[2021] UKFTT 0158 (TC)

TC08127

PROCEDURE – Schedule 36 FA 2008 information notice – whether information reasonably required – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/09530

BETWEEN

AVONSIDE ROOFING LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

The hearing took place on 9 March 2021. With the consent of the parties, the form of the hearing was V (video). A face-to-face hearing was not held because of the Covid pandemic and it was considered that the case was suitable for a remote hearing. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

The documents to which I was referred are a joint bundle of 700 pages, two further authorities, the Appellant's Skeleton Argument dated 4 March 2021 and the Respondents' Skeleton Argument dated 24 February 2021.

Ms Ximena Montes Manzano, counsel, instructed by PwC LLP, for the Appellant

Ms Glynis Millward, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against an information notice issued by the Respondents ("HMRC") to the Appellant ("Avonside") on 9 November 2018 pursuant to Schedule 36 to the Finance Act 2008 ("Schedule 36") as varied on 29 November 2019 ("the Notice").

2. Avonside implemented tax planning arrangements with the assistance of Clavis Tax Solutions Limited ("Clavis") and a remuneration consultant, Herald Employment Services ("Herald"), in the tax year 2009/10. These types of arrangements are known as Clavis Herald arrangements and this type of arrangement, involving an employer contribution to establish an employee benefit trust, was the subject of the decision in *RFC 2012 Plc* [2017] UKSC 45 and the earlier decisions in that case ("the *Rangers* litigation").

3. HMRC claim that they issued a determination under regulation 80 of the Income Tax (Pay as You Earn) Regulations 2003 on 5 April 2016 ("the Regulation 80 determination") in respect of the implementation of Clavis Herald arrangements by Avonside in 2009/10. Avonside dispute receipt of the Regulation 80 determination, and the appeal against it is ongoing.

4. Avonside claim that the information and documents requested by HMRC's Notice are not reasonably required for the purpose of checking Avonside's tax position on the basis that there is no realistic prospect of a penalty, as no one could have known the consequences in 2010. This decision considers whether HMRC have established that the Notice meets the required conditions set out in Schedule 36.

5. I am grateful to the parties for producing skeleton arguments notwithstanding that this appeal was categorised as a basic case, and for their submissions on the draft decision.

BACKGROUND

6. There is no dispute about the fact that Avonside entered into Clavis Herald arrangements and that some £1.3m of the company's funds were paid to a remuneration consultant which settled funds into an employee benefit trust. The trustees allocated funds to sub trusts for the benefit of certain employees of the company. The sub trusts used the funds to acquire shares in Avonside's holding company.

7. Avonside's accountants, Champion Accountants, had told them that there was an opportunity to plan their tax affairs, and the promoter of the scheme, Clavis, presented to four directors of Avonside and the accountant from Champion. The accountant concerned became part of the Afortis group who advised Avonside in relation to the arrangements.

8. HMRC became aware that Avonside had participated in Clavis Herald arrangements as a result of information obtained from a third party. HMRC's position is that the amounts paid to the settlor of the employee benefit trust (EBT) should have been included in the company's PAYE return. HMRC issued a warning letter to the company on 29 March 2016 to indicate that a Regulation 80 determination may be issued, but it issued the determination in respect of the PAYE tax due for 2009/10 on 5 April 2016 before receiving a response or information from the company.

9. Officer Hoare opened his investigation into Avonside's tax return for the accounting period ended 31 December 2009 by letter dated 12 September 2017. The letter advises Avonside that Officer Hoare believes that the company's tax return is inaccurate due to its participation in Clavis Herald arrangements. The letter acknowledges that the company's agent had contacted HMRC with a view to reaching a settlement of this matter, but the letter closes with a statement that if they are unable to agree the amount of additional tax the company owes,

Officer Hoare may issue a discovery assessment. The letter confirms that the enquiries would be conducted under Code of Practice 8 enquiry and that, in order to progress matters, Officer Hoare required the documents listed in the schedule to the letter. Officer Hoare told the Tribunal that he was aware that the Regulation 80 determination had been issued by this stage and that his reference to a discovery assessment was in respect of corporation tax.

10. Following a call with Avonside's agent, Mr Roseff of PricewaterhouseCoopers LLP ("PwC"), Officer Hoare wrote to update the company on 22 September 2017. This letter advised that HMRC had received an appeal in respect of a determination raised under Regulation 80 and that the documents that had been requested on 12 September were no longer required.

11. In 2017 HMRC introduced settlement opportunities for what they described as disguised remuneration schemes, and in November 2017 HMRC published 'disguised remuneration settlement terms' which were used up to 30 September 2020.

12. On 20 June 2018 Officer Hoare sent an email to PwC stating that he held "restricted" information that gave him reason to suspect careless or deliberate behaviour on Avonside's part. This email exchange was followed by a call on 22 June 2018 in which Officer Hoare suggested that HMRC's view was that the way in which the scheme had been implemented showed a degree of predetermination which may mean that the company is liable for a penalty.

13. On 26 July 2018 Officer Hoare issued an informal request for 50 items of information and documents.

14. On 26 October 2018 HMRC issued a follower notice in respect of the remuneration scheme by reference to the decision *in Landid Property Ltd, Allen (Concrete) Ltd & Anor v HMRC* [2017] UKFTT 692 (TC). The notice states that remuneration consultant, as settlor, "was the person in receipt of the amount paid in respect of the employee's or employees' work, and the payment to it should have been subject to deduction of income tax under the PAYE Regulations". Avonside is "liable to account for the income tax that you should have deducted from the payment to the settlor of the [EBT] trust under the PAYE regulations in respect to the year ended 5 April 2010 ("the denied advantage")."

15. On 9 November 2018 the Notice was issued. The Notice lists 9 items of required information and documents. In the information notice letter Officer Hoare states that "I need [the information and documents] so that I can determine if a penalty is due". The Tribunal's bundle includes Officer Hoare's submission to an authorising officer in respect of the Notice. The response confirmed that the information would be reasonably sought to explain "why the Company failed to mention the arrangement on the face of their accounts (other than to put the expenditure in "emoluments")" and to explain the evidence Officer Hoare had identified of a pre-planned commitment to purchase the shares in the parent company. The authorising officer concluded that it was "correct and proper" for Officer Hoare to seek the information upon which the taxpayer intends to rely on to claim their behaviours do not amount to carelessness "in order to form your final view on the penalty position".

16. Avonside appealed against the Notice by letter dated 3 December 2018. Officer Hoare set out his view of the matter in his letter dated 29 July 2019. In response to PwC's claim that HMRC require the information to determine the validity of the Regulation 80 determination, and that unless the PAYE determination is valid there is no question of a penalty being due, Officer Hoare stated that the information and documents are required to reach a view on the penalty position. He also made the following statement of his position:

> "… I require the information and documents as per the Information Notice to form a full view on behaviours. At present, I have a reason to suspect that the

> company failed to take reasonable care. This is because HMRC holds evidence which suggests that the company was aware of how the funds to be transferred to the EBT would be used before the arrangements were entered into. Despite this, the company completed paperwork to present a version of events where a remuneration planning exercise was undertaken by a third party to decide how the funds would be used. It is my view that the review of the company did not take place and that the directors were involved in completing paperwork which misrepresented what had actually happened for the purpose of obtaining a tax advantage. That the company accepted this without appearing to raise any doubts or seek any additional advice is an indicator of careless behaviour."

17. The parties attended a meeting on 12 March 2019. HMRC shared sight of documents at this meeting which in HMRC's opinion were "restricted" and yet supported their view of careless behaviour. HMRC have refused to share hard copies of the evidence held due the possible impact on the wider investigation of such arrangements, and consequently neither Avonside nor the Tribunal have had the opportunity to review them.

18. HMRC varied the Notice following the review conclusion letter dated 29 November 2019 from nine to seven items.

Findings of fact from Officer Hoare's witness evidence

19. HMRC was only made aware that Avonside had participated in the arrangements when the third-party information came to light.

20. The company did not disclose the details of the transactions in its accounts. Officer Hoare considers that a company's day-to day accountants would normally put a note in the accounts if they were aware that arrangements such as these had been entered into, notwithstanding that this is not a legal requirement.

21. As noted in paragraph 9 above, there was some confusion when Officer Hoare opened his investigation by his letter of 12 September 2017. The letter did not reflect the fact the Regulation 80 determination had been made and that Avonside had made attempts to agree a settlement with HMRC. However, Officer Hoare's letter of 22 September later confirmed that the case had been passed to him to progress matters towards settlement, and included a request for a meeting with directors and key employees "to discuss financial settlement, which may include any further tax liability, interest and penalties". His position in relation to the Regulation 80 determination is that HMRC must have had reason to raise it outside the normal time limit but, as he was not involved in its issue, he cannot confirm the reason.

22. On review of documentation received from a third party, including a copy of the bible of the documents used by Avonside to implement the Clavis Herald arrangements, Officer Hoare formed the view by June 2018 that certain steps may not have taken place and that certain steps had been preordained. Officer Hoare accepts that the company used the bible of documents provided by Clavis, but he considers that certain documents raise concerns about careless conduct.

23. Officer Hoare referred to an email that he believed showed that the scheme would be used to subscribe for shares. The email is between the company's accountant adviser (who became part of the Afortis group of accountants) and an employee of Herald. Officer Hoare believes that the email suggests that Avonside had a pre-determined notion of how the funds would be used before the payment was made to the settlor of the EBT, but he accepts that there was no guarantee that the funds would be used in this way. Officer Hoare accepts that whether the funds in the EBT were used for loans or shares does not make a difference to the company's tax position as this arose after the PAYE charging point.

24. Officer Hoare also referred to the fact that the minutes of a meeting that took place on 18 February 2009 appear to approve the outsourcing agreement with Herald even though the meeting to consider and agree whether the arrangements should be put in place was not until 10 March 2009. Officer Hoare also questions the report prepared by Herald. He accepts that Herald produced a report and employee evaluation sheets and that Avonside paid Herald's fees, but he queries how the information was provided to enable them to prepare the report and whether substantive services were indeed provided by Herald.

25. On 12 March 2019 Officer Hoare met with Avonside. Following this meeting PwC sent an email to summarise the evidence that Mr Burke had been able to provide about the events in 2009. Officer Hoare accepts that the company had received advice and documents from Clavis and that Clavis had obtained a QC's opinion on the arrangements (albeit that he has not seen it). He also acknowledges that Afortis were involved in putting the arrangements in place. However, Officer Hoare has not seen the advice, if any, that the company had from its day-to-day accountants on the arrangements. Officer Hoare considers that Clavis and Afortis cannot be considered to be independent advisers as they benefitted financially from the implementation of the arrangements. His language reflects the provisions in relation to reliance on 'disqualified advice' and 'interested person' applicable to tax periods beginning on or after 6 April 2017.

26. Officer Hoare's understanding of careless conduct is that if a taxpayer has taken full advice and fully considered the arrangements entered into, there might be a case that there was a mistake despite taking reasonable care. If however the company has entered the arrangements without considering the advice properly or without seeking full advice, then his view is that there is an element of carelessness in entering into the arrangements and this would result in the application of a penalty under Schedule 24.

27. Officer Hoare accepts that there is nothing before the Tribunal at this stage that would support an allegation of deliberate conduct. He has no reason to suspect deliberate conduct on the information that he has seen to date but, if the Notice is upheld and information then comes to light that gives reason to suspect deliberate conduct, HMRC would raise it at that stage. Officer Hoare was considering careless conduct when he issued the Notice.

28. I have considered the Notice letter, the documents in the bundle and Officer Hoare's witness evidence, and conclude that the Notice was given for the purpose of checking if a penalty may be payable.

Submissions

29. HMRC submit that the items requested in the Notice are required for the purpose of checking Avonside's tax position and that the Notice was validly issued.

30. HMRC submit that the items are required because Avonside filed an inaccurate return and HMRC need to consider if Avonside acted carelessly or deliberately. HMRC have identified certain issues in the arrangements in this context.

31. First, there is doubt about when/how the recruitment consultant carried out their review since Officer Hoare understands that the company had no direct contact with Herald.

32. Second, HMRC query when the outsourcing agreement was considered by the company. It is reasonable for HMRC to request sight of the underlying documents to ascertain precisely when/if activities took place.

33. Third, HMRC consider that an email between the accountant who introduced the company to Clavis and an employee of Herald suggests that the acquisition and allocation of equity in sub trusts was predetermined.

34. HMRC submit that the information and documents concerning the points on the documentation identified by Officer Hoare are reasonably required for the purpose of checking the behaviours which led to the failure to deduct PAYE and NICs.

35. HMRC submit that as Avonside claim that they relied on professional advice, sight of the professional advice is considered relevant to the question of the company's behaviour. If Avonside followed the steps in accordance with the scheme arrangements, this may provide protection from penalties. But HMRC consider that any divergence from the steps goes to the heart of whether there was careless behaviour.

36. HMRC accept that Avonside sought advice from Clavis and Afortis, but these parties benefitted financially from the implementation of the arrangements, and HMRC consider that they cannot therefore be considered to be independent advisers. HMRC wish to establish what advice was sought from the day-to-day accountants, including in relation to disclosure.

37. Avonside submit that HMRC have not demonstrated that Officer Hoare reasonably requires the information and documents in the Notice for the purpose of checking the company's tax position.

38. Avonside submit that the company's tax position in relation to the arrangements is the subject of a follower notice and the Regulation 80 determination, and so HMRC's request for further information following their issue is inconsistent with the conclusions that they must have reached. Avonside submit that HMRC issued the Regulation 80 determination outside the normal time limits without evidence of carelessness, and that the chronology of events suggests that checking the penalty position is an ulterior motive. Following the conclusion of Avonside's appeal against the Regulation 80 determination, HMRC will have the opportunity to issue a penalty assessment if appropriate, but it is not a reasonable use of Schedule 36 to require information for the purpose of gathering evidence to support its position that the Regulation 80 determination was validly issued.

39. Avonside submit that HMRC have not overcome the burden of establishing a prima facie case on carelessness, and that they have misdirected themselves on the test for carelessness. The fact that the arrangements were not disclosed in the accounts or that Officer Hoare has identified certain issues of concern in the documents (which is not accepted), does not mean that these issues caused a loss of tax or the inaccuracy for the purposes of the penalty legislation. Further, HMRC have not adduced evidence required to prove that they have a reason to suspect carelessness. HMRC rely heavily of documents received from a third party that have not been provided.

40. Avonside relied on its reputable adviser and the promoter of the Clavis Herald arrangements and the company believed that the documentation would be effective; it was not until the conclusion of the *Rangers* litigation that it was clear that this was not the case. Avonside did not seek to rely on the paragraph 18, Schedule 36 (possession or power), paragraph 19 (pending appeal), paragraph 20 (old documents) or paragraph 62 (statutory records) at the hearing.

RELEVANT LAW

Schedule 36

41. Schedule 36 sets out two clear requirements for an information notice to be valid.

42. First, paragraph 1 of Schedule 36 (Information and Inspection Powers – Part 1 Powers to obtain information and documents) provides that the information or document sought by the notice must be reasonably required, by the officer giving the notice, for the purpose of checking the taxpayer's tax position. The provision reads as follows:

> " (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."

43. Second, where a corporation tax return has been filed for the relevant period (as in this case), a taxpayer notice may only be given for the purposes for checking that person's corporation tax position in relation to the chargeable period to the extent that at least one of conditions A to D is met. In this case HMRC rely on Condition D in paragraph 21 of Schedule 36.

44. The relevant provisions in paragraph 21 read as follows:

> "(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.
>
> 4)Condition A is that a notice of enquiry has been given in respect of—
>
> (a)the return, or
>
> (b)a claim or election (or an amendment of a claim or election) made by the person in relation to the chargeable period in respect of the tax (or one of the taxes) to which the return relates ("relevant tax"),
>
> and the enquiry has not been completed.
>
> (5)In sub-paragraph (4), "notice of enquiry" means a notice under—
>
> (a)section 9A or 12AC of, or paragraph 5 of Schedule 1A to, TMA 1970, or (b)paragraph 24 of Schedule 18 to FA 1998.
>
> (6)Condition B is that an officer of Revenue and Customs has reason to suspect that—
>
> (a)an amount that ought to have been assessed to relevant tax for the chargeable period may not have been assessed,
>
> (b)an assessment to relevant tax for the chargeable period may be or have become insufficient, or
>
> (c)relief from relevant tax given for the chargeable period may be or have become excessive.
>
> (7)Condition C is that the notice is given for the purpose of obtaining any information or document that is also required for the purpose of checking that person's VAT position.

(8)Condition D is that the notice is given for the purpose of obtaining any information or document that is required (or also required) for the purpose of checking the person's position as regards any deductions or repayments referred to in paragraph 64(2) (PAYE etc)."

45. Paragraph 64 of Schedule 36 defines a person's tax position to include the following:

"(1)In this Schedule, except as otherwise provided, "tax position", in relation to a person, means the person's position as regards any tax, including the person's position as regards—

[…]

(b)penalties and other amounts that have been paid, or are or may be payable, by or to the person in connection with any tax, and

[…]

and references to a person's position as regards a particular tax (however expressed) are to be interpreted accordingly.

(2)References in this Schedule to a person's tax position include, where appropriate, a reference to the person's position as regards any deductions or repayments of tax, or of sums representing tax, that the person is required to make—

(a)under PAYE regulations,

[...]"

46. Paragraph 32 of Schedule 36 sets out the procedure for appeals as follows:

"(1)Notice of an appeal under this Part of this Schedule must be given—

(a)in writing,

(b)before the end of the period of 30 days beginning with the date on which the information notice is given, and

(c)to the officer of Revenue and Customs by whom the information notice was given.

(2)Notice of an appeal under this Part of this Schedule must state the grounds of appeal.

(3)On an appeal the First-tier Tribunal may—

(a)confirm the information notice or a requirement in the information notice,

(b)vary the information notice or such a requirement, or

(c)set aside the information notice or such a requirement.

(4)Where the First-tier Tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given 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 First-tier Tribunal on an appeal under this Part of this Schedule is final.

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

Caselaw

Purpose of the statutory scheme

47. Ms Millward referred me to the following paragraph in *Derrin Brothers* [2016] EWCA Civ 15 at [68]:

> "The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise."

Reasonably required

48. I was referred to *Gold Nuts Limited* [2017] UKFTT 84 (TC) ("*Gold Nuts*") at [202] and [204] in relation the test of what is 'reasonably required'. Judge Redston's decision states that:

> "a request for information or documents cannot be unreasonable, or entirely without foundation, but that does not rule out an element of uncertainty or speculation on HMRC's part."
>
> And that the test "incorporates an obligation to consider whether [the requests] are proportionate".

Carelessness

49. The Regulation 80 determination was issued on 5 April 2016, the last day of the extended time period that applies pursuant to section 36 Taxes Management Act 1970 ("TMA") if the loss of tax was brought about carelessly. The relevant provision reads as follows:

> "Loss of tax brought about carelessly or deliberately etc
>
> (1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period)."

50. HMRC submit that the information and documents listed in the Notice are reasonably required by Officer Hoare for the purpose of checking the penalty position in connection with the failure to deduct PAYE. The relevant provisions in Finance Act 2007, Schedule 24, paragraph 1 read as follows:

> "(1) A penalty is payable by a person (P) where—
>
> (a) P gives HMRC a document of a kind listed in the Table below, and
>
> (b) Conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to—
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss . . ., or
>
> (c) a false or inflated claim to repayment of tax.
>
> (3) Condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) [failure to take reasonable care] or deliberate on P's part.

51. Paragraph 3 states that an inaccuracy in a document given is "careless" if the inaccuracy is due to failure to take reasonable care,

52. Ms Montes Manzano referred me to *Bella Figura Ltd* [2020] UKUT 120 (TCC) ("*Bella Figura*") and *Bayliss* [2016] UKFTT 500 (TC) ("*Bayliss*") in relation to the correct test for carelessness that Officer Hoare's was checking.

53. Ms Montes Manzano also referred me to the *Rangers* litigation in the FTT in 2012, Upper Tribunal in 2014 and the Supreme Court in 2017, and the Morse Review in 2019, to support her submission that it was prevailing practice and a widely held view (at the time of alleged careless behaviour) that the type of arrangement implemented by Avonside would not be subject to income tax and/or Class 1 national insurance contributions.

Burden of proof

54. HMRC have the burden of proof to show that the Notice meets the conditions in Schedule 36 for its issue. HMRC's skeleton argument suggests that the burden is on Avonside, relying on the comments in *Joshy Matthew* [2015] UKFTT 139 (TC), where Judge Redston discussed who had the burden of showing that the information and documents were "reasonably required". She concluded "83…that the burden of proof […] rests on the appellant, and not on HMRC" and "84…it is the taxpayer who knows the relevance of information or documents to his tax position, because he knows the full facts". HMRC's submission that the burden of proof is on Avonside was not pursued at the hearing. For the reasons set out in my decision in *Cliftonville Consultancy Ltd v HMRC* [2018] UKFTT 231 and Judge Redston's later decisions in *Mahmood v HMRC* [2018] UKFTT 297 (TC) and *Duncan v HMRC* [2018] UKFTT 296 (TC), I find that the burden of proof is on HMRC in this case.

DISCUSSION

55. This appeal concerns the question of whether the Notice meets the conditions of Schedule 36. As set out in 42 to 45, Schedule 36 sets out two clear requirements for the Notice to be valid.

Issue of notice after corporation tax return filed and Regulation 80 determination

56. First, as Avonside had filed its tax return for the relevant period some years earlier, HMRC must meet one of Conditions A-D in paragraph 21, Schedule 36. HMRC rely on Condition D, which read with paragraph 64 of Schedule 36, provides that the Notice may be issued to the extent that any information or document is required for the purpose of checking Avonside's position as regards any deduction that it was required to make under PAYE regulations, and any penalties in connection with that tax.

57. Avonside submit that as HMRC have issued the Regulation 80 determination in respect of the PAYE in the extended time limit in 2016, HMRC cannot issue a Schedule 36 notice in 2018 to check its position in relation to the careless behaviour required for the issue of the determination. Ms Montes Manzano submits that the concept of a 'protective' determination, which can later be justified or reinforced by information requests, flies in the face of the taxpayer safeguards introduced by the TMA and is the antithesis of 'reasonably required'. Further, despite HMRC's claims that they need "to build a full picture of the behaviours that led to the inaccuracy", HMRC have issued a follower notice.

58. HMRC referred me to Judge Mosedale's comment in *Distinctive Care* [2016] UKFTT 0764 (TC) that "it was not obviously wrong to have issued the information notice" in a case in which the Schedule 36 notice was issued after HMRC had issued a discovery assessment in respect of the respect of the tax to be checked. The comment was made because HMRC had withdrawn the Schedule 36 notice because it was established that it had been issued in breach of HMRC's then policy, and the taxpayer was seeking an order for costs on the basis of

unreasonable behaviour by HMRC. Ms Millward advised me that it now the policy of HMRC's Tax Administration and Legal Advice ("TALA") that HMRC can issue a Schedule 36 notice to explore the PAYE position even though a substantive decision on the PAYE position and a Regulation 80 determination has been made.

59. As in the case of *Distinctive Care*, the parties did not make further submissions "on the law on whether or not HMRC had power to issue an information notice to a taxpayer in circumstances where HMRC had already determined the taxpayer was liable to the tax on the transaction in respect of which it sought information by the information notice". In that case Judge Mosedale was asked to consider whether HMRC had acted unreasonably for the purpose of the appellant's application for an award of costs. Judge Mosedale's view was that if she found that there was a reasonable explanation for the issue of the information notice and/or its upholding on review, then HMRC had not acted unreasonably in issuing the notice or upholding it.

60. I note from the decision of the Court of Appeal in *Distinctive Care* at [24] that the officer in that case had been told in 2012 that an officer has power to issue an information notice even though HMRC has determined the taxpayer's liability. HMRC's Central Policy team's view had changed to state that HMRC should not rely on the power in Schedule 36 by the time that the officer issued the notice in March 2015. Ms Millward has not advised when TALA decided the policy that a Schedule 36 notice can be used to explore the PAYE position even though a substantive decision has been made on the PAYE position. It is also not clear if the policy has changed as regards other determinations, but HMRC's position is in any event limited by paragraph 21 and the circumstances of the case. For example, Condition A only applies so long as the enquiry is open, and Condition B reflects the 'discovery' provisions. In this case HMRC rely on Condition D for the purpose of checking if a penalty may be payable in connection with PAYE that is the subject of a Regulation 80 determination. As the circumstances of this case are that HMRC have yet to make a decision on the PAYE penalty issue, I do not consider that they are precluded from issuing a notice if the information can be shown to be 'reasonably required'.

61. Ms Montes Manzano referred me to the decision in *Michael Hegarty & Flora Hegarty v HMRC* [2018] UKFTT 774 (TC) at [154-155] in which Judge Thomas makes the point that a person's tax position "is not being legitimately checked or enquired into if the position is one which cannot be corrected by an enforceable assessment". I respectfully agree, but the validity of the Regulation 80 determination is not in issue in this appeal and the question is whether HMRC have established that the information or documents requested in the Notice is 'reasonably required' for the purpose of checking whether a penalty should be imposed, albeit within the time limit set out in paragraph 13(3) Schedule 24.

Information and documents 'reasonably required'

62. The second requirement for a notice to be valid is for HMRC to establish that the information required to be produced is 'reasonably required' by the officer for the purpose of checking Avonside's tax position.

63. The first step in considering this question is to determine which aspect of Avonside's tax position Officer Hoare was checking and, as noted in paragraph 28 above, I have accepted that the Notice was given for the purpose of checking whether a penalty may be payable. This appeal does not require me to determine the question of whether there was careless behaviour, but I accept Ms Montes Manzano's submission that I should consider whether the information that Officer Hoare listed in the Notice is 'reasonably required' in the context of the relevant legislation in Schedule 24 Finance Act 2007 pursuant to which any penalty would be imposed.

64. Paragraph1of Schedule 24 provides that a penalty is payable if it is established that Avonside's PAYE return contained an inaccuracy which amounted to an understatement of a its liability to tax if that inaccuracy was due to failure by Avonside to take reasonable care. The following cases provide assistance in applying the correct test for carelessness.

65. In *Bayliss* Judge Falk (as she then was) considered whether HMRC had discharged the burden of proof to demonstrate that the appellant was negligent (now careless), and made the following points at [65 and 68]:

> " …we agree with HMRC that some aspects of the appellant's behaviour could be described as careless. A reasonable man would have paid more attention to the documents and would have kept copies at least of key ones such as the loan. …. However, our task is not to decide whether the appellant was negligent in the abstract. The question is whether he negligently filed an incorrect return within s 95(1) TMA. So we need to focus on the error in the return and whether the appellant was negligent in making that error."
>
> "However, in order for s 95 to be engaged HMRC would also have needed to show that there was a causal link between the negligence and the errors in the return."

66. In *Bayliss* HMRC did not discharge its burden of proof to demonstrate that the appellant was negligent in filing an incorrect return. The taxpayer relied fully on a chartered accountant and on what he believed to be the promoter's expertise. As noted in paragraph 25 above, Officer Hoare's language in his evidence in relation to this question reflects the provisions about 'disqualified advice' and an 'interested person' that were introduced for tax periods beginning on or after 6 April 2017. The officer in this case may check whether Avonside was careless in filing the return according to the applicable provisions of Schedule 24.

67. In *Bella Figura* the First-tier Tribunal had made detailed findings as to the care that the taxpayer had taken to select an appropriate practitioner to prepare documentation in full knowledge that the documentation would need to meet specific requirements, and identified a failure to obtain advice as a careless omission. The Upper Tribunal found that section 36 TMA was concerned with the question of whether a failure to take reasonable care had caused the loss of tax. In this case, I have concluded that Officer Hoare did not issue the Notice for the purpose of checking behaviour for the purposes of section 36 TMA, but as he was checking Avonside's position as regards a penalty under Schedule 24, the question is whether the information is 'reasonably required' to check whether the inaccuracy in the relevant document was due to a failure on Avonside's part to take reasonable care. The checking of Avonside's behaviour should not be in the abstract, and the information required by the Notice should be considered in the context of paragraph 3 of Schedule 24.

68. I have gone on to consider the information and documents listed in the Notice (as varied following review) in the light of my finding that the Notice was given for the purpose of checking whether a penalty may be payable, and the caselaw cited above that shows that this means that the checking should relate whether the inaccuracy in the relevant document was due to a failure on Avonside's part to take reasonable care. I have also taken account of the caselaw that provides that HMRC's request must be "genuinely directed to the purpose for which the notice may be given" (Simler J in *Derrin* at [20]). A request for information or documents "cannot be unreasonable, or entirely without foundation" and while "that does not rule out an element of uncertainty or speculation on HMRC's part" (*Gold Nuts* at [202]), it does not allow mere speculation or allow HMRC to use Schedule 36 "to "fish" for possible issues" (*Gold Nuts* at [185]). I have reached the following conclusions:

1. Communications (letters, emails, faxes, notes of telephone conversations or notes of meeting) between Avonside Roofing Limited, Afortis and Herald Employment Services relating to your decision to proceed with the arrangements.

69. The information required under this heading relates to the implementation of the arrangements. HMRC's case is that this information is reasonably required for the purpose of checking Avonside's position as regards a Schedule 24 penalty as would assist HMRC to understand how and when the decision to proceed with the arrangements was made.

70. Officer Hoare's evidence is that when he considered the bible of documents for Avonside's implementation of the arrangements in the light of other documents for Clavis Herald arrangements that he had seen, he identified certain concerns about Avonside's documentation that suggest careless behaviour. As noted above, HMRC did not produce the other documents that gave rise to Officer Hoare's concerns, but he explained that his concerns relate to the engagement of, and with, the remuneration consultant, whether the sub trusts' acquisition of equity was preordained and the lack of disclosure in the accounts. The disclosure and documents of concern identified by Officer Hoare were referred to at the hearing in turn and, in cross-examination, Officer Hoare confirmed that the possible carelessness in implementing the arrangements that he had identified did not affect the tax point or the under-deduction of PAYE when the remuneration arrangements were implemented by the payment to the remuneration consultant.

71. The question of whether information is 'reasonably required' should be considered in the context of what the officer is seeking to check. The purpose of the Notice is to check whether a penalty under Schedule 24 may be payable in respect of the under-deduction of PAYE but, as Ms Montes Manzano submits, Officer Hoare's explanation for requiring the information under this heading relates to whether Avonside was careless in its implementation of the arrangements as opposed to whether the inaccuracy in Avonside's PAYE return was due to failure to take reasonable care. Even if this information may demonstrate carelessness "in the abstract" (*Bayliss* at [65]), which Avonside dispute and this decision does not address (other than to note that the Tribunal would require sight of the documents on which Officer Hoare rely to reach a decision), HMRC have not established that the information under this heading is reasonably required for the purpose of Officer Hoare's check of whether the inaccuracy in the PAYE return was due to a failure on Avonside's part to take reasonable care.

2. The date and method of delivery, including communications between Avonside Roofing Limited, Afortis, Clavis or any other party involved in the arrangements, related to the outsourcing Agreement with Herald Resource dated 18th February 2009.

72. Officer Hoare's evidence is that he requires this information to establish when the outsourcing agreement was received and considered. For the reasons set out in paragraphs 70 and 71 above, HMRC have not established that this information is reasonably required for the purpose of checking Avonside's position as regards a Schedule 24 penalty on the basis that an inaccuracy in the relevant document was due to a failure on Avonside's part to take reasonable care.

3.The name of the person who drew up the minute of the meeting of the Board of Directors dated 18 February 2009, where the decision to enter into the outsourcing agreement is noted. If you were provided with a blank note of the meeting for the Board of Directors to sign, confirm the date and method of how this was provided to you and provide a copy of any relevant communications relating to its receipt.

73. Officer Hoare's evidence is that he requires this information in order to determine an accurate sequence of actions taken by the directors in order to establish a full view on behaviours. For the reasons set out in paragraphs 70 and 71 above, HMRC have not established

that this information is reasonably required for the purpose of checking Avonside's position as regards a Schedule 24 penalty on the basis that an inaccuracy in the relevant document was due to a failure on Avonside's part to take reasonable care.

4. If you were not visited by Herald Employment Services, please state what their form of contact was, the date that this occurred and the name of the person who you liaised with. Please provide communications between Avonside Roofing Limited, Afortis, Clavis or any other party involved in the arrangements relating to this contact.

74. Officer Hoare's evidence is that he requires this information in order to establish how the information relating to the company and its activities was obtained and reflected in the remuneration consultant's report. For the reasons set out in paragraphs 70 and 71 above, HMRC have not established that this information is reasonably required for the purpose of checking Avonside's position as regards Schedule 24 penalties on the basis that an inaccuracy in the relevant document was due to a failure on Avonside's part to take reasonable care.

5. State whether the company has, at any time prior to the advice received from the remuneration consultant, indicated to Herald Resource the amount of the initial contributions to be made to the trust prior to the advice received from the remuneration consultant. If so, please provide the date and communications between the Avonside Roofing Limited, Afortis, Clavis or any other party involved in the arrangements in which this amount was discussed and quantified.

75. Officer Hoare's evidence is that he requires this information in order to establish how the remuneration consultant obtained the figure for the payment into the EBT structure. For the reasons set out in paragraphs 70 and 71 above, HMRC have not established that this information is reasonably required for the purpose of checking Avonside's position as regards Schedule 24 penalties on the basis that an inaccuracy in the relevant document was due to a failure on Avonside's part to take reasonable care.

6. State when and how the decision to use the funds held within the sub-trust to purchase shares in the group company was made. Please include communications between Avonside Roofing Limited, Afortis, Clavis or any other party involved in the arrangements in which this decision was reached.

76. Officer Hoare's evidence is that he requires this information in order to establish how and when this decision was made. For the reasons set out in paragraphs 70 and 71 above, HMRC have not established that this information is reasonably required for the purpose of checking Avonside's position as regards Schedule 24 penalties on the basis that an inaccuracy in the relevant document was due to a failure on Avonside's part to take reasonable care.

7. Professional advice relating to the Clavis/Herald SPT arrangements provided by Afortis and/or Clavis.

77. Officer Hoare's evidence is that he requires this information because Avonside claims to have taken reasonable care as they sought and relied on the professional advice of Afortis and Clavis in relation to its implementation and tax treatment of the Clavis Herald arrangements.

78. Officer Hoare suspects that Avonside did not take reasonable care in this respect. Officer Hoare accepts that Avonside implemented the arrangements using the documents provided by the promoter and that it was advised by Afortis, but his evidence is that he requires the professional advice to check if the directors were involved in completing documentation without appearing to raise any doubts or seeking any additional advice about the issues of concern that he has identified. In any event, Officer Hoare considers that the company should have sought advice from its day-to-day accountants as Afortis and Clavis were financially interested in the transaction. As noted in paragraph 70 above, the issues of concern were raised in turn in cross-examination, and Officer Hoare confirmed that none of them had any effect on

the tax point or the under-deduction of PAYE when the remuneration arrangements were implemented by the payment to the remuneration consultant.

79. For example, as regards the professional advice, the email concerning equity that Officer Hoare considers indicative of Avonside's careless behaviour was between the adviser and the promoter, and it could not have changed the fact that the arrangements were implemented when the payment was made to the remuneration consultant. HMRC's position with regard to the tax point and liability are already the subject of the Regulation 80 determination and the follower notice.

80. The information requested is not 'reasonably required' without some foundation that it is for the purpose of checking whether the inaccuracy in the PAYE return was due to a failure on Avonside's part to take reasonable care. Officer Hoare's witness evidence does not suggest or even speculate that that the inaccuracy in the PAYE return is due to Avonside's failure to follow the tax advice received from Clavis and Afortis. As highlighted by the *Rangers* litigation and the Morse Review, in 2010 it was generally understood that the contribution would not trigger an obligation to make a deduction under PAYE, and taxpayers are "entitled to rely on the law as interpreted by the courts – rather than a position taken by HMRC – as the authoritative guide to their tax obligations". Officer Hoare's 'view of the matter' letter did not challenge that this was the prevailing view as regards PAYE in response to the Avonside's representative's point on this issue, but responded that "the prevailing thought at the time was that until the contribution became an emolument (and subject to PAYE and NIC) a company could not have a CT deduction in the accounts". This comment is consistent with Officer Hoare's reference to a discovery assessment in relation to the CT deduction in his opening letter (see paragraph 9 above), but it is not consistent with the information under this heading being reasonably required for the purpose of checking if the inaccuracy in the PAYE return was due to Avonside's failure to take reasonable care.

81. I noted in paragraph 25 that Officer Hoare referred to Clavis and Afortis as being financially interested. He concluded in his 'view of the matter' letter that "a reasonably prudent person alerted by the many dubious features of the scheme could have obtained advice from an alternative source". Regardless of the accuracy of Officer Hoare's views on the dubious features of the scheme or the relevance of financial interest, the information and documents required under this heading do not establish whether or what advice was sought from the company's day-to-day accountants in relation to the disclosure, the return or otherwise.

82. I have concluded that HMRC have not established that professional advice provided by Afortis and Clavis is reasonably required for the purpose of checking if the inaccuracy in the PAYE return was due to Avonside's failure to take reasonable care.

CONCLUSION

83. For the reasons set out in this decision, I allow this appeal. The notice is set aside under paragraph 32(3)(c) of Schedule 36.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

84. This document contains full findings of fact and reasons for the decision. Paragraph 32(5) Schedule 36 provides that the decision of the Tribunal regarding an appeal made by a taxpayer against a notice is final.

VICTORIA NICHOLL
TRIBUNAL JUDGE

RELEASE DATE: 15 MAY 2021