TC07701

INCOME TAX/CORPORATION TAX—Appeal against data-holder notice under Schedule 23 FA 2011—Appeal against information notice under Schedule 36 FA 2008—Appeal against penalties

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/07620
TC/2017/02275
TC/2017/01995
TC/2017/01974
TC/2017/02089

BETWEEN

QUBIC TAX LTD
ASSETHOUND LTD
ORCHARD STREET SERVICE CO LTD
QUBIC TRUSTEES LTD
QUBIC TAX LTD **Appellant**

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE CHRISTOPHER STAKER

Sitting in public at London on 4 and 5 February 2019

Keith Gordon, counsel, for the Appellants

Paul Shea, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. These cases which were heard together involve appeals against:

   (1) a data-holder notice issued by HMRC under Schedule 23 to the Finance Act 2011 ("**Schedule 23**"), and

   (2) information notices issued by HMRC under Schedule 36 to the Finance Act 2008 ("**Schedule 36**") and against penalties for failure to comply with those notices.

2. The relevant legislation relating to Schedule 23 data-holder notices is set out in Appendix A to this decision, and that relating to Schedule 36 information notices is set out in Appendix B.

3. Background to each of the appeals is set out in Appendix C.

4. The witness evidence given in the proceedings is set out in Appendix D.

THE MATTERS UNDER APPEAL

5. In appeal TC/2017/02089, Qubic Tax Ltd ("**Qubic Tax**") appeals against two Schedule 23 data-holder notices in respect of tax years 2013-2014 and 2014-15 respectively.

6. In appeal TC/2017/07620, Qubic Tax appeals against two Schedule 23 data-holder notices in respect of tax years 2015-2016 and 2016-17 respectively.

7. In appeal TC/2017/01974 (with which two other appeals, TC/2017/01975 and TC/2017/01976, have been consolidated), Qubic Trustees Ltd ("**Qubic Trustees**") appeals against Schedule 36 information notices in respect of the periods ending 31 March 2014 and 30 September 2014 respectively, and against an initial penalty and daily penalties for failure to comply with the information notices.

8. In appeal TC/2017/01995 (with which two other appeals, TC/2017/01997 and TC/2017/01999, have been consolidated), Orchard Street Service Co Ltd ("**Orchard**") appeals against a Schedule 36 information notice in respect of the period ending 30 September 2014, and against an initial penalty and daily penalties for failure to comply with the information notice.

9. In appeal TC/2017/02275, Assethound Limited ("**Assethound**") appeals against a Schedule 36 information notice issued by HMRC for the accounting period ended 30 September 2014.

10. The Appellants' skeleton argument for the hearing contained an Appendix setting out, in relation to each of the appeals, the relevant items in the notices appealed against that were still in dispute. Each of these items is identified and considered below.

THE PARTIES' CASES

General submissions on law

The Appellants' general submissions on Schedule 36

11. An information notice can only require the provision of information and documents that are "reasonably required" for purposes of checking the taxpayer's position (paragraph 1 of Schedule 36). Schedule 36 does not entitle HMRC to obtain information merely because they would like to see it or would be interested to see it. Schedule 36 cannot be used by HMRC to obtain information for a collateral purpose, such as checking the tax position of a third party.

There is a difference between HMRC being subjectively interested in seeing information, and HMRC objectively reasonably requiring it. In an appeal against an information notice, the Tribunal decides as at the date of hearing whether the information and documents are "reasonably required", the burden of proof being on HMRC (*Longson v Baker (Inspector of Taxes)* [2001] STC 6 ("***Longson***")). Where HMRC have sufficient information to make a decision, they do not reasonably require further information. This is certainly the case once HMRC have actually made a decision.

12. It is not reasonable to make an enquiry into a person's tax position if the position established by the information sought through the information notice could not be corrected by an enforceable assessment (*Hegarty v Revenue & Customs* [2018] UKFTT 774 (TC) ("***Hegarty***") at [155]). HMRC cannot issue an information notice on the basis that the information thereby obtained might provide grounds for the issuing of the information notice (*Betts v Revenue & Customs* [2013] UKFTT 430 (TC)).

13. Information notices should be expressed in clear terms, so that it is straightforward for a taxpayer to know what is required in order to comply with it (*RD Utilities v Revenue & Customs* [2014] UKFTT 303 (TC) ("***RD Utilities***") at [10]). Vague notices are unenforceable and should be struck down; HMRC can always issue fresh information notices that comply with legal requirements (*Anstock v Revenue & Customs* [2017] UKFTT 307 (TC)). The power of the Tribunal under paragraph 32(3) of Schedule 36 to vary an information notice is confined to the correction of obvious errors. It is not for the Tribunal to rewrite an information notice substantively, and the appropriate course where an information notice is impermissibly vague is to quash the notice and remit the matter to the HMRC decision maker.

14. In an appeal against an information notice, it is for the Tribunal and not HMRC to determine what are "statutory records" for purposes of paragraph 29(2) of Schedule 36. The context of the enquiry determines the relevant definition of statutory record (*Mumbai Kitchen (Bromley) Ltd v Revenue & Customs* [2016] UKFTT 313 (TC) at [23]-[27]). In the context of an enquiry into a company tax return, "statutory records" would not include records required to be kept by VAT legislation.

15. In the context of an enquiry into a company tax return the relevant provisions determining what are "statutory records" are paragraphs 21 and 22 of Schedule 18 to the Finance Act 1998. Paragraph 21(1)(a) requires a company to "keep such records as may be needed to enable it to deliver a correct and complete return for the period". A spreadsheet recording transactions would be sufficient to meet the requirement of this paragraph, which imposes no requirement to keep underlying business records. Original receipts may be statutory records in certain cases (for instance, in the case of a small trader who keeps receipts in a shoe box), but will not necessarily be statutory records in other contexts. The regulation-making power in paragraph 21(5A) has never been used in the 20 years since it was enacted. VAT legislation is more specific as regards what records are required to be kept. If HMRC does not know what records a company has kept, it cannot know what statutory records that company has.

16. Paragraph 19(1) of Schedule 36 provides that an information notice does not require a person to provide certain information relating to the conduct of a pending appeal. This is a broad provision, and includes a PAYE determination under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (the "**PAYE Regulations**").

17. Paragraph 25 of Schedule 36 provides that an information notice does not require a tax adviser to provide certain information. This provision extends professional legal privilege to tax advisers.

18. A penalty for non-compliance with a Schedule 36 information notice does not arise if there is a reasonable excuse for the failure (paragraph 45 of Schedule 36). The fact that there

is a pending appeal against the information notice is a reasonable excuse (*Sokoya v Revenue & Customs* [2009] UKFTT 163 (TC) ("***Sokoya***")).

The Appellant's general submissions on Schedule 23

19. While it appears that there is no case law on the matter, the Tribunal can declare a data-holder notice to be invalid if it is issued for a collateral purpose.

20. The onus is on HMRC to prove that the statutory requirements for issuing a Schedule 23 notice are met.

HMRC general submissions on Schedule 36

21. The burden rests with HMRC, if relevant, to demonstrate that the information in dispute is reasonably required for the purpose of checking the tax position.

22. The burden rests with HMRC to demonstrate that the Appellants are liable to the penalties.

23. The burden rests with the Appellants, if relevant, to demonstrate that the provision of the information is onerous, that they have a reasonable excuse for non-compliance with the notice, and, if appropriate, that the information is not in their possession or power.

24. Paragraph 62 of Schedule 36 states that information or a document is a statutory record if it is information or a document which the person is required to keep and preserve under or by virtue of the Taxes Acts.

25. Statutory records include sales records, bank records and records of debtors (reliance was placed on paragraph 62 of Schedule 36, paragraphs 21 and 22 of Schedule 18 to the Finance Act 1998, and *Couldwell Concrete Flooring Ltd v Revenue & Customs* [2015] UKFTT 135 (TC) ("***Couldwell***") at [19]-[27]). A private account used for a large number of business transactions may be a business record and therefore a statutory record (reliance was placed on *Beckwith v Revenue & Customs* [2012] UKFTT 181 (TC) at [62]-[66]).

Appeals TC/2017/02089 and TC/2017/07620 (Qubic Tax)

The Appellant's case

26. The underlying principles of Schedule 23 (such as clarity) are the same as with Schedule 36. The notices under appeal are not clear as to what part of the documentation constitutes the statutory notices and what is merely a covering letter. In the information notices relating to 2013-14 and 2014-15, it is totally unclear what information is actually being required from the company. Most evidently, the requests for details of "payments … for the period 06 April 2013 to 05 April 2014" and "payments …for the period 06 April 2014 to 05 April 2015" are unclear as to whether HMRC want details of payments made in those periods, or details of payments relating to services provided in those periods.

27. HMRC have not established that the statutory criteria for the issuing of a Schedule 23 data-holder notice are met. Their only basis for asserting that the criteria are met is the company's answer to the March 2016 questionnaire. The questionnaire was clumsily worded, and provides no useful information or basis for believing that anything happened at this particular point in time. HMRC contend that the information is required to ascertain whether recipients of commissions which might have been paid have included the commissions in their books. However, as the suspected recipients of commissions are professional firms, they are unlikely not to have included any commissions in their books, and in any event HMRC have

no evidence that any commissions were ever paid. HMRC have provided only anecdotal evidence of one specific incident that is said to have occurred.

28. The wording of the notices under appeal lacks clarity. The original notices were withdrawn due to lack of clarity. The new notices now under appeal remedied some of the problems with the earlier notices but not all. It is not clear which document is the Schedule 23 notice and which document is the covering letter. It is not clear whether the notice requires details of each individual payment or the gross amount paid to each payee. It requires details to be given of payments made "directly or otherwise" but is unclear as to what is meant by "or otherwise". The notices require details to be given of the "period end date", but does not state whether it requires details of payments made in the relevant period or of payments in respect of work done in the relevant period. The 3 February 2017 review decision accepted that the aspect of the notices referred to in the previous sentence was unclear. However, rather than suggesting the withdrawal and further replacement of the notices, the reviewer has impermissibly sought to amend the notices and change their meaning. The ambiguity cannot be resolved by reference to the HMRC guidance, since in the case of a discrepancy between a Schedule 23 notice and the HMRC guidance, the addressee of the notice must comply with the notice. It must be noted that a Schedule 23 notice relates to the tax affairs of a third party, not those of the addressee of the notice.

29. Qubic Tax is regulated by the Institute of Chartered Accountants in England and Wales which imposes a duty of client confidentiality on its members, and Qubic Tax is therefore not allowed to supply information to HMRC beyond that stipulated in a valid information notice (referring to *Wilsons Solicitors LLP v Revenue & Customs* [2018] UKFTT 627 (TC) ("***Wilsons Solicitors***") at [27]). It was Qubic Tax's right, and probably their duty to their clients, in circumstances where the law lacked clarity, to appeal against the data holder notice in order to test whether they were obliged to give HMRC the information which HMRC sought.

The HMRC case

30. Qubic Tax appears to challenge the validity of the notices, rather than raise a valid ground of appeal in accordance with paragraph 28 of Schedule 23.

31. The notices were validly issued. HMRC are aware that Qubic Tax carries on a business in connection with which relevant payments are or are likely to be made. Those relevant payments are introducer commission payments, being payments made by Qubic Tax to persons who are not directly employed in Qubic Tax's business in return for the latter introducing clients to Qubic Tax. Qubic Tax is therefore a relevant data-holder in accordance with paragraph 9(1)(d) of Schedule 23. The data sought is relevant data under regulation 3 of the Data Gathering Powers (Relevant Data) Regulations 2012 (the "**Relevant Data Regulations**"), in that it is information relating to relevant payments made in connection with a business, or a part of a business.

32. The notices subject to this appeal were issued in order to obtain details of commission payments made by Qubic Tax to its introducers. The data will enable HMRC to check the tax position of the recipients of the commissions, and to review the tax position of the recipients for possible action under DOTAS and/or the Promoters of Tax Avoidance Schemes ("POTAS") legislation at Part 5 of the Finance Act 2014.

33. Paragraph 3(2) of Schedule 23 requires an officer of HMRC to have reason to believe that the data could have a bearing on a chargeable or other period ending within the 4-year period prior to giving the notice. The Tribunal must be satisfied that the officer holds the relevant opinion (*R (Derrin Brother Properties Ltd) v HM Revenue and Customs* [2014] EWHC 1152 (Admin)). In this case, HMRC required the data to identify the recipients of

payments made by Qubic Tax to persons not employed in its business, namely introducer commission payments for, or in relation to, the introduction of clients or potential clients. Qubic Tax's response to the early warning letter confirmed that Qubic Tax makes payments to introducers in return for the introduction of clients or potential clients. HMRC therefore have reason to believe that the required data could have a bearing on each of the specific periods for the introducers who have received commissions for introducing new or potential clients to Qubic Tax.

34. The evidence of Officer Clark given at the hearing demonstrates that he had sufficient knowledge that Qubic Tax was paying commissions. It is not necessary for the officer issuing the notice to have absolute knowledge.

35. The indicated tax year for each of the notices falls within the applicable period prescribed in paragraph 3(3) of Schedule 23.

36. It is clear which document is the Schedule 23 notice and which document is the covering letter. HMRC accept that the notices contain an error, in that the "Schedule" begins with the sentence: "The enclosed notice requires you to send me…". That sentence should read: "*This notice* requires you to send me…." However, this error is not fatal as the requirements of the notices can be readily ascertained despite the error, and the notices are in substance and effect in conformity with the intent and meaning of the Taxes Acts (s 114 Taxes Management Act 1970 ("**TMA**")). The error is not so grievous as to render the notices invalid.

37. The conclusion of the HMRC officer does not, in effect, amend the content of the notices themselves. The requirements of the notice can be readily understood and the review officer's comments merely clarify those requirements. The notices are drafted in sufficiently precise terms, such that they are valid and must be complied with. Significant amounts of guidance were given as to what was required.

38. The required data form part of Qubic Tax's statutory records, that is to say records required to be kept and preserved under any tax enactment (paragraphs 45 and 46(1) of Schedule 23). Data ceases to form part of a data-holder's statutory records when the period for which they are required to be preserved has expired. An appeal cannot be made on the grounds that a requirement is unduly onerous if the requirement is to provide data forming part of the data-holder's statutory records (paragraph 28(2) of Schedule 23).

39. Qubic Tax was registered for VAT from 1 February 2008 until 14 August 2014, when it became part of a VAT group. It has therefore been a taxable person for the purposes of VAT since 1 February 2008. The data sought relate directly to the business records of Qubic Tax, and therefore forms part of the statutory records that it must keep and preserve according to paragraph 6 of Schedule 11 of the Value Added Tax Act 1994 ("**VATA**"). Regulation 31(1)(a) of the Value Added Tax Regulations 1995 requires every taxable person to keep their business and accounting records. The records must be kept for a minimum of six years (paragraph 6(3) of Schedule 11 to VATA). The data is part of Qubic Tax's everyday business records, which must be kept and preserved for the purposes of VAT and in accordance with Schedule 18 to the Finance Act 1998.

40. Further or alternatively, Qubic Tax is a registered company and therefore is required to hold records under paragraph 21 of Schedule 18 to the Finance Act 1998. Any company which may be required to deliver a company tax return must keep and preserve such records as may be needed to enable it to deliver a correct and complete return for the period (paragraph 21(1)). This includes records of all receipts and expenses in the course of the company's activities and the matters in respect of which the receipts and expenses arise (paragraph 21(5)(a); *Couldwell* at [23].)

41. Alternatively, even if the relevant data do not form part of Qubic Tax's statutory records, it would not be unduly onerous for Qubic Tax to comply with the notices in any event.

Appeal TC/2017/01974 (Qubic Trustees)

The Appellant's case

42. Qubic Trustees' position is more or less identical to that for Orchard (see below). Additionally, Qubic Trustees relies on the exemption in paragraph 25 of Schedule 36 for "tax advisers". That exemption extends not only to "relevant communications", but to "provid[ing] information *about* relevant communications" (emphasis added). Thus, any information which relates to tax advice falls within the exemption. Furthermore, a communication is relevant, not only if it conveys tax advice, but also if it is for the purposes of giving or obtaining tax advice.

The HMRC case

43. HMRC has opened enquiries into the tax returns of Qubic Trustees for the relevant periods. Such enquiries can be a full or an aspect tax check. HMRC is not required to give reasons for making enquiries. HMRC can request information that is reasonably required for the purposes of checking the tax position. The information requested is reasonably required in the context of a tax check of this type, being a full enquiry. None of the items are novel or unusual. They are items (business books, records and accounts analysis) that HMRC normally requests when performing tax checks of business taxpayer returns and associated accounts, which underpin the tax computations and ultimately the return. The HMRC officers responsible for the enquiries have provided witness statements that addresses this contention on a point by point basis.

44. No explanation has been provided by Qubic Trustees as to why it would be onerous for them to comply. The information already exists, being standard books, records and accounts analysis work, which must be retained in physical or electronic form. HMRC has offered to accept the information in electronic form if that would assist.

45. Qubic Trustees asserts that the requests are broad and inherently unclear, but do not expand with precise reasons as to why they cannot comprehend the notice. The requests are clear and comprehensible in terms of what is being asked for. The items not provided are prime business records and an analysis of debtors. Qubic Trustees must know what books and records they have, what they have already provided to HMRC, so by definition they must know what they have not provided, or be able to confirm that nothing further exists.

46. The items not supplied are statutory records. Under paragraph 29(2) of Schedule 36 there is no right to appeal against the requirements of the notices.

47. Qubic Trustees has failed to comply with the notices. It does not have a reasonable excuse for not complying with the notices.

48. Paragraph 40(2) provides for daily penalties not exceeding £60 per day. HMRC have assessed the penalties at £25 per day and submit that this is reasonable in all the circumstances, taking into account the partial compliance and the nature of the items not provided, which HMRC say are statutory records. The HMRC officer who assessed the penalties has provided in her witness statement the reasons for setting the penalty at this amount.

Appeal TC/2017/01995 (Orchard)

The Appellant's case

49. Twelve of the items in the information notice were fully complied with even before Orchard had even received the formal information notice. The objections to the remaining two items (items 5 and 6 in the original notice) include the lack of specificity of the request and the inherent onerousness of providing every business record in order to satisfy what appear to be HMRC's unreasonable whims.

50. Items 5 and 6 are not "statutory records". The relevant definition of statutory record is found in the Finance Act 1998, Schedule 18, paragraph 21(1), being "such records as may be needed to enable [the company] to deliver a correct and complete return for the period". This definition is entirely non-prescriptive as to what records a company is obliged to keep, and as long as it records the company's income and expenditure then it is sufficient. Orchard contends that item 14 has been complied with.

51. The penalties are wholly inappropriate (and excessive) particularly given that Orchard has been trying to engage with HMRC in relation to the remaining requests, and had repeatedly sought to respond to and address HMRC's alleged concerns, and HMRC have refused to engage meaningfully. It is a reasonable excuse for a recipient of an information notice not to comply with the notice whilst that notice is subject to a Tribunal appeal, since any such appeal would otherwise be rendered nugatory (referring to *Sokoya* at [23]). Given that the extant appeal means that compliance must be deferred until *after* the Tribunal's decision (Schedule 36, paragraph 32(4)), it is implicit that there has in fact, as yet, been no compliance failure. In the cases of Assethound and Qubic Tax, HMRC recognised this and cancelled earlier penalty notices once it became apparent that the underlying information notices were under appeal.

The HMRC case

52. The HMRC position is more or less identical to that for Qubic Trustees (see above).

Appeal TC/2017/02275 (Assethound)

The Appellant's case

53. The information notice appealed against was issued in the context of a corporation tax self-assessment enquiry opened on 20 November 2015 in relation to Assethound's returns for the year to 8 May 2014 and the accounting period from 9 May 2014 to 30 September 2014. Although the original enquiry was stated to be "checking the whole of the return[s]", the notice under appeal is expressly limited to the accounting period which ended on 30 September 2014, and focuses solely on an "Employers Benefit Trust".

54. HMRC already have a number of documents relating to the trust, and Assethound has already provided a considerable number of documents to HMRC. HMRC may require the information sought only if that information is "reasonably required" for the purposes of checking the company's own tax position (Schedule 36, paragraph 1(1)). HMRC cannot legitimately use a taxpayer notice issued to Assethound Ltd in order to check up on a different taxpayer's tax position (such as that of the employee who has benefited under the arrangements). HMRC have not shown why the considerable information provided to date is inadequate for the purposes of allowing HMRC to form a view on these two matters, and how the provision of the information sought will be of any practical assistance to HMRC in these endeavours. The burden of proof lies on HMRC to show that the information is reasonably required, and HMRC has not done so in this case.

55. Each particular request in an information notice must be clear and unambiguous (referring to *RD Utilities* at [10]).

56. On 18 January 2019, Assethound received a determination under regulation 80 of the PAYE Regulations in respect of the 2014-15 and 2015-16 tax years. It has appealed against those determinations. It appears that these PAYE determinations are issued in relation to precisely the same matters as lie at the heart of the information requests under appeal. Once a formal appealable decision has been reached concerning the arrangements entered into by Assethound concerning the remuneration of Mr Graham, the documents requested in the Schedule 36 notice are no longer reasonably required (reliance is placed on *Hegarty* at [155]). "Required" should be all but likened to "necessary" (reliance is placed on *Longson*).

The HMRC case

57. Assethound disclosed on its tax returns for the periods ending 8 May 2014 and 30 September 2014 the use of a tax avoidance scheme, the Assethound Limited Employee Trust 2014 (the "EBT").

58. The burden rests with HMRC to demonstrate that the items in dispute are reasonably required for the purpose of checking the tax position. The burden rests with Assethound, to the extent that it asserts that the notice is unclear, to demonstrate why it cannot understand it.

59. HMRC is not required to give reasons for making enquiries. Assethound is aware that HMRC is making enquiries into the EBT arrangements.

60. To establish what the tax implications of the EBT arrangements are, it is necessary for HMRC to have sight of all relevant documents and information relating to the implementation of those arrangements. As these are complex arrangements, it is not possible for HMRC to say with certainty what might exist so the information requested is, of necessity, comprehensive. However, the information notice is based on HMRC experience in relation to similar arrangements and an awareness of what is likely to exist, what is required to establish the arrangements, how they work, and how they have been implemented.

61. The documents requested must exist, as some are referred to in other items already provided by Assethound, and can therefore be provided. Alternatively, Assethound can confirm that they do not exist.

62. Each item is reasonably required and Assethound will have access to the necessary records to produce it. The HMRC officer responsible for enquiries has provided a witness statement in evidence setting out why each item is reasonably required.

63. HMRC is requesting documents that relate to the implementation of the EBT arrangement with a view to establishing the correct tax position for this period. Only Assethound can know exactly what documentation was supplied or created and when. To the extent that it was supplied or created prior to 9 May 2013, it is still relevant to informing what the tax position of the EBT arrangements are in the accounting/tax return periods that are under enquiry.

64. Requested item 5 is specific and relevant. HMRC is requesting copies of documents provided by Qubic Tax Ltd (the scheme provider) in which the EBT arrangements were mentioned. This request is directly relevant to the affairs of Assethound, being documents held by Assethound and relating to its use of the EBT arrangements.

65. The requests in the information notice are clear in scope and comprehensible to Assethound. The accounting period is identified on the schedule to the notice and each of items 16-21 is clear and specific. These items can be complied with by Assethound.

THE TRIBUNAL'S FINDINGS

Appeals TC/2017/02089 and TC/2017/06720 (Qubic Tax)

66. The appendix to the Appellants' skeleton argument for the hearing confirmed that the only items in the data-holder notices that remain in dispute are the requests for details of "commission" payments made by Qubic Tax in 2013-14, 2014-15, 2015-16, and 2016-17.

67. The Tribunal is a creature of statute, and has only such jurisdiction as is conferred upon it by statute. Paragraph 28 of Schedule 23 confers jurisdiction on the Tribunal to determine appeals against data-holder notices, but only where those appeals are brought on the basis of one or more of three specified grounds of appeal.

68. No jurisdiction is conferred on the Tribunal to hear an appeal brought against a document purporting to be a data-holder notice on the ground that the document, although purporting to be a Schedule 23 data-holder notice, is not in fact a data holder notice at all because it fails to comply with the legal requirements for such a notice, or because there were public law errors in the decision to issue the notice.

69. The documents against which Qubic Tax seeks to appeal are either valid and lawful data-holder notices for purposes of paragraph 28 or they are not. If they are, Qubic Tax can appeal against them to the Tribunal but only on one or more of the three grounds specified in paragraph 28. If they are not, the Tribunal has no jurisdiction to entertain an appeal against them. Any challenge to a data-holder notice on any grounds other than those specified in paragraph 28 could be brought in judicial review proceedings, but cannot be brought in a Tribunal appeal.

70. Qubic Tax understandably does not seek to argue that the Tribunal lacks jurisdiction in this appeal on the basis that the challenged documents in this case are not valid data-holder notices for purposes of paragraph 28.

71. The Tribunal is satisfied that the documents against which Qubic Tax seeks to appeal are indeed data-holder notices for purposes of paragraph 28. It finds as follows.

72. The essential requirements of a data-holder notice are set out in paragraphs 1-3 of Schedule 23. However, it is clear from paragraph 28 that a document may be a data-holder notice for purposes of paragraph 28 (that is to say, a document in respect of which there is a right of appeal to the Tribunal on specified grounds), even if all of those requirements are not met. Specifically, a document may be a data-holder notice for purposes of paragraph 28 even if the person specified in the document as the data-holder is not in fact a "data-holder" (as required by paragraph 1(1) and (2)), and even if the data specified in the document is not in fact "relevant data" (as required by paragraph 1(1) and (3)). This is clear from paragraph 28, which confers a right of appeal against a document on the basis that either or both of those two requirements are not met.

73. This leaves open the possibility that a document may be a data-holder notice for purposes of paragraph 28 even if certain other of the requirements of paragraphs 1-3 are not met. For instance, paragraph 3(2) provides that "Relevant data may not be specified in a data-holder notice unless an officer of Revenue and Customs has reason to believe that the data could have a bearing on chargeable or other periods ending on or after the applicable day". Suppose that a document purporting to be a data-holder notice failed to meet that requirement. If that document, by reason of the failure to meet that requirement, was not a data-holder notice for purposes of paragraph 28, the result would be that it is not possible to appeal against that document to the Tribunal. On the other hand, if that document, although not meeting that requirement, was still a data-holder notice for purposes of paragraph 28, it would be possible

to appeal against that document to the Tribunal, although only one or more of the grounds specified in that provision.

74. It is in the interests of those to whom documents purporting to be data-holder notices are addressed that the definition of a data-holder notice for purposes of paragraph 28 be drawn widely, so as to expand the circumstances in which such documents can be challenged in a Tribunal appeal rather than judicial review. For instance, suppose that a document purporting to be a data-holder notice failed to comply with paragraph 3(2) and also specified data none of which was "relevant data". If the failure to comply with paragraph 3(2) meant that the document was not a data-holder notice at all for purposes of paragraph 28, there would be no possibility of a Tribunal appeal, and the only remedy of the addressee of the document would be judicial review. On the other hand, if the document was a data-holder notice for purposes of paragraph 28, a Tribunal appeal would be possible. True, it would not be possible to appeal on grounds of failure to comply with paragraph 3(2) (which is not one of the grounds specified in paragraph 28 and any challenge on the basis of which would still need to be brought by way of judicial review), but it would be possible to appeal on the basis that none of the data specified in the notice was "relevant data". If an appeal brought on that basis succeeded and the data-holder notice was set aside by the Tribunal on that basis, that would render judicial review proceedings unnecessary.

75. Qubic Tax argues, in relation to the data-holder notices in respect of 2013-14 and 2014-15, that it was served with two separate documents, and that it is unclear which of the two is the data-holder notice, and which is a covering letter or other accompanying document.

76. For instance, for the period 6 April 2013 to 5 April 2014, Qubic Tax was simultaneously served with two documents, both of which are dated 31 August 2016, both of which bear the heading "Notice under Paragraph 1, Schedule 23 to the Finance Act 2011", and each of which duplicates much of the information in the other. Furthermore, each of the two documents contains the words "The enclosed notice" with the result that each of the documents suggests that the other is the actual data-holder notice.

77. On its own consideration of the documents, the Tribunal is satisfied that it would be reasonably clear to anyone receiving the documents that the document that is the actual data-holder notice is the one that contains text in a box stating: "Therefore take notice that under the above provisions I hereby require you by 31 October 2016 to make and deliver to me at the above address, using the means and format described in the enclosed letter, a return of data specified in the schedule below". That document is clearly expressed as imposing an obligation on the recipient. The other document does not contain any language of this kind.

78. In any event, even if there were any possibility for doubt about this, the Tribunal sees no reason why two documents sent together at the same time could not jointly constitute a data-holder notice for purposes of paragraph 28. The other provisions of Schedule 23 do not require a data-holder notice to be contained in a single stand-alone document, but only that it be "by notice in writing". Furthermore, even if it was a requirement for a data-holder notice to be contained in a single stand-alone document, failure to comply with that requirement would not mean that the documents together do not constitute a data-holder notice *for purposes of paragraph 28*.

79. The Tribunal also rejects the argument that the inclusion of the word "duplicate" on the notices for 2013-14 and 2014-15 means that they are not valid data-holder notices for purposes of paragraph 28.

80. The Tribunal is therefore satisfied that Qubic Tax has, for purposes of paragraph 28 of Schedule 23, been issued with four data-holder notices (in respect of tax years 2013-14, 2014-15, 2015-16 and 2016-17 respectively), and that the Tribunal therefore has jurisdiction to

determine appeals against those data-holder notices, but only on the grounds specified in paragraph 28 of Schedule 23.

81. The first of the grounds specified, in paragraph 28(1)(a), is that "it is unduly onerous to comply with the notice or requirement".

82. The Tribunal has not been referred to case law dealing with the meaning of the expression "unduly onerous" within the specific context of paragraph 28.

83. The Tribunal considers that a finding that it would be "unduly onerous" to comply with a requirement in a data-holder notice cannot be made based on the wording of the data-holder notice alone. Rather, it must be answered having regard to all of the facts and circumstances of the particular case as a whole. There may be cases where a request in a notice, on its face, appears extremely vague and general, but where in practice it is very simple to comply with it. An example of this might be where the addressee is asked to provide a very detailed list of every payment ever made by that addressee over the course of several years. While the request may seem to require a very large amount of detailed information to be provided, in fact it would be very simple to comply with it if the addressee was a dormant company that never made any payments during the period in question, or only made one or two payments in the period in question. To comply with the notice, all that the addressee would need to do is to confirm that no relevant payments were made, or to give details of the one or two payments that were made. Conversely, there may be other cases where a requirement, on its face, appears to be specific and targeted, but where in practice due to the particular circumstances of the individual case it would be extremely onerous to give an answer.

84. The Tribunal also considers that where only some of the items in a data-holder notice would be unduly onerous to comply with, the addressee of the notice must still be expected to comply with those parts which are not unduly onerous to comply with.

85. HMRC cannot have knowledge of all of the individual facts and circumstances of the recipient of a data-holder notice. The burden must be on the recipient to identify and prove the existence of the facts and circumstances relied upon as making compliance with the data-holder notice unduly onerous.

86. Qubic Tax argues first that compliance with the data-holder notices would be unduly onerous due to the fact that the wording of the data-holder notices is too vague and difficult to understand.

87. The notices in respect of 2013-14 and 2014-15 are materially identical, the wording of the former reading as follows:

> The enclosed notice requires you to send me a return of information about "All payments in respect of services for or in relation to the introduction of clients or potential clients
>
> "Payments" includes:
>
> - commissions
> - loans
> - grants
> - fees
> - benefits and valuable consideration of whatever description
>
> which were made by you, directly or otherwise for the period 06 April 2013 to 05 April 2014 inclusive.

88. The notices in respect of 2015-16 and 2016-17 are materially identical, the wording of the former reading as follows:

> This notice requires you to send me a return of information about all payments made in the period 6 April 2015 to 5 April 2016* inclusive, for, or in relation to the introduction of clients or potential clients, which were made by you, directly or otherwise. We need this data to check that the recipients of the payments have paid the right tax.
>
> "Payments" includes:
>
> - commissions
> - loans
> - grants
> - fees
> - benefits and valuable consideration of whatever description
>
> *(For tax year ended 2016, the relevant dates are 6 April 2015 to 5 April 2016)

89. All four notices then go on to state:

> In respect of each payment I require you to give the following particulars in your return.
>
> **Payees Name** – The name of the person to whom the payment was made.
>
> **Payees Address & Postcode** – The Payees full postal address & postcode (C/o addresses are not acceptable)
>
> **Gross Amount Paid** – the total amount of the payments for the year
>
> **Currency Code** – please include the appropriate code for the currency of the payment e.g. GBP for Great British pounds, EUR for Euros
>
> **Includes VAT Y/N** – please indicate if VAT was included in the payment (enter Y for yes or N for no)
>
> **Period End Date** – this will be the year to which the payments relate and should be shown in the format DD/MM/YYYY e.g. 05/04/2016
>
> **Payment Description** – Please enter a brief description of the services provided by the payee e.g. commission, consultancy etc.
>
> **Your Company/Organisation name**
>
> **Payee Reference** - If available, a reference number from your accounting system to identify the record (in case we need to contact you about it).

90. The Tribunal accepts that these notices are not worded as clearly and grammatically as they could be. In the notices in respect of 2013-14 and 2014-15, the words "The enclosed notice requires you to send me …" clearly should have been worded "This notice requires you to send me …", and the definition of "Payments", which has been inserted in the middle of another sentence, should have been placed at the end of that sentence ending with the word "inclusive".

91. However, the Tribunal does not accept that the mere fact that the wording of a data-holder notice is less clear than it could be or is ungrammatical means in and of itself that it would be "unduly onerous" within the meaning of paragraph 28 to comply with it. It is still necessary for the Tribunal to be satisfied that in the particular circumstances of this particular case, the ambiguity makes it unduly onerous in practice to comply with the notice.

92. The Tribunal considers that from the wording of all four notices it would be sufficiently clear to any recipient that the notice requires provision of the details referred to in paragraph 89 above in relation to "payments in respect of services for or in relation to the introduction of clients or potential clients", "payments" having the meaning set out in the notices (defined to include commissions, loans, grants, fees and benefits and valuable consideration of whatever description). The Tribunal further considers that it would be sufficiently clear to any recipient that the notices thereby require details to be given of all payments made, or valuable consideration of any kind given, by Qubic Tax to third parties in return for services provided by those third parties by way of introducing clients or potential clients to Qubic Tax. In relation to these matters, the Tribunal does not consider that there is any relevant ambiguity.

93. In particular, the Tribunal does not accept that the words "direct or otherwise" are ambiguous. There are many ways in which a payment can be made to a person indirectly. For instance, A could make an indirect payment to B by paying the relevant amount to C, knowing that C will subsequently pass on that payment to B. Or A could make an indirect payment to B by paying the relevant amount to C, knowing that C is taking that amount in discharge of a debt owed by B to C. The Tribunal considers the effect of the wording of the notice to be clear. If Qubic Tax has made a payment or given valuable consideration knowing that it did so in return for services provided to it by a third party by way of introduction of clients, then the payment is required to be returned. At the hearing, counsel for Qubic Tax raised the question whether, in the event that payment was made to B as a nominee of C, it would be sufficient to report the payment to B. The Tribunal considers it sufficiently clear from the wording of the notice that if the payment in such circumstances was an indirect payment to C, it would be necessary to return it as such, although the details of the payment to B would be included in the payment details.

94. As to the argument that the notices do not make it clear whether they require the gross amount to each payee to be stated or each individual payment, the Tribunal considers it clear from the wording quoted in paragraph 89 above that the notices require details to be provided only of "the total amount of the payments for the year" in respect of each payee, although such details could also in practice be provided by way of giving the amount of each individual payment to each individual payee.

95. The wording of the notices in respect of 2015-16 and 2016-17 indicates that details are required of such payments "made *in* the period 6 April 2015 to 5 April 2016" and "made *in* the period 6 April 2016 to 5 April 2017" (emphasis added), and the Tribunal considers that it would be sufficiently clear to any recipient that each of those notices requires details of payments *made* in the stated period by Qubic Tax, regardless of when the services to which the payment relates were rendered by the payee.

96. The wording of the notices in respect of 2013-14 and 2014-15 states that details are required of such payments "made … *for* the period 06 April 2013 to 05 April 2014 inclusive" and "made … *for* the period 06 April 2014 to 05 April 2015 inclusive" (emphasis added). Qubic Tax contends, and indeed the 3 February 2017 HMRC review decision in fact accepts, that this wording is ambiguous in that it does not make it clear whether it refers to *payments made* in the stated period, or payments relating to *services rendered* in the stated period. That review decision states by way of clarification that these notices require Qubic Tax to provide details of payments made *in* the relevant period.

97. Qubic Tax argues that this review decision effectively purports to make a substantive amendment to the data-holder notice, and contends that it is not possible for a review decision to do so. The Tribunal does not accept this argument. Paragraph 29 of Schedule 23 applies the provisions of Part V TMA to appeals under paragraph 28 of Schedule 23. Section 49E(2)

TMA provides that "The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances". Section 49E(5) TMA provides that "The review may conclude that HMRC's view of the matter in question is to be … varied". The Tribunal finds that the review decision was capable of varying the notice, and that following the review decision, this aspect of the notice was clear.

98. The Tribunal accordingly finds that following the 3 February 2017 HMRC review decision, the ground of appeal against the data-holder notices in respect of 2013-14 and 2014-15 based on this ambiguity in those notices must be rejected.

99. As to the argument that Qubic Tax is regulated by the Institute of Chartered Accountants in England and Wales which imposes a duty of client confidentiality on its members, the Tribunal finds as follows. *Wilsons Solicitors* at [27] accepts that a data-holder notice would override that duty of confidentiality. Qubic Tax has not established the contrary. That case lends support to the argument that it may be reasonable for a firm with such a duty of confidentiality not to comply with the data-holder notice until any appeal against the notice has been finalised. That is to say, that case lends support to the argument that the fact of a pending appeal may be a reasonable excuse for not complying with the notice, and therefore a ground of appeal against any penalty for failure to comply with the notice. However, it would not be a ground of appeal against the notice itself.

100. The two other possible grounds of appeal against a data-holder notice, set out in paragraph 28(1)(b) and (c) of Schedule 23, are that "the data-holder is not a relevant data-holder" and that "data specified in the notice are not relevant data". Qubic Tax has not appealed on either of these grounds. In any event, the Tribunal is satisfied that for purposes of the particular data-holder notices appealed against, Qubic Tax is a "relevant data-holder" by virtue of paragraphs 1(2) and 9(1)(d) and (2)(a) and 9(3) of Schedule 23, and that the data is "relevant data" by virtue of paragraph 1(3) of Schedule 23 and regulation 3(5)(a) of the Relevant Data Regulations.

101. The Tribunal therefore dismisses the appeals of Qubic Tax against the Schedule 23 data-holder notices.

Appeal TC/2017/01974 (Qubic Trustees) and Appeal TC/2017/01995 (Orchard)

102. It is convenient to deal with these appeals together.

103. The appendix to the Appellants' skeleton argument confirms that the appeal of Qubic Trustees is limited to items 1, 2 and 5 in the information notice appealed against.

104. Item 1 of that information notice reads as follows:

> An itemised analysis of turnover to include an explanation of the basis used to arrive at the figure together with copies of all supporting sales invoices.

105. Item 2 of that information notice reads as follows:

> All company and non-company bank, building society or other account statements and passbooks covering the period 1 April 2013 to 30 September 2014 together with cheque book stubs and paying in books for all accounts used by the company to receive income or fund expenditure.

106. Item 5 of that information notice reads as follows:

> An aged analysis of the trade debtors of £156,000 to include
>
> a. The name and address of each debtor
>
> b. The amount of each debt making up the total

c. The nature of each debt.

107. The appendix to the Appellants' skeleton argument confirms that the appeal of Orchard is limited to items 5 and 6 in the information notice appealed against.

108. Item 5 reads as follows:

> All business books and records from which the accounts for the period 01 October 2013 to 30 September 2014 were prepared, including but not restricted to company bank accounts statements, cheque books and paying in book stubs, company credit card statements, cash, petty cash, sales and purchase day books, wages and sub-contractor records, work diaries, sales/fee invoices, purchase and expense invoices. Along with any other original prime business records.

109. Item 6 reads as follows:

> All company and non-company bank, building society or other account statements and passbooks covering the period 01 October 2013 to 30 September 2014 together with cheque book stubs and paying in books for all accounts used by the company to receive income or fund expenditure.

110. The grounds of appeal against a Schedule 36 information notice are not limited by any provision akin to paragraph 28 of Schedule 23. An appeal against a Schedule 36 information notice may be brought, for instance, on the ground that the information or documents in respect of which it is issued are not reasonably required for the purpose of checking a taxpayer's tax position. An appeal may also be brought, for instance, on the ground that the information or documents are not sufficiently identified, or that the request is ambiguous. If the request is ambiguous, the Tribunal will not be able to satisfy itself what information or documents are required or whether they are reasonably required. Furthermore, because there are penalties for non-compliance, the information and documents required must be sufficiently identified so that it is possible for the addressee of the notice to know what is required in order to comply, and in order that it is possible to establish whether there has been a compliance failure.

111. However, it must also be recognised that HMRC, at the time of issuing an information notice, will often be incapable of knowing exactly what information or documents the addressee does and does not have. HMRC will therefore often be required in an information notice to request a general category of documents, without knowing precisely what documents falling within that category may or may not be within the addressee's possession or power. An information notice will be sufficiently precise if an addressee would reasonably be able to know, in relation to any given information of document in its possession or power, whether or not that information or document falls within the category described in the information notice.

112. In the appeal of Qubic Trustees, the Tribunal finds as follows.

113. Item 1 of the information notice is clear. It requires a breakdown of the company's turnover for the year in question, together with copies of supporting sales invoices.

114. Qubic Trustees argues that it has already provided an itemised list of over 600 sales invoices. HMRC in argument appeared to acknowledge that what HMRC are now still seeking is the underlying sales invoices themselves. However, the fact that an appellant has already complied with a request in an information notice is not a ground of appeal of appeal against an information notice. The Tribunal, in an appeal against an information notice, will not strike out of an information notice those items that have already been complied with. For even greater reason, the Tribunal will not strike out part of the request in an information notice that has been partially complied with. The fact that an information notice has been complied with may be a

ground of appeal against a penalty, but compliance cannot somehow affect the validity of the information notice itself.

115. Item 2 of the information notice is clear. It requires bank documents for the period in question for all accounts used by the company to receive its income or fund its expenditure. Its wording includes "*non-company* bank [etc] account statements … used by the company to receive income or fund expenditure". That wording is also clear. If the company used accounts in the name of third parties to receive company income or fund company expenditure, statements from these accounts are also required to be provided.

116. Amounts received by Qubic Trustees in its capacity as trustee, to be held by it on trust for a beneficiary, are not "income" or "expenditure" of Qubic Trustees. Therefore, as worded, this item in the information notice would not require documents to be provided in relation to any account into which were paid amounts to be held on trust by Qubic Trustees for others, provided that no income or expenditure of Qubic Trustees itself was paid into or out of that that account.

117. Item 5 of the information notice is clear. It simply requires a breakdown of the company's aged debt. It is true that the wording of the item is somewhat ungrammatical, and that the first line might perhaps have more correctly read for instance "A breakdown of the aged debt of £156,000 to include". However, the Tribunal is not persuaded that the wording creates any ambiguity.

118. If the addressee of an information notice appeals against it on the ground that the requests are unreasonably onerous or difficult to comply with, it is for the addressee to establish that this is the case. It is not apparent to the Tribunal that these three requests would inherently be onerous or difficult to comply with. Nor is the Tribunal persuaded on the evidence in these appeals that there is any reason why compliance would be unduly onerous for Qubic Trustees in this instance. Providing copies of sales invoices should not be particularly difficult. The Tribunal does not have information as to how many bank accounts the company uses for its income and expenditure and how many bank transactions it had in the period in question, and how many trade debts it has. However, even if the numbers in each case were relatively large, this is the kind of information that the company, in the absence of any evidence to the contrary, would normally be expected to keep in a manner that is complete and up to date and readily accessible.

119. In the appeal of Orchard, the Tribunal finds as follows.

120. Item 5 of the information notice is clear. In effect, the whole content of item 5 is conveyed by the words "All business books and records from which the accounts for the period 01 October 2013 to 30 September 2014 were prepared". All of the subsequent wording of that item merely gives examples of the kinds of documents that might potentially fall within the meaning of the words "All business books and records". However, item 5 requires the provision of such documents only if they were documents from which the accounts for the period 1 October 2013 to 30 September 2014 were prepared.

121. Orchard has not referred to any authority for the proposition that HMRC generally cannot in an information notice request the documents from which the accounts for a given year were prepared. No authority has been pointed to that would suggest that such a request is too general, vague or difficult to comply with. Orchard can be expected to know from which documents it prepared its accounts for the period in question. Those are the documents which item 5 requires it to produce. It should therefore be clear to Orchard which documents fall within that request and which documents do not. On the other hand, HMRC cannot know precisely which documents Orchard used to prepare its accounts for that year, and it is not unreasonable for HMRC to describe the documents sought in the general way that they have.

122. In the case of both companies, HMRC was in the course of conducting full enquiries into their relevant tax returns. The Tribunal is satisfied that the information and documents sought in these items of the information notices is typical of information notices generally. In any event, these items requested basic information and documents that were of direct relevance to the companies' tax position in relation to the years in question. The Tribunal is therefore satisfied that the information requested in all of the items referred to above in both appeals is reasonably required by the relevant HMRC officer for the purpose of checking the relevant taxpayer's tax position.

123. Given that HMRC were conducting enquiries into both companies' tax returns, the Tribunal is not persuaded by the arguments that the information was being sought not for the purposes of checking the tax position of Qubic Trustees and Orchard, but instead, for an impermissible purpose of checking the tax position of third parties. Given that HMRC were conducting enquiries into both companies' tax returns, the Tribunal is also not persuaded by any argument that the information requested could not lead to any enforceable decision by HMRC, or the argument that HMRC were impermissibly seeking to rely on information generated by the information notice to justify issuing the information notice in the first place.

124. Nor is the Tribunal persuaded by any argument that the information and documents were not reasonably required, on the ground that HMRC otherwise already had enough information on the basis of which it was able to make an assessment or issue a closure notice. Even if HMRC have enough information to make *an* assessment (in the sense that HMRC *would* make an assessment on the basis of the information that they already have if satisfied that no other relevant evidence was reasonably obtainable), that does not mean that additional evidence if obtainable would not be "reasonably required for the purpose of checking a taxpayer's tax position". Even if HMRC could make *an* assessment on the basis of currently available information, HMRC cannot know without seeing any obtainable further evidence whether that further evidence might make a difference to the assessment that HMRC is about to make. That additionally obtainable evidence that HMRC has not yet seen is reasonably required to ensure that when an assessment is made, it is as accurate as it is possible to make it, based on a consideration of all obtainable relevant information. It is not for a taxpayer to determine when HMRC have enough information and should terminate an investigation or enquiry. It is not for a taxpayer to determine what information might or might not make a difference to the view that HMRC would otherwise take on the basis of the information that HMRC already has.

125. Having concluded that all of the information and documents are reasonably required, it is unnecessary to determine whether the requested information and documents constitute statutory records. However, for completeness, the Tribunal adds the following.

126. The relevant provisions determining what are "statutory records" for present purposes are paragraph 62 of Schedule 36 and paragraphs 21 and 22 of Schedule 18 to the Finance Act 1998.

127. Paragraph 21(1)(a) of Schedule 18 requires a company to keep all records which are necessary to establish, without doubt, that a return is accurate. That will include all documents and information necessary to establish the sales, purchases, assets and liabilities of the company in the relevant accounting period and at the end of the accounting period. The requirement that the return must be correct and complete implies a requirement that the documents and information to be kept must evidence that the return is correct and complete.

128. It is necessary for any company seeking to prepare a correct and complete tax return to have records of sales, purchases, receipts, payments, trade debtors and other debtors. If a business operates a bank account it will need to keep a record of transactions on the account and of the balance on the account at any particular time to ensure that receipts and expenditure

have been properly recorded in the company's accounting records, and that the transactions and balance on the account have been properly recorded by the bank.

129. One way in which a business can satisfy itself that bank transactions have been properly recorded both in the business' own records and by the bank is by retaining paying in books and cheque book stubs. Therefore, if an addressee of an information notice retains paying in books and cheque book stubs then they are a means by which the Appellant satisfies the requirements of paragraph 21(1)(a), and they will be statutory records.

130. A company must also retain records of its purchases, including administration and office expenses, and these records are specifically required by paragraph 21(5).

131. The fact that a request for information requires some act of accountancy does not mean that the information requested is not a statutory record. If there is a duty to keep the information then it is a statutory record. (See *Couldwell* at [23]-[28], [34].)

132. The Tribunal finds that all of the information and documents required by the challenged items of the information notices in both appeals, to the extent that such information and documents are in the possession or power of Qubic Trustees and/or Orchard, are statutory records of Qubic Trustees and/or Orchard.

133. Qubic Trustees also relies on paragraph 25 of Schedule 36, which provides that an information notice does not require a tax adviser to provide information about "relevant communications", that is to say, certain communications by a tax adviser "the purpose of which is the giving or obtaining of advice about … tax affairs".

134. The Tribunal rejects this argument for the reason alone that Qubic Trustees has not established that any of the challenged items in the information notice in any way related to the giving of tax advice. The witness statement of Mr Graham in the Qubic Tax case states that Qubic Tax specialised in the giving of tax advice, while his statement in the Qubic Trustees case states that Qubic Trustees specialises in the provision of trustee services. The witness statement of Mr Graham in the Qubic Trustees case does not address the paragraph 25 point. The burden is on the addressee of an information notice to establish that paragraph 25 applies, and Qubic Trustees has not provided evidence to establish the prima facie applicability of that provision.

135. However, even if it were to be presumed for the sake of argument that all of the turnover of Qubic Trustees consisted of fees earned for providing tax advice, the Tribunal would still find that paragraph 25 does not apply. Qubic Trustees has not been asked to provide details of any tax advice given to any client. Qubic Trustees apparently argues that even if details of, and sales invoices for, fees earned for providing tax advice are not of themselves "relevant communications", such details and sales invoices are nonetheless "information about relevant communications" within the meaning of paragraph 25(1)(a).

136. The Tribunal does not accept that argument. If correct, it would mean that a tax adviser could never be required by an information notice to provide information or documents about fees it has earned through the provision of tax advice. The Tribunal finds that paragraph 25(1)(b) applies to *documents* that are the actual communications from a tax adviser, to the client or other tax adviser of the client, *containing* tax advice. Paragraph 25(1)(a) applies to information about the *substance* of tax advice given by a tax adviser to a client or other tax adviser of a client. Paragraph 25 does not apply to information or a document that is merely about fees charged to a client for the provision of tax advice, when that information does not disclose the content of the tax advice given, or even the subject matter of the tax advice given.

137. The Tribunal therefore rejects the appeals of both Qubic Trustees and Orchard against the information notices.

138. As to their appeals against the penalties, the Tribunal finds as follows.

139. It must be reasonable for a recipient of Schedule 36 notice not to comply with such a notice whilst that notice is being challenged in the Tribunal or in the courts. Otherwise any such appeals would be rendered nugatory. (See *Sokoya* at [23].)

140. In the case of both Qubic Trustees and Orchard, the information notices were issued on 30 March 2016 and the companies appealed against the information notices in time on 11 April 2016. The penalty notices appealed against were issued on 6 May 2016 and 29 June 2016 respectively, while the Appellants were still awaiting the HMRC review conclusion letters, which were subsequently issued only on 27 January 2017. Within the applicable time limit, the companies then appealed to this Tribunal. It follows that both companies have had a reasonable excuse for not complying with the information notices from the date that they were issued until the present date, and that they will continue to have a reasonable excuse until the present appeal proceedings are concluded.

141. The appeals of both companies against the penalties is accordingly allowed.

Appeal TC/2017/02275 (Assethound)

142. The appendix to the Appellants' skeleton argument confirms that the appeal of Assethound is limited to items 1, 2, 5, 16 and 17-22 in the information notice appealed against.

143. The challenged items in the information notice seek information about The Assethound Limited Employee Trust 2014 (the "Trust"), an employee benefit trust used by Assethound.

144. Item 1 reads as follows:

> All documents recording discussions prior to 28 February 2014 in respect of the company's consideration of the setting up of an Employer's Benefit Trust (para 2 Board minutes of 28/2/14 refers).

145. Item 2 reads as follows:

> Documents supporting the consideration of reward and decision to incentivise David Graham.

146. Item 5 reads as follows:

> All documents provided by Qubic Tax Ltd in which the tax planning arrangements where reward using an Employers Benefit Trust and/or purchase agreement of gold bullion is mentioned (para 3 Board minutes 12/3/14 refers).

147. Item 16 reads as follows:

> Copies of loan agreements for each of the following loans – Loan 1, Loan 2, Loan 3, Loan 4 and Loan 5.

148. Items 17-22 read as follows:

> 17. Who was considered for incentivisation and reward? Please state names of those considered and their role in the company.
>
> 18. Of those considered, why was David Graham the only person to receive a reward by arrangements under which he received assets in the form of a title to gold bullion?
>
> 19. How did the company incentivise other employees?
>
> 20. How did the company satisfy itself of the independence of the Trustees, given David Graham held the role of Protector of the Trust?

> 21. State how the scheme developed in house differs from the approach advised by Qubic Tax Ltd (par 3 Board minutes 12/3/14 refers).
>
> 22. Was the company provided with a scheme reference number by Qubic Tax Ltd?

149. Officer Shakles accepted in her evidence that motivating and incentivising employees would be wholly and exclusively for the purposes of trade. However, the HMRC position is that if the purpose of the scheme was not to incentivise employees but to avoid tax, then it would not be wholly and exclusively for the purposes of trade. The HMRC contention is that it is therefore necessary to determine the circumstances around the creation and operation of the Trust. HMRC acknowledge that they have already received a considerable amount of information about the Trust, and it seems that they know the mechanics of its operation. As Officer Shakles put it, HMRC knew what had happened, but were requesting the information and documents in order to find out why and how it had happened. It is also said more generally that the Trust involves complex arrangements, and that in order to establish what the tax implications of the arrangements are, it is necessary for HMRC to have sight of all relevant documents and information.

150. HMRC acknowledge that they do not know exactly what documents exist, and that where documents do not exist, it is open to Assethound to confirm that this is the case in its response to the information notice. However, HMRC state that some of the requested documents must exist as they have been referred to in other documents already provided by Assethound.

151. Assethound have not sought to argue that the requested information is *irrelevant* to checking its tax position. Rather, Assethound argues that the request information is *unnecessary* for checking its tax position, since enough information has already been provided to HMRC for HMRC to be in a position to take a view on the matter.

152. The Tribunal refers to what is said in paragraph 124 above. The Tribunal is satisfied that the information requested in the information notice is relevant to the tax position of Assethound in the period in question, given especially that HMRC were in the course of an enquiry into the company's tax return. Absent any countervailing consideration, the Tribunal would consider HMRC to have established that the requested information and documents are reasonably required for the purpose of checking Assethound's tax position. The Tribunal is not persuaded by anything presented by Assethound that the information and documents requested in the disputed items, if provided to HMRC, would make no difference to the assessment that HMRC would otherwise have made on the basis of the information that it currently has. For that reason, the Tribunal is satisfied that the requested information and documents are "reasonably required" to check Assethound's tax position.

153. However, the Tribunal does note that the obligation to comply with the information notice is subject to the operation of paragraph 25 of Schedule 36. By virtue of paragraph 25, Assethound will not be required, in its response to the information notice, to provide information about relevant communications (as to which see paragraphs 133-136 above) or documents which are its tax adviser's property and consist of relevant communications. For instance, item 5 of the information notice seeks "All documents provided by Qubic Tax Ltd in which the tax planning arrangements where reward using an Employers Benefit Trust and/or purchase agreement of gold bullion is mentioned". It is quite possible that some or all of the documents falling within this category are subject to paragraph 25. So, possibly, may other documents referred to in other disputed items.

154. However, there is no need for the Tribunal to vary the information notice to give effect to paragraph 25. That provision does not restrict the powers of HMRC when issuing information notices. Rather, it limits the obligations of the addressee of the information notice

when responding to it. HMRC can ask in an information notice for documents to which paragraph 25 applies, or can ask for a generic category of documents which might in practice in a given case include documents to which paragraph 25 applies. However, by virtue of paragraph 25, the addressee of the information notice is not required to provide them. Because of this, the scope of application of paragraph 25 is more likely to arise in an appeal against a penalty for failing to comply with an information notice, than in an appeal against the information notice itself. In the case of Assethound, no penalty for failing to comply with the information notice has been imposed.

155. Given that HMRC are conducting an enquiry into the tax return of Assethound, the Tribunal is not persuaded by the argument that the requested information is sought for an impermissible purpose of checking the tax position of a third party (such as Mr Graham) rather than the tax position of Assethound itself. The Tribunal is satisfied that the operation of the Trust, if fully understood by HMRC, may affect the tax position of Assethound itself.

156. Finally, Assethound argues that it has received a determination under regulation 80 of the PAYE Regulations in respect of the 2014-15 and 2015-16 tax years, against which it has appealed. It argues that these PAYE determinations are issued in relation to precisely the same matters as lie at the heart of the information requests under appeal, and that once a formal appealable decision has been reached concerning the arrangements entered into by Assethound concerning the remuneration of Mr Graham, the documents requested in the Schedule 36 notice are no longer reasonably required. Assethound further argues that because of the pending PAYE appeal, paragraph 19(1) of Schedule 36 applies.

157. The Tribunal rejects the argument that paragraph 19(1) of Schedule 36 applies. That provision states that an information notice does not require a person to produce "information that relates to the conduct of a pending appeal relating to tax or any part of a document containing such information". That provision is expressed to relate to "information" (rather than documents), and is expressed to relate to information which relates to "the conduct of" any pending appeal. To the extent that this provision relates to documents, it would apply only to documents which in their wording refer to the conduct of a pending appeal. It does not relate to documents which merely refer to subject matters which may be matters in issue in a pending appeal. Indeed, even a document which may have been produced in evidence in a pending appeal would not for that reason alone fall within the terms of paragraph 19(1)(a), if the document does not itself refer to the conduct of the pending appeal.

158. The Tribunal is not satisfied on the material before it that any of the documents referred to in the challenged items in the information notice refer to the conduct of the pending PAYE appeal. It is not satisfied that any of the requested information or documents falls within paragraph 19(1)(a).

159. However, even if they did, the observations in paragraph 154 above would apply. Paragraph 19(1)(a) does not restrict or limit the power of HMRC to issue information notices, but merely restricts the obligations of addressees in relation to compliance with information notices. Even if there might potentially be documents falling within the challenged items to which paragraph 19(1)(a), there is no need to vary the information notices themselves to reflect that fact that Assethound would not be required to produce them.

160. The Tribunal is also not persuaded that the pending PAYE appeal would render the information notice futile, or would render futile any HMRC action that might be taken in the light of information or documents provided pursuant to the information notice. An appeal under regulation 80 of the PAYE Regulations does not deal with exactly the same issues as a closure notice issued at the end of an enquiry into Assethound's tax return. The former deals with Assethound's obligations to make payments to HMRC pursuant to the PAYE Regulations.

The latter deals with Assethound's substantive tax liability for the period in question. On the material before it, and the legal arguments presented to it the Tribunal is not persuaded that a decision on the PAYE appeal would preclude HMRC from issuing a closure notice reflecting information provided pursuant to the information notice, or from enforcing that closure notice.

CONCLUSION

161. The appeals of Qubic Tax and Orchard against the penalties dated 6 May 2016 and 29 June 2016 is allowed, and those penalties are set aside.

162. All of the appeals are otherwise dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

163. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 11 MAY 2020

APPENDIX A

Relevant provisions of Schedule 23 to the Finance Act 2011

1. Section 86(1) of the Finance Act 2011 provides:

> (1) Schedule 23 contains provision for officers of Revenue and Customs to obtain data from data-holders.

2. Paragraph 1 of Schedule 23 relevantly provides:

> (1) An officer of Revenue and Customs may by notice in writing require a relevant data-holder to provide relevant data.
>
> (2) Part 2 of this Schedule sets out who is a relevant data-holder.
>
> (3) In relation to a relevant data-holder, *"*relevant data*"* means data of a kind specified for that type of data-holder in regulations made by the Treasury.
>
> (4) The data that a relevant data-holder may be required to provide—
>
> (a) may be general data or data relating to particular persons or matters, and
>
> (b) may include personal data (such as names and addresses of individuals).
>
> (5) A notice under this paragraph is referred to as a data-holder notice.

3. Paragraph 2 of Schedule 23 relevantly provides:

> (1) The power in paragraph 1(1) is exercisable to assist with the efficient and effective discharge of HMRC's tax functions—
>
> (a) whether a particular function or more generally, and
>
> (b) whether involving a particular taxpayer or taxpayers generally..

4. Paragraph 3 of Schedule 23 provides:

> (1) A data-holder notice must specify the relevant data to be provided.
>
> (2) Relevant data may not be specified in a data-holder notice unless an officer of Revenue and Customs has reason to believe that the data could have a bearing on chargeable or other periods ending on or after the applicable day.
>
> (3) The applicable day is the first day of the period of 4 years ending with the day on which the notice is given.

5. Paragraph 4(1) of Schedule 23 provides:

> (1) Relevant data specified in a data-holder notice must be provided by such means and in such form as is reasonably specified in the notice.

6. Paragraph 9 of Schedule 23 provides:

> (1) Each of the following is a relevant data-holder—
>
> (a) an employer,
>
> (b) a person who is concerned in making payments to or in respect of another person's employees with respect to their employment with that other person,
>
> (c) an approved agent within the meaning of section 714 of ITEPA 2003 (which relates to payroll giving), and

(d) a person who carries on a business in connection with which relevant payments are or are likely to be made.

(2) Relevant payments are—

(a) payments for or in connection with services provided by persons who are not employed in the business, or

(b) periodical or lump sum payments in respect of any copyright, public lending right, right in a registered design or design right.

(3) Payments are taken to be made in connection with a business if they are made—

(a) in the course of carrying on the business or a part of it, or

(b) in connection with the formation, acquisition, development or disposal of the business or a part of it.

(4) Sub-paragraph (1)(d) applies to the carrying on of any other kind of activity as it applies to the carrying on of a business, but only if the activity is being carried on by a body of persons (and references in sub-paragraphs (2) and (3) to the business are to be read accordingly).

(5) A reference in this paragraph to the making of payments includes—

(a) the provision of benefits, and

(b) the giving of any other valuable consideration.

7. Paragraph 28 of Schedule 23 provides.

(1) The data-holder may appeal against a data-holder notice, or any requirement in such a notice, on any of the following grounds—

(a) it is unduly onerous to comply with the notice or requirement,

(b) the data-holder is not a relevant data-holder, or

(c) data specified in the notice are not relevant data.

(2) Sub-paragraph (1)(a) does not apply to a requirement to provide data that form part of the data-holder's statutory records.

(3) Sub-paragraph (1) does not apply if the tribunal approved the giving of the notice in accordance with paragraph 5.

8. Paragraph 29 of Schedule 23 relevantly provides.

(3) On an appeal that is notified to the tribunal, the tribunal may confirm, vary or set aside the data-holder notice or a requirement in it.

(4) If the tribunal confirms or varies the notice or a requirement in it, the dataholder must comply with the notice or requirement—

(a) within such period as is specified by the tribunal, or

(b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of Revenue and Customs following the tribunal's decision.

(5) A decision by the tribunal under this Part is final (despite the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007).

(6) Subject to this paragraph, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under paragraph 28 as they have effect in relation to an appeal against an assessment to income tax.

9. Paragraph 46 of Schedule 23 provides.

> (1) For the purposes of this Schedule data form part of a data-holder's statutory records if they are data that the data-holder is required to keep and preserve under or by virtue of any enactment relating to tax.
>
> (2) Data cease to form part of a data-holder's statutory records when the period for which the data are required to be preserved under or by virtue of that enactment has expired.

10. The regulations referred to in paragraph 1(3) of Schedule 23 are the Data Gathering Powers (Relevant Data) Regulations 2012 (the 2012 Regulations").

11. Regulation 3(5) of the 2012 Regulations states:

> (5) For the purposes of paragraph 9(1)(d) and, where relevant, paragraph 9(4)—
>
> (a) the relevant data are information relating to relevant payments made in connection with a business, or a part of a business;
>
> (b) particulars of the following payments are not relevant data—
>
> (i) payments from which income tax is deductible; and
>
> (ii) payments made to any one person where the total of those payments, particulars of which would otherwise fall to be provided, does not exceed £500.

APPENDIX B

Relevant provisions of Schedule 36 to the Finance Act 2008

1. Paragraph 1 of Schedule 36 provides:

> (1) An officer of Revenue and Customs may by notice in writing require a person ("the taxpayer")–
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position.
>
> (2) In this Schedule, *"*taxpayer notice*"* means a notice under this paragraph.

2. Paragraph 18 of Schedule 36 provides:

> The information notice only requires a person to produce a document if it is in the person's possession or power.

3. Paragraph 19 of Schedule 36 relevantly provides:

> (1) An information notice does not require a person to provide or produce–
>
> (a) information that relates to the conduct of a pending appeal relating to tax or any part of a document containing such information, …

4. Paragraph 21 of Schedule 36 relevantly provides:

> (1) Where a person has made a tax return in respect of a chargeable period under section 8, 8A or 12AA of TMA 1970 (returns for purpose of income tax and capital gains tax), a taxpayer notice may not be given for the purpose of checking that person's income tax position or capital gains tax position in relation to the chargeable period.
>
> (2) Where a person has made a tax return in respect of a chargeable period under paragraph 3 of Schedule 18 to FA 1998 (company tax returns), a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period.
>
> (3) Sub-paragraphs (1) and (2) do not apply where, or to the extent that, any of conditions A to D is met.

5. Paragraph 23 of Schedule 36 provides:

> (1) An information notice does not require a person–
>
> (a) to provide privileged information, or
>
> (b) to produce any part of a document that is privileged.
>
> (2) For the purpose of this Schedule, information or a document is privileged if it is information or a document in respect of which a claim to legal professional privilege, or (in Scotland) to confidentiality of communications as between client and professional legal adviser, could be maintained in legal proceedings.
>
> (3) The Commissioners may by regulations make provision for the resolution by the tribunal of disputes as to whether any information or document is privileged.

(4) The regulations may, in particular, make provision as to–

(a) the custody of a document while its status is being decided, …

6. Paragraph 25 of Schedule 36 provides:

(1) An information notice does not require a tax adviser–

(a) to provide information about relevant communications, or

(b) to produce documents which are the tax adviser's property and consist of relevant communications.

(2) Sub-paragraph (1) has effect subject to paragraph 26.

(3) In this paragraph–

*"*relevant communications*"* means communications between the tax adviser and–

(a) a person in relation to whose tax affairs he has been appointed, or

(b) any other tax adviser of such a person,

the purpose of which is the giving or obtaining of advice about any of those tax affairs, and

*"*tax adviser*"* means a person appointed to give advice about the tax affairs of another person (whether appointed directly by that person or by another tax adviser of that person).

7. Paragraph 29 of Schedule 36 relevantly provides:

(1) Where a taxpayer is given a taxpayer notice, the taxpayer may appeal against the notice or any requirement in the notice.

(2) Sub-paragraph (1) does not apply to a requirement in a taxpayer notice to provide any information, or produce any document, that forms part of the taxpayer's statutory records.

8. Paragraph 39 of Schedule 36 relevantly provides:

(1) This paragraph applies to a person who–

(a) fails to comply with an information notice, …

(2) The person is liable to a penalty of £300.

(3) The reference in this paragraph to a person who fails to comply with an information notice includes a person who conceals, destroys or otherwise disposes of, or arranges for the concealment, destruction or disposal of, a document in breach of paragraph 42 or 43.

9. Paragraph 40 of Schedule 36 relevantly provides:

(1) This paragraph applies if the failure or obstruction mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure or obstruction.

(2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure or obstruction continues.

10. Paragraph 45 of Schedule 36 relevantly provides:

(1) Liability to a penalty under paragraph 39 or 40 does not arise if the person satisfies HMRC or (on an appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the failure or the obstruction of an officer of Revenue and Customs.

11. Paragraph 62 of Schedule 36 relevantly provides:

> (1) For the purposes of this Schedule, information or a document forms part of a person's statutory records if it is information or a document which the person is required to keep and preserve under or by virtue of–
>
> (a) the Taxes Acts, or
>
> (b any other enactment relating to a tax,
>
> subject to the following provisions of this paragraph.
>
> (2) To the extent that any information or document that is required to be kept and preserved under or by virtue of the Taxes Acts–
>
> (a) does not relate to the carrying on of a business, and
>
> (b) is not also required to be kept or preserved under or by virtue of [any other enactment relating to a tax,
>
> it only forms part of a person's statutory records to the extent that the chargeable period or periods to which it relates has or have ended.
>
> (3) Information and documents cease to form part of a person's statutory records when the period for which they are required to be preserved by the enactments mentioned in sub-paragraph (1) has expired.

APPENDIX C

Background to the appeals and grounds of appeal

APPEAL TC/2017/02089 (QUBIC TAX)

Background

1. In a letter dated 1 March 2016, HMRC advised Qubic Tax that HMRC would in approximately 30 days be sending Qubic Tax a notice under paragraph 1 of Schedule 23 for the 2012-13, 2013-14 and 2014-15 tax years. The letter requested Qubic Tax to complete and return an enclosed questionnaire to help HMRC ensure that the return was accurate.

2. On 24 March 2016, Qubic Tax's financial controller, Mr K Forrest, returned the completed questionnaire as requested. At question 6 on the questionnaire form, Mr Forrest answered "yes" to the question: "Do you make the following type(s) of payments? All payments, commissions, loans, grants, fees, benefits and valuable consideration of whatever description made by you, directly or otherwise in respect of services, including the introduction of clients or potential clients."

3. On 22 April 2016, HMRC sent to Qubic Tax three data holder notices in respect of tax years 2012-13, 2013-14 and 2014-15 respectively.

4. On 18 July 2016, Qubic Tax appealed against the three notices.

5. In a letter dated 24 August 2016, HMRC accepted Qubic Tax's late appeal against the three Schedule 23 notices. The letter accepted that the notices were drawn too widely and advised that the notices were withdrawn. The letter went on to advise that the notices for 2013-14 and 2014-15 would be reissued with amended wording, and set out the wording that the re-issued notices would contain. HMRC state that the 2012-13 notice was not re-issued because it was out of time.

6. On 31 August 2016, HMRC issued two Schedule 23 notices, for tax years 2013-14 and 2014-15 respectively. These are the notices subject to this appeal.

7. On 3 October 2016, Qubic Tax appealed against the two notices.

8. In a letter dated 8 November 2016, HMRC set out its view of the matter in response to the Qubic Tax's appeal, concluding that the notices were valid and should be complied with.

9. In a letter dated 5 December 2016, Qubic Tax requested a review.

10. Following further correspondence between the parties, on 3 February 2017 the HMRC review conclusion letter concluded that the HMRC decision summarised in the 8 November 2016 HMRC letter was correct and should be upheld.

11. Qubic Tax subsequently appealed to the Tribunal.

Qubic Tax's grounds of appeal

12. The grounds of appeal as set out in the notice of appeal are (1) that it is inherently unclear which document is the notice and which document is a covering or accompanying document, as each document suggests that the other is the notice, (2) that the wording of the purported notice is ambiguous, and the officer issuing the review decision had no statutory power to revise the wording of the notice, and (3) that the revised wording will potentially require Qubic

Tax to provide information that has a bearing on chargeable periods before the date 4 years before the notice was given.

APPEAL TC/2017/07620 (QUBIC TAX)

Background

13. Earlier background facts are set out in paragraphs 1-12 of this Appendix above.

14. On 31 May 2017, HMRC sent to Qubic Tax two data holder notices in respect of tax years 2015-16, and 2016-17 respectively. These are the notices subject to this appeal.

15. On 29 June 2017, Qubic Tax appealed against the two notices.

16. In a letter dated 3 July 2017, HMRC set out its view of the matter in response to the appeal, concluding that the notices were valid and should be complied with.

17. In a letter dated 28 July 2017, Qubic Tax requested a review.

18. An HMRC review conclusion letter dated 8 September 2017 concluded that the notices were legally valid and should be upheld.

19. Qubic Tax subsequently appealed to the Tribunal.

Qubic Tax's grounds of appeal

20. The grounds of appeal as set out in the notice of appeal are (1) that it would be unduly onerous to comply with the notices, particularly given the ambit and ambiguity of the requests and the fact that HMRC are not concerned with Qubic Tax's tax affairs, (2) that some or all of the data requested is not relevant data and HMRC's request is far wider than permissible, and (3) that the notice is invalid due to its ambiguity, content and stated purpose, and it is unclear which document is the notice and which is the covering or accompanying document.

APPEAL TC/2017/01974 (QUBIC TRUSTEES)

Background

21. On 16 February 2016, HMRC opened enquiries into Qubic Trustees's tax returns for the accounting periods ending 31 March 2014 and 30 September 2014.

22. On 30 March 2016, HMRC issued to Qubic Trustees two information notices in respect of the periods ending 31 March 2014 and 30 September 2014 respectively.

23. On 11 April 2016, Qubic Trustees appealed against the information notices.

24. On 6 May 2016, HMRC issued to Qubic Trustees an initial penalty of £300 for failure to comply with the information notice.

25. Following further correspondence between the parties, on 29 June 2016, HMRC issued to Qubic Trustees daily penalties totalling £1,200 (£25 per day for 48 days) for failure to comply with the information notice.

26. In a letter dated 18 July 2016, Qubic Trustees expressed the view that as the information notices were under appeal, the penalties were premature and should be withdrawn, or alternatively, that the penalties should be considered to be under appeal as well.

27. In a decision dated 25 August 2016, HMRC found that there was no appeal against the information notices insofar as it related to statutory records, that the information notices were otherwise not unduly onerous, and that the penalties had been correctly charged. The letter

stated that the penalties had been informally stood over pending the appeal but that daily penalties continued to accrue.

28. On 11 October 2016, Qubic Trustees requested a review of that decision.

29. Following further representations made by Qubic Trustees, in a review conclusion letter dated 27 January 2017, HMRC concluded that the 25 August 2016 decision was correct and should be upheld.

30. Qubic Trustees subsequently filed notices of appeal with the Tribunal, appealing against the information notices and penalties.

The Appellant's grounds of appeal

31. The grounds of appeal as set out in the notice of appeal against the information notices are (1) that the information still being sought does not constitute statutory records or at least not all of it does, (2) that the requests are broadly drafted and inherently unclear and unenforceable, (3) that the information still being sought was not reasonably required for checking the company's tax position for the accounting period ended 31 March 2014 and/or 30 September 2014 and provision of the information would be onerous for the company, and (4) that items 1 and 5 of the information sought are exempt under paragraph 25 of Schedule 36.

32. The grounds of appeal as set out in the notices of appeal against the penalties are, in addition to the grounds of appeal relating to the information notices themselves (1) that the company has endeavoured to cooperate to provide the relevant information to HMRC who have not explained the extent to which the requests have not been met such that it is unclear whether the information sought is actually in the company's possession or power, (2) that a taxpayer has a reasonable excuse for non-compliance with an information notice while there is a pending appeal, and (3) that the rate of daily penalties of £25 per day is excessive.

APPEAL TC/2017/01995 (ORCHARD)

Background

33. On 3 February 2016, HMRC opened enquiries into Orchard's tax returns for the accounting period ending 30 September 2014, and in a letter of that date requested Orchard to provide certain documents and information.

34. On 30 March 2016, HMRC issued to Orchard an information notice in respect of the period ending 30 September 2014.

35. On 31 March 2016, Orchard responded to the 3 February 2016 HMRC letter.

36. On 11 April 2016, Orchard appealed against the information notice.

37. On 6 May 2016, HMRC issued to Orchard an initial penalty of £300 for failure to comply with the information notice.

38. Following further correspondence between the parties, on 29 June 2016 HMRC issued to Orchard daily penalties totalling £1,300 (£25 per day for 52 days) for failure to comply with the information notice.

39. In a letter dated 18 July 2016, Orchard appealed against both penalty notices.

40. In a decision dated 25 August 2016, HMRC found that there was no appeal against the information notices insofar as it related to statutory records, and that the penalties had been correctly charged.

41. In a letter dated 11 October 2016, Orchard requested a review of that decision.

42. Following further correspondence between the parties, in a review conclusion letter dated 27 January 2017, HMRC concluded that the 25 August 2016 decision was correct and should be upheld.

43. Orchard subsequently filed notices of appeal with the Tribunal, appealing against the information notices and penalties.

The Appellant's grounds of appeal

44. The grounds of appeal as set out in the notice of appeal against the information notices are (1) that the information still being sought does not constitute statutory records or at least not all of it does, (2) that the requests are broadly drafted and inherently unclear and unenforceable, and (3) that the information still being sought was not reasonably required for checking the company's tax position for the accounting period ended 30 September 2014 and provision of the information would be onerous for the company.

45. The grounds of appeal as set out in the notices of appeal against the penalties are, in addition to the grounds of appeal relating to the information notices themselves (1) that the company has endeavoured to cooperate to provide the relevant information to HMRC who have not explained the extent to which the requests have not been met such that it is unclear whether the information sought is actually in the company's possession or power, (2) that a taxpayer had a reasonable excuse for non-compliance with an information notice while there is a pending appeal, and (3) the rate of daily penalties of £25 per day is excessive.

APPEAL TC/2017/02275 (ASSETHOUND)

Background

46. On 20 November 2015, HMRC opened enquiries into Assethound's tax returns for the accounting periods ended 8 May 2014 and 30 September 2014, and in a letter of that date requested Assethound to provide certain documents and information.

47. Following communications between the parties, on 8 February 2016 HMRC issued to Assethound an information notice stated to be for the return periods covering 8 May 2014 to 30 September 2014.

48. On 7 March 2016, Assethound responded to the 20 November 2015 HMRC letter.

49. In a letter dated 5 April 2016, HMRC made an informal request for further documents and information.

50. Following further communications between the parties, on 27 May 2016, HMRC issued to Assethound an information notice stated to be for the accounting period ended 30 September 2014. This is the information notice to which this appeal relates.

51. On 22 June 2016, Assethound responded to the information notice.

52. On 22 July 2016, HMRC issued to Assethound an initial penalty of £300 for failure to comply with the information notice.

53. On 17 August 2016, Assethound appealed against the information notice and the penalty assessment.

54. In a decision dated 2 November 2016, HMRC found that the 22 June 2016 letter did not constitute a full response to the information notice, and that the penalty had been correctly charged.

55. In a letter dated 9 December 2016, Assethound requested a review of that decision.

56. Following further correspondence between the parties, in a review conclusion letter dated 9 February 2017, HMRC concluded that the information notice was correct and should be upheld, but that the penalty notice should be cancelled.

57. On 10 March 2017, Assethound filed a notice of appeal with the Tribunal, appealing against the information notice.

The Appellant's grounds of appeal

58. The grounds of appeal as set out in the notice of appeal against the information notice are that specified items in the request (1) are too broadly drafted, (2) concern the company's tax position for an earlier tax period, (3) do not reasonably restrict itself to matters relevant to Assethound, (4) are unclear in scope and therefore unenforceable, and/or (5) are unclear how they have anything to do with the company's tax position for any period at all.

APPENDIX D

The witness evidence

EVIDENCE OF DAVID GRAHAM (RELATING TO QUBIC TAX)

1. The witness statement of David Graham in appeal no TC/2017/02089 states amongst other matters as follows.

2. Mr Graham is a chartered accountant and a member of the Institute of Chartered Accountants for England and Wales ("ICAEW"). He is the sole director of Qubic Tax Ltd, which was first incorporated in January 2008, and which is an ICAEW member firm of chartered accountants specialising in the provision of tax advice. He found the correspondence from HMRC dated 31 August 2016 to be ambiguous. For each tax year there were two documents, each referring to the other as the notice, so that it was unclear which of the documents constituted the formal notice. He also found the language of the documents to be unclear. If Qubic Tax is obliged to comply with HMRC's documents it will do so, but it is necessary to know what falls within or outside the scope of the requests. Otherwise, considerable time may be spent unnecessarily by officers or employees of Qubic Tax trying to ascertain the ambit of the request and compiling documents which are not required by HMRC, which is also why the requests place an unduly onerous burden on Qubic Tax.

3. Mr Graham made a further witness statement in appeal no TC/2017/07620.

EVIDENCE OF DAVID GRAHAM (RELATING TO QUBIC TRUSTEES)

4. The witness statement of David Graham states amongst other matters as follows.

5. Mr Graham is one of two directors of Qubic Trustees, which was first incorporated in 2009 and which is an ICAEW member firm of chartered accountants specialising in the provision of trustee services. Mr Graham considers that the information notice issued to Qubic Trustees is ambiguous. In item 2, for instance, it is unclear whether the request includes accounts in respect of which the company acts as trustee. The notice will require time to be spent searching for documents that HMRC do not reasonably need, which creates an unnecessary and onerous administrative burden. In relation to item 1 in the notice, there are approximately 600 sales invoices listed in the analysis of turnover annex to Qubic Trustees' letter dated 31 March 2016 which also present an administrative burden to compile. Qubic Trustees have asked HMRC without reply what its specific concerns are in relation to the company's tax return. The notice asks for information which Mr Graham considers is not relevant and therefore would create an unnecessary administrative cost.

EVIDENCE OF DAVID GRAHAM (RELATING TO ORCHARD STREET)

6. The witness statement of David Graham states amongst other matters as follows.

7. Mr Graham is the sole director of Orchard Street, which was incorporated in 2009, and which at material times acted as agent for two separate client principals, for the purpose of obtaining the supply of management services. The ambit of the requests set out in items 5 and 6 of the information notice are very wide and the full extent of this information is not reasonably needed for checking the company's tax position. It is difficult to identify clearly what HMRC require, which would result in an unnecessary and onerous administrative burden.

EVIDENCE OF DAVID GRAHAM (RELATING TO ASSETHOUND)

8. The witness statement of David Graham states amongst other matters as follows.

9. Mr Graham is the sole director of Assethound, which was incorporated in 2013, and which at material times assisted clients with the purchase of gold bullion on credit terms. Assethound will comply with any unsatisfied obligations identified by the Tribunal. Assethound sought to cooperate with HMRC's information notices, and Mr Graham considers that the documents provided were sufficient for HMRC to check the company's tax return for the period in question.

EVIDENCE OF HMRC OFFICER CLARK (RELATING TO QUBIC TAX)

10. The witness statement of Officer Clark states amongst other matters as follows.

11. Officer Clark is an "intervention lead" for the "Promoter Channel" which is part of HMRC's Counter-Avoidance Directorate. He was the intervention lead when the data-holder notices under appeal were issued. Qubic Tax was the subject of an intervention by the Promoter Channel because it is a promoter of tax avoidance schemes. Promoter Channel colleagues were aware that promoters of tax avoidance schemes often market their products via a network of introducers or intermediaries and that they pay for introductions. A project was therefore started to seek details of such payments from promoters in order to check that the introducers included such payments in their tax returns. A list containing 48 promoters was drawn up, which included Qubic Tax.

12. It is standard HMRC practice to give advance notice of data-holder notices the first time that they are issued, and this was done for all the promoters on this list, including Qubic Tax. The financial controller of Qubic Tax, Mr Kit Forrest, responded to the early warning letter from HMRC, returning the completed questionnaire that had been sent with that letter. In this completed questionnaire, Mr Forrest answered "yes" to question 6 (see paragraph 2 of Appendix C above). Officer Clark took this to indicate that Qubic Tax made such payments, that it was a data holder within paragraph 9 of Schedule 23, that the "reason to believe" test in paragraph 3(2) of Schedule 23 was satisfied, and that Schedule 23 notices could be validly issued to require returns of such payments.

13. In examination in chief, Officer Clark said that he had left HMRC in 2018.

14. In cross-examination, Officer Clark said as follows.

15. He did not know why the Promoter Channel was called "Channel" and accepted that this "HMRC speak" might not be clear to external stakeholders. He thought it hard to say whether the questionnaire issued with the early warning letter gave the impression that a data-holder notice would not be issued if the response to the questionnaire indicated that it would not be appropriate. He did not design the questionnaire form so could not say if it was designed to give HMRC reason to issue a data-holder notice. Officer Clark did not send the early warning letter or questionnaire. Everyone to whom a data-holder notice is issued receives an early warning letter before a data holder notice is sent for the first time, as a matter of standard procedure. He did not know what would happen if a person responded to question 6 of the questionnaire by stating that they do not make payments of that kind, but presumably a data-holder notice would still be issued if HMRC had other reasons to do so. In this case, and more generally, the fact that a person answers "yes" to question 6 is a justification for continuing to send further data-holder notices indefinitely in the future. If someone stated in good faith that they did not make such payments and HMRC accepted that, HMRC would stop sending the notices.

16. HMRC had become aware that Qubic Tax were making payments to intermediaries who were introducing clients to them. He could not say whether Qubic Tax would have received a data holder notice regardless of how the questionnaire had been answered. Question 6 was worded in the present tense, so a positive answer to the question indicated that payments of the kind referred to were being made as at the date of answering the questionnaire. From such an answer HMRC would also assume it to be likely that such payments had been made in the past since otherwise the answer to the questionnaire would state so. That was the basis for asking for information going back 3 years. HMRC knew that Qubic Tax was an established business that had been in operation for a considerable period, and if they were making such payments at the time of the questionnaire, it was obvious that they did so earlier as well. Officer Clark accepted that it would have been better if the questionnaire had asked specifically if such payments had been made over the previous 3 years.

17. Question 6 was drawn in wide terms because there are many means by which such payments can be made, for instance by way of making loans that are never intended to be repaid. There are many means by which valuable consideration can be transferred. Officer Clark could not say whether there could be any company other than a dormant company that would be able to answer "no" to question 6, but agreed that it covered any payment made by any company including for instance a payment for fuel by a taxi service. Nevertheless, he considered that a positive response to that question justified issuing a data-holder notice. In the case of Qubic Tax, HMRC considered it likely that they were making payments of commissions, and that the questionnaire helped justify issuing the notice.

18. In cases like this commissions are usually paid to accountants and other professional advisers, who should include these amounts in their turnover. He was aware of one case in 2016 where the professional adviser had failed to do this, and there had been a significant settlement with HMRC. He could not say if this happened often. He accepted that the purpose of the checks was not to counter tax avoidance, but to counter evasion or careless error. When this was repeated to him for confirmation, he said that the purpose was to ascertain the facts. The sole purpose was to check compliance by accountants. Notices are issued to thousands of people, not because it is thought likely that people are evading tax but because one or two may be. Spreading the message that avoidance does not work was a collateral benefit.

19. The information obtained was to be fed into HMRC databases so that it would be available for risk assessments of accountants and financial advisers.

20. Officer Clark said that the original data holder notices were subsequently withdrawn on his decision, after taking advice. He was trying to assist Mr Graham to comply by taking on board his comments. The re-issued data holder notices were intended to be clearer and more precise.

21. When asked which pages of the documents sent to Qubic Tax on 31 August 2016 constituted the data holder notices and which pages were accompanying letters, he identified the notice as being a 2 page document which contained the title "Schedule" about half way down the first page. He said that the text underneath the heading "Schedule" was part of the notice. It was put to him that the first words under that heading stated "The enclosed notice requires you to send …", and later in the document there is another reference to "the enclosed notice", thereby necessarily suggesting that this document was not the notice. It was further put to him that while HMRC might have understood which part of the documentation constituted the notice, it would not have been clear to someone receiving the documentation. Officer Clark said that it was just necessary to read the documentation sensibly, and that its meaning was fairly obvious.

22. When asked, Officer Clark confirmed that if several payments had been made to a particular person over the course of a year, the notice only required the total amount paid to that person during the year to be returned. However, it was put to him that the notice stated "In respect of each payment I require …", and that in the event of an inconsistency between the notice and the HMRC guidance, the recipient of the notice was required to comply with the terms of the notice itself. Officer Clark accepted that the notice would have been clearer if it had said "In respect of each payee I require …"

23. When asked what was meant by the expression "directly or otherwise", Officer Clark said that he thought this covered the situation where value is transferred by making payment via a third party, but was not certain. When asked whether, in the event that payment was made to B as a nominee of C, it would be sufficient to report the payment to B, Officer Clark said that any answer would be speculative as he was not involved in the drafting of the notice. When asked what was meant by "period end date", he said that he thought this meant the payer's period end date but he could not be sure. When asked why the notice did not simply ask for the exact date of each payment, he said that it was because the notice required only the total of all payments made to a payee during a year. When asked what was meant by "year to which payment relates", he said that this was explained in the guidance. He accepted that the notice could have been better worded, but considered that it was understandable.

24. Officer Clark confirmed that apart from the one case he had mentioned, he did not have personal knowledge of cases where commissions had been paid to professional advisers who had then failed to include these amounts in their turnover.

25. In re-examination, Officer Clark said that he felt based on conversations with colleagues that promoters with very large numbers of clients were very likely to have paid commissions.

EVIDENCE OF HMRC OFFICER SHAKLES (RELATING TO QUBIC TRUSTEES AND ORCHARD)

26. The first witness statement of Officer Shakles states amongst other matters as follows.

27. Officer Shakles works in the HMRC Counter Avoidance Directorate. In September 2015 she was assigned to work as a caseworker on a Qubic Tax asset purchase avoidance scheme which had been registered under the Disclosure of Tax Avoidance Scheme ("DOTAS"). She was responsible for the individual corporation tax enquiries into the tax returns of Qubic Trustees and Orchard.

28. In relation to Qubic Trustees, HMRC consider that the outstanding items required by the information notices are statutory records, but HMRC in any event consider that the information requested is reasonably required for purposes of checking the tax position of Qubic Trustees.

29. In the case of Orchard, the outstanding documents that HMRC are seeking are business books and records from which the accounts for the period 1 October 2013 to 30 September 2014 were prepared, all company and non-company bank and building society and other account documents, and details of each debtor and debt. This is usual for such a check. The business books and records underpinning the tax return are statutory records in any event. These records are in any event reasonably required to check the overall tax position of the company.

30. In cross-examination, Officer Shakles said amongst other matters as follows.

31. She accepted that the wording of the information notice was standard wording that had been drafted by someone else, but she believed the wording to be correct in relation to this case. She decided what to ask for in the information notice on the basis that it was considered to be reasonably required, and excessive information was not asked for. When deciding what

to ask for, the guidance was checked and the previous year's return was looked at for a comparison, but the PAYE records were not looked at as this would not be usual before opening an enquiry. She had no input into the HMRC statement of case.

32. When asked whether the fact that Orchard had a pending appeal against the information notice had been taken into account when the £300 penalty had been threatened on 20 April 2016, Officer Shakles said that the requested items that had still not been provided were considered to be statutory records against which there was no right of appeal. Officer Shakles was not sure whether the 27 April 2016 letter from Orchard had been received before the £300 penalty was imposed, but considered that the penalty would have been appropriate in any event.

33. Officer Shakles did not accept that items 5 and 6 in the information notice issued to Orchard were "kitchen sink" requests. All underlying documents on which the returns were based were required. She had no idea what those records might be, and thought it reasonably obvious to the recipient what was required. The recipient was required to provide only those documents that actually existed; HMRC cannot know what documents and records the recipient has so requests have to be stated in broad and general terms. If an entire return is being checked, it is not inappropriate for HMRC to ask for documents relating to very small amounts. While HMRC is not confined to asking for information on a single occasion only, the first request asks for everything to avoid drip-feeding requests.

34. Officer Shakles accepted that Orchard had complied with all but 2 items in the information notice to HMRC's satisfaction, that Orchard had been trying to engage with HMRC, and that Orchard's letters to HMRC were not merely playing for time. On 27 July 2016, she informally postponed the penalties, and sought further advice from someone in a higher position at HMRC.

35. Officer Shakles was working on cases assigned to her and did not choose the cases.

36. In relation to Qubic Trustees, Officer Shakles insisted that all of the information requested had been required to check the return of that particular company, and denied that any of the information requested had been wanted in order to check the tax affairs of third parties. She adopted the same approach that she did for every enquiry. She accepted that it might be possible for an addressee of an information notice to provide primary documents with names of third parties redacted, although she had never seen this done.

EVIDENCE OF HMRC OFFICER MILLWARD (RELATING TO QUBIC TRUSTEES AND ORCHARD)

37. The first witness statement of Officer Millward states amongst other matters as follows.

38. Officer Millward had responsibility for providing technical leadership for the enquiries into the scheme and its users. He also took over from Officer Shakles responsibilities for the individual corporation tax enquiries into the tax returns of Qubic Trustees and Orchard.

39. In the case of Qubic Trustees, the outstanding documents that HMRC are seeking are sales invoices for the accounting period and an aged debtor analysis. In conducting a full corporation tax check, HMRC would expect to be able to see the company's prime records. The request for these documents is normal for such an enquiry and these constitute part of the statutory records of the company. These records are in any event reasonably required to check the overall tax position of the company. Reviewing the sales and receipts of the company is a key starting point for this. An aged debt analysis of the debtor figure is required to understand the overall cash flow of the business.

40. In the case of Orchard Street, HMRC are conducting a full corporation tax check of its corporation tax return, and the documents requested are needed to understand how the figures

in the return have been arrived at and to assess whether those figures are complete and correct. Business books and records are considered to be statutory records, and they are in any event reasonably required to check the tax position of the company. While the company has already provided an explanation of certain figures within the accounts and tax return, without sight of the primary records he cannot assess whether those explanations and the underlying tax figures are correct. He considered the quantum of the penalties to be reasonable in the circumstances.

41. In cross-examination, Officer Millward said amongst other matters as follows.

42. He accepted that a collaborative approach is better than issuing an information notice, if the taxpayer is willing to cooperate. However, he did not accept that the Appellants were collaborative in this case, and could not see why the Appellants were unwilling to provide the requested documents. He considered that the outstanding records were statutory records, and these had not been provided after 3 months.

EVIDENCE OF HMRC OFFICER SHAKLES (IN RELATION TO ASSETHOUND)

43. The second witness statement of Officer Shakles states amongst other matters as follows.

44. Assethound disclosed in their accounts to accounting period ended 8 May 2014 and 30 September 2014 their use of an employee benefit trust scheme with a tax efficient structure that operated when the reward was conferred upon the employee. In that disclosure, the company stated that "this disclosure is made on the basis that HMRC may not agree this and so they can raise queries, should they wish to do so".

45. HMRC understand that the scheme is stated to work as follows. Assethound set up an employee benefit trust with a small sum (often £1,000) plus a small contribution to the trust (say £5,000). When the company decides to reward an employee (usually a director) it invests a sum (say £95,000) in gold via a bullion house, and the trust also invests in gold with the £5,000. A tripartite agreement signed by the company, the employee and the trustee provides that title to the gold passes to the employee who agrees to pay the trust the value of the gold at a later date, usually in 10 years' time. The employee is then free to sell the gold and receives the sale proceeds. The company claims a deduction for the fees associated with using the scheme and £100,000 contribution.

46. In cross-examination, Officer Shakles said amongst other matters as follows.

47. Officer Shakles accepted that motivating and incentivising employees would be wholly and exclusively for the purposes of trade, but that it was always necessary to look at what actually happened in a particular case. Records of earlier discussions might disclose the actual thought processes around what was done. If the purpose of the scheme was not to incentivise employees but to avoid tax, then it would not be wholly and exclusively for the purposes of trade. Officer Shakles was looking for information confirming what had happened, and shedding light on why it had happened. There were many contrived steps in the scheme and she needed to take a lot of advice from colleagues. She was at this stage simply trying to gather information about the scheme. She considered that her request in item 2 of the information notice was clear.

48. As to the request in item 5 of the information notice, she accepted that she knew what had happened, and that she was requesting the information in order to find out why and how it had happened.

49. As to the request in item 16 of the information notice, she said that she could not know how the information would be relevant to taxability or what the risk to tax might have been until she had seen the information.

50. As to the request in item 17 of the information notice, she said that behind all of the requests for information was the purpose of ascertaining whether the real purpose of what happened was to incentivise and reward the director, or whether it was to avoid tax. She accepted that the request did not indicate how far back in time she was looking, and that with hindsight the request could have been more specific.

EVIDENCE OF HMRC OFFICER MILLWARD (IN RELATION TO ASSETHOUND)

51. The second witness statement of Officer Millward states amongst other matters as follows.

52. Officer Millward took over responsibility for the corporation tax enquiries into Assethound from Officer Shakles at the beginning of 2016.

53. HMRC are investigating tax avoidance schemes, designed and marketed by Qubic Tax, that utilise transactions involving gold bullion to reward employees allegedly in a tax efficient manner.

54. HMRC understand that in general terms the scheme operates as follows. The company settles an onshore employee benefit trust with a small initial sum (often £1,000), then increases the capital value of the trust with a further payment (say £10,000). The company decides to reward an employee (usually a director) with a purchase of gold bullion though an independent bullion dealer (in this example, the value of the gold purchased is £90,000). The trustees of the trust also decide to purchase gold for the employee in the sum of £10,000 so that the total bullion purchased is £100,000. The value of the gold purchased with trust funds is taxed through the company payroll. The company, employee and trustees enter into a tripartite agreement whereby the beneficial title to the gold bullion passes to the employee and the employee agrees an obligation to pay the value of the bullion to the trust at a specified future point, usually 10 years from the agreement date. The employee then sells the bullion (usually on the same day that it is purchased and at the same price point) and receives the sales proceeds from the dealer. The company claims a corporation tax deduction for the £100,000 of gold bullion purchased and any scheme fees associated with those arrangements. The employee receives £100,000 gross with £95,000 not suffering the deduction of PAYE or NICs.

55. It is also HMRC's understanding that Assethound is part of the scheme transactions for an undisclosed variant of this scheme, in which the gold bullion is sourced on credit.

56. Officer Millward agrees that it was reasonable to request the disputed items in the information notice.

57. In examination in chief, Officer Millward said amongst other matters as follows. The determination under regulation 80 of the PAYE Regulations was issued to protect the position after a new ground of appeal was added in this appeal, in order to protect the position. HMRC have not yet formed any view arising out of the corporation tax enquiry.

58. In cross-examination, Officer Millward said amongst other matters as follows.

59. Officer Millward understood from a conversation with a colleague that HMRC considered that it had enough information to issue the determination under regulation 80 of the PAYE Regulations. This was not just a mechanism to buy more time, although the fact that the time limit for issuing the determination was about to expire was a factor. He accepted that the amount of tax due is not affected by whether or not a DOTAS number is correctly cited on the return. He could not recall hearing anything in the evidence of Officer Shakles with which he disagreed. The HMRC caseworker has day to day contact with the individual taxpayer, and there may be a technical team with a technical lead for particular tax arrangements to which

the caseworker can refer. All of the documents requested concerned tax arrangements entered into by Assethound. The arrangements enabled the director to be remunerated without paying tax or National Insurance, and the company could claim a corporation tax deduction for its contribution to the arrangement.

60. As to the request in item 1 of the information notice, he did not believe that the disclosure made by the company set out all of the steps of the scheme. It would have been remiss of him to make a decision denying the tax advantage of the scheme without first seeing all relevant information. Even if HMRC at the time had a lot of information about the implementation of the scheme in question, he did not want to close down the enquiry without fully exploring all information. He will not form a final view as to whether the scheme used by Assethound is the same scheme as that used by Qubic Tax until he has seen all documents.