefore, 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, these arrangements, would, but for the requirements of the regulations, be able to obtain a premium fee from a person experienced in receiving services of the type being provided.

20. This appears to be supported by the fees in fact charged. The Hamilton Bradbury Companies retained up to 15% of the users' gross contract value each pay cycle. There was a self-billing agreement between the Hamilton Bradbury Companies which showed that that HBL paid 97.5% of users' gross invoice value to HBC. HBL retained 2.5% of the gross contract value and HBC retained approximately 12.5% (having paid out the remainder to users as NMW and payments pursuant to the loan agreements).

21. Users therefore appeared to agree to give say 90% of their taxable income generated by their economic activities to HBC (allowing approximately 10% of the gross contract value to be paid as wages in line with the NMW legislation) in return for receiving around 75% of the gross contract value under loan agreements, which is asserted not to be employment income and so is not liable to tax or NICs. As such, the amounts withheld are paid out of income generated by users' economic activities and ultimately, although indirectly, at users' expense.

22. The amounts withheld by the Hamilton Bradbury Companies are determined by reference to the amounts put through the scheme or, in other words, charged based on users' contract value with the end user. Since processing large sums does not call for significantly more work from the Hamilton Bradbury Companies than processing small sums, the amounts withheld do not reflect the amount of time, effort or risk to the Hamilton Bradbury Companies. HMRC contend that the rewards which the Hamilton Bradbury Companies received therefore must have been attributable to something else. The value of the amounts put through the scheme determine the amount of the tax advantage which users expected to obtain from the arrangements. As the fee is chargeable as a percentage of the contract value, the greater the amount awarded through the arrangements, the greater the expected tax saving (as tax is a percentage of earnings) and therefore the Hamilton Bradbury Companies' cut increases in line with the expected tax saving. The expected outcome of the arrangements is that users receive cash payments to the value of approximately 85% of the income generated by their economic activities with no, or no significant, tax or NICs either deducted and accounted for or payable by their employers or by them and with no practical prospect of being required to repay funds borrowed.

23. It is obvious that no individual would willingly agree to be paid only NMW for work that was commonly paid at much higher rates. Nor would individuals agree to be loaned money if they thought that both the money would need to be paid back and that in another employment a high proportion of that loan would be paid as wages.

24. It is therefore clear that the tax purported tax advantage was an integral and main feature of the scheme, and was implemented in order to gain that tax advantage.

25. The tax advantage is the main, if not the only, benefit of the arrangements. It is only because of the tax advantage that users are willing to give up 15% of their pre-tax income by agreeing to the Hamilton Bradbury Companies withholding and retaining that amount. The amount withheld shows the size of fee that could have been obtained and that is only attributable to the tax advantage to which the transactions purportedly give rise.

26. I agree with HMRC that the arrangements therefore fall within the description in regulation 8.

(ii) Regulation 10, description 5: Standardised Tax Products

The Standardised Tax Products description was amended in 2016 by SI 2016/99.

Regulation 10, description 5: Standardised tax products
Prior to 23 February 2016, description 5 of regulation 10 provided as follows:

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

(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.

Since 23 February 2016, description 5 of regulation 10 provides as follows:

(1) Subject to regulation 11, arrangements are prescribed if a promoter makes the arrangements available for implementation by more than one person and the conditions in paragraph (2) are met.

(2) The conditions are that an informed observer (having studied the arrangements and having regard to all relevant circumstances) could reasonably be expected to conclude that –

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

(i) the purpose of which is to enable a person to implement the arrangements;

- (ii) the form of which is determined by the promoter; and
- (iii) the substance of which does not need to be tailored, to any material extent, to enable a person to implement the arrangements;
- (b) a person implementing the arrangements must enter into a specific transaction or series of transactions;
- (c) the transaction or series of transactions is standardised, or substantially standardised, in form; and
- (d) either the main purpose of the arrangements is to enable a person to obtain a tax advantage or the arrangements would be unlikely to be entered into but for the expectation of obtaining a tax advantage.

27. In relation to current regulation 10(1) and former regulation 10(4), HMRC contend the requirements are met on the basis that the arrangements were made available for implementation by more than one person.

28. HMRC state that in 2017/2018 there were approximately 900 users of the arrangements. The Tribunal has not been provided with complete lists of all the users, but from the evidence provided in the form of contracts of employment, loan documents, and details from the HBL of employees paid under umbrella arrangements it is clear that there were many users of these arrangements.

29. HMRC say that evidence obtained by them demonstrates the requirements of current regulation 10(2)(a) to (c) and former regulation 10(1) and (2) are also clearly met.

30. Documentation obtained by HMRC indicates the arrangements are substantially similar in relation to each user, varying only in relation to the personal details of the individuals involved and the monetary sums. The documents were not tailored to any material extent to suit the individual circumstances of the different parties. Evidence provided to the Tribunal showed multiple identical loan agreements and contracts of employment, varying only in personal details and monetary sums. Whilst it may be common for employers to have standardised agreements, given that for example the Bank of England base rate, and the official beneficial loan rate varied over the period, it might be expected that there would be some variation in loan arrangements to reflect this.

31. Following execution of the above standardised documents, each user was placed into HBC's PAYE system reference 120/MA86049 where they received their NMW and payments in the form of a loan pursuant to the loan agreements. There was no significant difference in the way the arrangements operated with the series of transactions being broadly the same for each user.

32. On the basis of the above, it would appear that HBL, HBC or both together pre-determined the form of the series of standardised documents, which are integral to the series of standardised transactions which users entered into. The purpose of these documents and transactions was to enable the implementation of the arrangements by users.

33. In relation to current regulation 10(2)(d) and former regulation 10(3), HMRC contend it would be reasonable for an informed observer (having studied the arrangements) to conclude the main purpose of the arrangements was to enable users to obtain a tax advantage.

34. It is clear from the evidence provided by HMRC, both from 'personal illustrations' provided to users, and from information provided by the users to HMRC, that low

taxation/increased money in their bank account every month was the main marketed benefit to this arrangement.

35. There does not appear to be any other significant benefit to the arrangements.

36. I agree with HMRC that the conditions for both the former and current regulation 10 hallmark apply in this case.

37. As it is only necessary for one hallmark to apply, and I have considered two hallmarks and found them both to apply, I have not considered whether any other hallmarks apply.

s306 (1) (b) and (c)

38. As I have found s306 (a) applies, I now need to consider whether the requirements of section 306(1)(b) and (c) FA 2004 are met.

39. These are met where the arrangements:

(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.

40. As mentioned above, the evidence from the written personal illustrations, and from communications between users of the arrangements and HMRC, show that the amount of cash received per month, and the difference between amount and the amount of cash that might be expected from using either a personal limited company or a direct employment relationship were foremost in the marketing to the users and the understanding of the arrangements by the users.

41. According to the evidence provided, the users did not view the loans as something that required repaying. One user said 'I have not repaid any of the loans, I don't actually understand how the loan works...In terms of repaying the loans....I was originally told this never happens. If this does happen I don't have any source of funds to repay the loans'.

42. Users had also been told that the arrangements reduced tax. For example 'X had been advised by HBL of the benefits of having a proportion of his emoluments paid in the form of a loan and out of the Isle of Man. As an offshore tax jurisdiction, these emoluments would not attract a charge to either income tax or employers/employees NI contributions.'

43. As mentioned above, it is not credible that an individual would willingly agree to be paid far below the market rate for his or her services, and to be advanced an amount that, even if it was slightly more than they might receive through a payroll, would need to be paid back with interest.

44. It is clear that the individuals entering into the agreement were told, and believed, that the loan would not need to be repaid and that interest would not need to be paid.

45. It is noticeable that even though HBC was dissolved, there was no attempt to call in the loans that had been made to hundreds of individuals.

46. Therefore the reduction in income tax that arose from only the NMW being put through the payroll was an 'advantage in relation to tax'.

47. There is no other credible benefit from these arrangements, and therefore the tax advantage is the main benefit.

48. I conclude that the requirements of s306(1)(b) and (c) FA 2004 are met.

PROMOTER

49. As HMRC has withdrawn the application in respect of HBC, I am only considering whether HBL is a promoter in respect of these 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.

(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...

50. HMRC contend that HBL is a promoter under s307(1)(a)(iii). They contend that the ‘relevant business’ of HBL was facilitating the arrangements of the contracts designed to enable minimisation of income tax and National Insurance Contributions, and that this is therefore a relevant business involving the provision to other persons of services relating to taxation.

51. HBL was the gateway for employment contracts to be signed with HBC. It appears from the evidence in the bundle that it was not clear to end users that there was an offshore company in the employment arrangements. The emails sending links to the documents were sent by HBL and reference what HBL would do, for example ‘during working hours we process your invoices the same day we receive them’.

52. I concluded above that the main purpose of these arrangements was to obtain a benefit in relation to taxation. As HBL was paid for its part in these arrangements, I conclude that HBL had a business which involved the provision to other persons of services relating to taxation, and hence this was relevant business.

53. In relation to s307(1)(a)(iii) it is clear that the notifiable proposal was ‘made available for implementation by other persons’ by HBL. The bundle contains examples of emails from HBL to end users with links to all the documents required to enter into the arrangements.

54. HBL also appears to be significantly involved in the organisation or management of the arrangements, as HBL invoiced UK agencies on behalf of users, received payments from UK agencies on behalf of users, issued full VAT invoices to HBC in relation to the amounts HBL owed HBC (which it was required to settle by paying HBC in return for the services users provided to end users in their capacity as HBC employees) and transferred the above funds to

HBC. Without HBL's involvement the income received would not reach HBC and be paid to the end users. The issuing of invoices to agencies is therefore crucial to the arrangements, and therefore HBL is involved in a critical part of the organisation of the arrangements.

55. I therefore find that HBL is a promoter under s307(1)(a)(iii) and 307(1)(b)(ii).

56. The relevant legislation in respect of National Insurance Contributions is section 132A Social Security Administration Act 1992 and National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2012, SI 2012/1868.

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

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

(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 is a notifiable contribution proposal or the arrangements are notifiable contribution arrangements; and

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

(4) Reasonable steps under paragraph (3)(a) may (but need not) include taking action under regulation 17 or 18.

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

(a) the fact that the relevant arrangements fall within a description prescribed by the Descriptions Regulations;

(b) an attempt by the promoter to avoid or delay providing information or documents about the proposal or arrangements under or by virtue of regulation 17 or 18;

(c) the promoter's failure to comply with a requirement under or by virtue of regulation 17 or 18 or section 313A or 313B in relation to another proposal or other arrangements.

(6) Where an order is made under this regulation in respect of a proposal or arrangements, the period for the purposes of paragraphs (1) and (3) of regulation 8 is that prescribed.

(7) An order under this regulation in relation to a proposal or arrangements is without prejudice to the possible application of regulation 8, other than by virtue of this regulation, to the proposal or arrangements.

57.

7.—(1) For the purposes of this Part a person is a promoter—

(a) in relation to a notifiable contribution 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 proposal with a view to P making the proposal available for implementation by C or any other person; or

(iii)makes the notifiable contribution proposal available for implementation by other persons; and

(b)in relation to notifiable contribution arrangements, if the person (“P”) is by virtue of sub-paragraph (a)(ii) or (iii) a promoter in relation to a notifiable contribution proposal which is implemented by those arrangements or if, in the course of a relevant business, P is to any extent responsible for—

(i)the design of the arrangements, or

(ii)the organisation or management of the arrangements.

58. I find the requirements of the legislation in relation to National Insurance are also met, for the reasons given above.

DECISION

59. For the reasons given above, I make an order under s314A Finance Act 2004 that the arrangements are notifiable within the meaning of s306(1)FA 2004.

60. Right to apply for permission to appeal

61. By virtue of article 3(i) of the Appeals (Excluded Decisions) Order 2009 (SI 2009/275) any decision of this Tribunal about the applicability of section 314A and section 306A of the Finance Act 2004 is an excluded decision for the purposes of section 11(1) of the Tribunals, Courts and Enforcement Act 2007 and accordingly there is no right of appeal against this decision.

**SARAH ALLATT
TRIBUNAL JUDGE**

Release date: 02nd FEBRUARY 2023