



TC06464

Appeal number: TC/2017/00122

CORPORATION TAX – appeal against paragraph 1 Schedule 36 information notice – whether burden of proof on HMRC - whether information and documents reasonably required for the purpose of checking the appellant's tax position – notice varied but otherwise appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CLIFTONVILLE CONSULTANCY LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE VICTORIA NICHOLL

Sitting in public at Taylor House, London on 8 March 2018

Conrad McDonnell, counsel, instructed by Reynolds Porter Chamberlain LLP, solicitors, for the Appellant

Paul Shea, HMRC officer, for the Respondents

DECISION

Introduction

1. This is an appeal against an information notice issued by the Respondents (“HMRC”) on 13 May 2016 under paragraph 1 of Schedule 36 to the Finance Act 2008 in the same terms to a number of companies, including the Appellant (“Cliftonville”) that had used a tax avoidance scheme known as the dividend replacement strategy (“DRS”) or “Aikido”. Cliftonville’s appeal was designated as the lead appeal under rule 5(3)(b) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (“Tribunal Rules”) on 14 August 2017. The information notice issued to Cliftonville requires full information and documents to be provided (“full documents”).
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2. On 12 August 2016 HMRC issued an information notice under paragraph 1 of Schedule 36 to the Finance Act 2008 to a number of other companies that had used the DRS or Aikido, including Uppercut Films Limited (“Uppercut”). This information notice required a limited list of documents to be produced by the companies (“limited list”). Uppercut’s appeal against the notice requiring the limited list was also designated as the lead appeal under rule 5(3)(b) of the Tribunal Rules on 14 August 2017 and it was joined to be heard together with Cliftonville’s appeal.
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3. This decision relates to the full documents information notice issued to Cliftonville. The parallel decision relating to the limited list information notice issued to Uppercut is under reference TC/2017/01045. The common facts, law and conclusions that relate to both Cliftonville and Uppercut are reflected in both decisions, but certain issues are relevant and considered only in one or other decision.
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Background

4. The DRS was disclosed under Disclosure of Tax Avoidance Schemes (“DOTAS”) by RSM Tenon Group plc on 15 August 2011 and was allocated the reference number SRN 19509036. The scheme was explained as follows:

“A UK company (“Holdco”) looking to pay a dividend will either have an existing subsidiary company or will incorporate a new one (“Subco”). Shares in Subco will be settled into an IIP trust for the benefit of the Holdco shareholders. The terms of the IIP trust will be such as to ensure that Holdco retains an interest in the trust under s625 ITTOIA 2005. If Holdco has incorporated a new Subco, Holdco will inject cash equal to the dividend to be paid by way of a new share subscription into mainly share premium. The share premium account will then be cancelled and the reserves will be transferred to distributable reserves. If Holdco has an existing Subco with sufficient reserves then this step is unnecessary. A dividend is then paid by Subco. Any dividend paid to the IIP trusts will be passed onto the shareholders under the terms of the trust. However, under s624 ITTOIA 2005, the income is treated for tax purposes as that of Holdco. Accordingly, if the marginal rate of tax on income for Holdco is less than that of the shareholders then a tax advantage will arise. The dividend should not be taxed under any other provision due to the protection of s716 ITEPA 2003.”
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5. At a meeting between HMRC and the promoters of the DRS in 2013 it was agreed that HMRC would pursue enquiries into, and make detailed requests for information and documents from, ten representative users of the scheme (“the first sample”). Information and documents equivalent to those requested in the full documents notice were provided following an informal request from HMRC. The enquiries into the tax returns of the individual shareholders of the first sample, which did not include the shareholders of Cliftonville or Uppercut, have concluded and the appeals by Ms Clipperton and Mr Lloyd have been designated lead cases under a direction made under rule 18 of the Tribunal Rules on 24 August 2017 (the “lead cases”). The appeals 10 are due to be heard by the First-tier Tribunal in December 2018. The enquiry in the holding company relevant to the lead cases, Winn & Co (Yorkshire) Ltd, was concluded on 16 March 2016. The closure notice stated that HMRC did not need to make any amendments to the company’s tax return.

15. On 8 December 2015 HMRC decided to open enquiries into 23 further users of the DRS (“the second sample”), and to seek full documents from some users and a limited list of documents from the other users of the scheme. As noted above, Cliftonville is one of the cases where full documents have been requested and Uppercut is an example of the cases where a limited list of documents has been sought.

20. 7. The first sample of ten cases and the second sample of twenty three cases together represent 10% of the 300 companies plus that have implemented the DRS. There is no representative sample agreement (“RSA”) in place in relation to either sample for the DRS.

Evidence and findings of fact

25. 8. The Tribunal was provided with two bundles of documents prepared by HMRC and two bundles prepared by the Appellants. HMRC officers Hilary Woolston and Timothy Lintott provided witness statements and gave oral evidence. Mrs Woolston joined HMRC’s Counter Avoidance business unit in August 2014 and was the HMRC technical lead for the DRS arrangement between September 2014 and June 2016, and 30 is technical lead for the arrangement again since November 2017. Mr Lintott joined HMRC’s Counter Avoidance business unit in November 2013 and was HMRC technical lead for the DRS arrangement from June 2016 until November 2017. On the basis of the evidence I make the following findings of fact:

35. 8.1 Cliftonville’s accounts for the accounting period ended 31 August 2012 were filed with its tax return and computation on 19 December 2012. Note 10 to the accounts included the following “Related Party Disclosure”:

40. The company is controlled by J C Midgley, director and shareholder of the company. During the period, Pines Birchwood Limited paid a dividend of £200,000 on a B Share held by a Trust whose main beneficiaries are Cliftonville Consultancy Limited and its shareholder, J C Midgley. As a result, the following related parties received the following amounts (J C Midgley - £197,010).”

Pines Birchwood Limited (“the subsidiary”) is a subsidiary of Cliftonville.

8.2 Cliftonville did not file a form CT600J to disclose that it had implemented the DRS, but HMRC identified that it had done so from a note in the accounts. On 23 August 2013 HMRC opened an enquiry into Cliftonville's corporation tax return for the period ended 31 August 2012.

5 8.3 As noted in paragraph 5 above, Cliftonville was not one of the users of the DRS selected as part of the first sample and its shareholder has not made an appeal that is stayed behind the lead cases. Ms Woolston decided that the first sample was not adequate to provide a sufficiently large enough pool of cases to establish how the scheme operated and she decided to increase the pool. On 4 March 2016 HMRC made
10 an informal request to Cliftonville to provide full information and documents relating to its use of DRS. As the information and documents were not supplied by Cliftonville, HMRC issued a notice under paragraph 1 of schedule 36 to the Finance
15 Act 2008 requiring the same information and documents on 13 May 2016. The information notice states that the officer, Mrs Roache, believes that the information and documents are reasonably required "so that I can check the company's Corporation Tax position. I need them so that I can further consider the tax consequences of the company's use of the Dividend Replacement Strategy (known as "Aikido") scheme, having DOTAS reference number 19509036."

20 8.4 Cliftonville's representative, Reynolds Porter Chamberlain LLP ("RPC"), appealed against the notices issued to some 15 of their clients, including Cliftonville, on the grounds that the documents and information requested are not reasonably required for HMRC's enquiries in relation to these companies. The appeal was acknowledged and, as HMRC confirmed their decision, RPC requested a review of the decision. The statutory review concluded by letter dated 18 November 2016 that the first information item (a) should be varied, but that the remainder of the notice dated 13 May 2016 should be upheld. The notice as varied on review ("the Notice") is set in Appendix 1 to this decision and represents the notice the subject of this appeal.
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8.5 Cliftonville appealed to the Tribunal on 15 December 2016.

Law

30 9. The Notice was issued by HMRC under the powers given in schedule 36, Finance Act 2008 ("Schedule 36"). Paragraph 1(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

35 (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."

40 10. Paragraph 58 of Schedule 36 provides that "checking" includes carrying out an investigation or enquiry of any kind. Paragraph 63 provides that, except where the context otherwise requires, "tax" means all or any of a list of taxes including income tax, capital gains tax, corporation tax and VAT. It also specifies that in Schedule 36

“corporation tax” includes any amount assessable or chargeable as if it were corporation tax.

5 11. Paragraph 64 of Schedule 36 provides that “tax position”, in relation to a person, means the person's position as regards any tax, including the person's position as regards past, present and future liability to pay any tax and, 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 under PAYE regulations.

10 12. HMRC's power under Schedule 36 is restricted under paragraph 21 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). In these circumstances a taxpayer notice may not be given for the purpose of checking that person's corporation tax position in relation to the chargeable period unless, or only to the extent that, certain conditions are satisfied. These include circumstances in Condition A in which a notice of enquiry has been given in respect of the return and those in Condition D in which 15 the notice is given for the purpose of obtaining any information or document that is required for the purpose of checking the person's position as regards any deductions or repayments of PAYE.

20 13. The restrictions in Part 4 of Schedule 36 also state at paragraph 23 that an information notice does not require a person to provide privileged information, or to produce any part of a document that is privileged as it is information or a document in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

25 14. Part 5 of Schedule 36 sets out the provisions allowing a taxpayer who is given a taxpayer notice to appeal against the notice or any requirement in the notice, unless the tribunal has approved the giving of the notice in accordance with paragraph 3 of Schedule 36. On an appeal the 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.”

30 **Submissions**

15. Cliftonville claim that HMRC's decision to issue the Notice is wrong in fact and in law. The information sought is not ‘reasonably required’ by HMRC for the purpose of checking Cliftonville's tax position. Cliftonville submit that none of the information or documents requested has any bearing on its corporation tax position. 35 HMRC should not be permitted to use the Notice in order to circumvent the much tougher requirements (in paragraphs 2 and 3 of Schedule 36) to obtain the approval of the Tribunal for a third party notice relating the individual who has asserted the tax benefit.

40 16. Cliftonville submit that the burden of proof of showing that the officer reasonably requires the information and documents in the Notice is on HMRC.

17. HMRC submit that each item requested is reasonably required to check Cliftonville's tax position. The purpose of the request for the information and documents is to examine the precise implementation of the scheme by Cliftonville and it will not be until this is supplied that HMRC can make its analysis of the tax
5 position. HMRC acknowledges that where the scheme has been implemented correctly with no unusual features, for the users examined in detail to date, it considers that the tax consequences arise on the individual shareholders. However, it is Cliftonville, and not the shareholders, who have implemented the scheme and until that implementation has been reviewed in detail, it is not possible to say what the
10 precise tax consequences may be, and on whom they arise.

18. Neither party addressed the question of whether of the items requested in the Notice form part of the taxpayer's statutory records.

Ground of appeal regarding the sample not within the Tribunal's jurisdiction

19. RPC's response to the informal request for information and documents in March
15 2016, the grounds of appeal in their letter of appeal dated 10 June 2016, the notice of appeal to the Tribunal and the Skeleton Argument prepared for the hearing all raise the issue of HMRC's decision to broaden the sample. Cliftonville submit that it was neither reasonable nor appropriate for HMRC to extend the sample.

20. HMRC accept that an informal agreement was reached regarding the size of the sample but, in the absence of an RSA, they decided that the sample should be extended.

21. It was agreed by the parties that the decision to expand the sample is not an appealable decision within the jurisdiction of this Tribunal but a question for judicial review.
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Burden of proof

22. Mr McDonnell submitted in opening that HMRC bear the burden of proof of showing that the information and documents in the Notice are 'reasonably required'. This was not raised in Cliftonville's Skeleton Argument. Mr Shea did not make a
30 submission in response, but he said that HMRC had discharged the burden of proof by producing their witness evidence.

23. Mr McDonnell's argument is that, in the absence of statutory guidance on the burden of proof, it is a tenet of civil litigation that the burden of proof is on the party who asserts that position.¹ He contrasts this with the provisions of section 50 Taxes Management Act (tax appeals against assessments) that state that HMRC's decision
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¹ The authority cited in *Phipson on Evidence* (19th edn, 2017 at 6-06) for the general rule that the burden of proof lies upon the party who substantially asserts the affirmative of the issue is *Robins v National Trust Co* [1927] A.C. 515 at 520. The passage goes on to explain that in deciding which party asserts the affirmative; regard must be had to the substance of the issue. This means that where a given assertion, whether affirmative or negative, forms an essential part of a party's case, the proof of such assertion rests on him.

- (the assessment) shall “stand good” if the tribunal is not persuaded by the appellant that it should be reduced. Mr McDonnell referred to the detailed analysis of the case law on Schedule 36 and the precursor provision by Judge Redston in *Joshy Mathew v The Commissioners for Her Majesty’s Revenue & Customs* [2015] UKFTT 139 (TC) (“*Joshy Mathew*”), but asked the Tribunal to take a different view on the basis that the authorities relied upon by Judge Redston related to the judicial review of third party notices that had been approved by the tribunal before their issue. He submits that it is not appropriate to apply the presumption of regularity to the objective condition for the issue of a notice under paragraph 1(1) Schedule 36 and so the burden of proof should be determined in accordance with the general rules of evidence.
24. I have taken HMRC’s statement that it considers that it has discharged the burden of proof and its decision not to make a submission in response on this issue as agreement that I should consider this case on the basis that it has the burden of proof. This reflects the position that HMRC appear to have taken in a number of recent cases as referred to in paragraphs 28, 29 and 30 below. However, in case this does not represent HMRC’s position, and in view of my deletion of certain items and variation of other items in the Notice, I have set out below why I have considered the appeal on the basis that the burden is on HMRC to establish that the information and documents are reasonably required for the purpose of checking the company’s tax position.
25. In *Joshy Mathew* Judge Redston set out a cogent analysis of the cases of *R v Commissioners of Inland Revenue ex parte T C Coombs & Company* [1991] 2 AC 283 (“*Coombs*”) and *R (oao) Derrin Brother Properties Ltd v HMRC* [2014] EWHC 1152 (Admin) (“*Derrin*”) and, in particular, the ‘presumption of regularity’. This is a presumption that a statutory authority has acted lawfully and in accordance with its duty, with the result that it is for the other party to rebut this presumption. Judge Redston concluded that “the weight of authority is that the burden of proof in relation to the “reasonably required” test in Schedule 36 notices rests on the appellant, and not on HMRC.” The decision notes that this conclusion was reached in the absence of a decision of the Upper Tribunal or courts on this issue in the context of Schedule 36 notices provided to taxpayers, and concedes that, because of the differences between these cases and the applications for judicial review of a third party notices considered, “it remains arguable that the burden is on HMRC.”
26. In *Gold Nuts Limited; R Square Properties Limited; Corona Properties Limited; Bronze Nuts Limited; Venture Pharmacies Limited; Blackbay Ventures Limited v The Commissioners for Her Majesty’s Revenue & Customs* [2017] UKFTT 354 (TC) (“*Gold Nuts*”) Judge Redston referred to her earlier conclusion in *Joshy Mathew* but, as neither party made a submission on the issue, she proceeded on the basis that the burden rests with HMRC.
27. In *Eudora Thompson v HMRC* [2013] UKFTT 103 (TC) Judge Brannan found that the onus of proof in relation to an appeal in respect of an information notice lies upon HMRC. He noted that where the information notice specifies information or a document which is reasonably required for statutory purposes and that information or document (such as a bank or credit card statement) is *prima facie* within the taxpayer’s

possession or power, the burden shifts to the taxpayer to demonstrate why that information or document cannot be produced.

28. In *New Way Cleaning Limited v The Commissioners for Her Majesty's Revenue & Customs* [2017] UKFTT 293 (TC) Judge Brannan refers to Judge Redston's conclusion in *Joshy Mathew*, but noted that "HMRC accepted that it bore the burden of proof in this case and it seemed to me that this was a pragmatic and sensible way to proceed."

29. In *Marylin May Phillipou v HMRC* [2017] UKFTT 20 (TC) HMRC "were content to accept that the burden of establishing that the information sought by the notices was reasonably required, was on them" and the appellant agreed with this approach. Judge Popplewell referred to the discussion in *Joshy Mathew*, but concluded that as HMRC had met the burden of establishing that the information sought by the notices was reasonably required, the tribunal did not need to decide this point.

30. Similarly, in *Codexe Limited v HMRC* [2017] UKFTT0569 (TC) Judge Mosedale approved the conclusion reached by the tribunal in *Joshy Mathew*, but HMRC had proceeded on the basis it had the burden of proof and it was found that it had met the burden.

31. I also agree with the analysis in *Joshy Mathew*, but I find that a point made in the later decision of the Court of Appeal in *Derrin* [2016] EWCA Civ 15 suggests that there is a third alternative of taking a combined view of the procedures in relation to third party notices. This would favour a conclusion that an appeal to the tribunal in relation to a taxpayer notice should not be compared with the position on either *ex parte* proceedings or an application for judicial review in isolation, but with the combined procedures for third party notices for the reasons, and with the consequences, explained below.

32. In the Court of Appeal decision in *Derrin* Sir Terence Etherton C said (at paragraph 80) "Parliament has balanced those extensive rights of HMRC to obtain documents and information from third parties, at the investigatory stage of checking possible tax avoidance or evasion, with a number of protections against abuse and excessive intrusion by the executive". In the context of the appellants' challenge that their rights were infringed because judicial review does not allow appellants access to court to determine whether the documents the subject of the notice are 'reasonably required' he concludes (at paragraph 114) that he "cannot see any good reason why the judicial monitoring scheme in Schedule 36 *combined with* [my emphasis] judicial review should not be sufficient to satisfy the appellants' article 6 rights combined with article 8 [of the European Convention for the Protection of Human Rights]".

33. The power under paragraph 2 Schedule 36 to issue a third party notice requires the information or document to be reasonably required by the officer for the purpose of checking a tax position in the same way as a taxpayer notice, but it may not be given without the agreement of the taxpayer or the approval of the tribunal. What is significant is that the protection in paragraph 3(3)(b) Schedule 36 sets a condition that the tribunal may not approve the giving of either a taxpayer notice or a third party

notice unless it is satisfied “that, in the circumstances, the officer giving the notice is justified in doing so”.

34. The extracts from the authorities cited in *Joshy Mathew* and below confirm that a ‘presumption of regularity’ applies to the officer’s decision, but that it becomes 5 “strong” when the decision is approved because the tribunal is satisfied that the officer is justified in issuing the notice. The presumption of regularity in relation to the exercise of information powers is most clearly described by Lord Lowry in *Coombs* as follows (in the context of the provisions of section 20 TMA):

10 “Parliament designated the inspector as the decision-maker and also designated the commissioner as the monitor of the decision. A presumption of regularity applied to both … the presumption that the inspector acted *intra vires* when giving the notice can only be displaced by evidence which cannot be reconciled with the inspector’s having had the required reasonable opinion.”

15 35. This presumption, and the role of the tribunal with regard to third party information notices, was considered by Simler J in *Derrin* in the judicial review hearing (at paragraphs 14, 15 and16) who concluded that:

20 “It follows that the tribunal must be satisfied not merely that the officer holds the relevant opinion that the documents are reasonably required for checking the tax position of the taxpayer and is justified in so concluding, but also that as a matter of fact, the factual matters identified in Sch 36 para 3(3) are satisfied.”

25 “A number of further matters in relation to third party notices of this kind are well established by reference to the predecessor [s 20](#) TMA 1970 scheme and apply with equal force to Sch 36 notices, as the parties agreed. First, and significantly, as held in *R v Commissioners of Inland Revenue ex parte T C Coombs & Company* [1991] 2 AC 283, 300C-F, 302E-F, [1991] 3 All ER 623, [1991] STC 97 (Lord Lowry) the tribunal is the independent person designated by Parliament with the duty of supervising the exercise of HMRC's intrusive powers. Parliament designated the officer as the decision-maker and the tribunal as the monitor of the decision. A presumption of regularity applies to both, and 30 is strong in relation to the tribunal in particular.”

35 “Accordingly, in challenging a third party notice, what must be proved are facts which are inconsistent or irreconcilable with the authorised officer's conclusion that documents are reasonably required for checking the taxpayer's tax position and the tribunal being satisfied that the officer is justified in the circumstances in giving that notice. The resolution of this question will usually depend on confidential information or evidence which is not before the court on judicial review. The tribunal, able to receive such confidential information or evidence in an ex parte hearing, is therefore in a much better position to make a proper appraisal of it than this court on judicial review. The fact that the tribunal, 40 having heard an application, approved the giving of the notice is therefore evidence which the court should take account of in this respect, not least since

the tribunal's approval is the real and intended safeguard in the statutory scheme.”

36. This last passage demonstrates that the officer is to provide information or evidence to the tribunal so that it can appraise whether he is justified in issuing the third party notice. While this is required as part of the combined mechanism to provide protections on the issue of third party notices in the absence of a right of appeal, it is clear that the presumption of regularity in relation to the officer’s decision is not expected to be sufficient to satisfy the tribunal without the officer providing his reasons, information or evidence to allow the tribunal to appraise his decision.
- 10 37. The weight attached to the commissioner’s consent (the tribunal’s approval) by Lord Lowry in *Coombs* was also referred to by Sir Terence Etherton in the Court of Appeal in *Derrin* as follows (at paragraph 11):
- 15 “He said that, where the commissioner gave his consent, there was a presumption that he reasonably held the opinion that the tax inspector (giving the third party notice) was justified in proceeding under section 20, and that presumption could only be displaced by evidence showing that the inspector could not reasonably have held the opinion (required by section 20(3)) that the documents specified in the third party notice contained or may have contained information relevant to the taxpayer’s tax liabilities.”
- 20 38. This passage considers the officer’s decision to issue the third party notice, the judicial monitoring of an officer’s decision and the application for judicial review as a combined picture for the purpose of determining the onus, and reflects the combined view referred to in paragraphs 31 and 32 above.
- 25 39. It is suggested that if this combined view of procedures in relation to third party notices is compared with the position on an appeal against a taxpayer notice, the starting position is that the condition for the issue of an information notice under both paragraphs 1 and 2 of Schedule 36 is that the officer reasonably requires the information or a document for the purpose of checking the taxpayer’s tax position. If the approval of the tribunal is sought and obtained for the issue of a third party notice, the appellant will bear the burden on an application for judicial review because the tribunal has confirmed that the officer has already satisfied the conditions for the approval of the third party notice, creating the strong presumption of regularity. If the approval of the tribunal is not sought it still remains a condition that the information or document is reasonably required by the officer and this is to be established by HMRC when a taxpayer appeals to the tribunal. In this case, HMRC must establish its assertion that the items requested are reasonably required by the officer for the purpose of checking the appellant’s tax position, and then the onus is on the appellant on the grounds of its appeal, including grounds that an item is not a statutory record or that a restriction in Part 4 of Schedule 36 applies. This approach reflects the position on a combined view of the procedures in relation to third party notices.

Discussion

40. The question for the Tribunal under paragraph 32(3) of Schedule 36 is whether the requirements of the Notice should be confirmed, varied or set aside. I have considered each of the requirements of the Notice below, but the parties made the same submissions in relation to a number of the requirements and these are therefore addressed first to put my comments on the specific items in context.

Cliftonville's tax position v tax position of the individual

41. Mr McDonnell submits that as the Notice states that the information and documents are required so that the officer "can check the company's Corporation Tax position" it is not open to HMRC to require them to check the company's tax position more generally. It was open to HMRC to check a wider range of issues, including the company's position with regard to deductions or repayments of PAYE, but the drafting of the Notice limits the check to the company's corporation tax position. Mrs Woolston referred to the drafting as 'unfortunate', but it reflects the fact that HMRC's enquiry is into the company's corporation tax return for the period ending 31 August 2012.

42. I accept Mr McDonnell's submission that the drafting of the Notice has limited the purpose for which the information and documents can be required to checking the company's corporation tax position.

43. Mr McDonnell also submits that not one of the information items or documents listed in the Notice is reasonably required to check the corporation tax position of Cliftonville. The investment in the subsidiary and the payment of a dividend by the subsidiary does not give rise to corporation tax for the parent. The DRS only affects the individual shareholder's tax position and the Notice cannot be used to require information and documents to check the individual shareholder's tax position. Even if the DRS fails for some reason and the dividend is re-characterised as a dividend paid by the parent to the individual shareholder, that would not result in any corporation tax consequences for the company.

44. Mr Shea submits that the DRS is an arrangement that transferred value from Cliftonville to its director shareholder. This may be taxed a dividend paid by the company or the subsidiary (which would have no tax consequences for the company as Mr McDonnell submits), or it may be found that the DRS implementation gave rise to a loan or remuneration which could have tax consequences for the company, but "checking" includes determining whether the tax position is as claimed or whether a different treatment should apply. Mrs Woolston gave the example that a charge may have arisen under section 455 Corporation Act 2010 if the DRS was implemented in a way that gave rise to a loan or advance to a participator or to the trustees of a settlement of which a participator is a potential beneficiary.

45. I agree with Mr Shea that "checking" Cliftonville's corporation tax position includes carrying out an enquiry into whether its declaration of the company's tax position as a result of its implementation of the DRS is full and correct as it is not possible to be sure that this tax treatment applies until the documents have been reviewed. HMRC accept that the tax consequences arise on the individual and not the

company where the scheme has been implemented correctly and has no unusual features, but it is not a speculative or far-fetched proposition (as Mr McDonnell submits) that a different tax position could have arisen if the arrangements, which transferred value from a company to a director shareholder, gave rise to remuneration or a loan. It is not for this Tribunal to decide whether there are any tax implications for the company as a result of implementing the DRS, but to consider whether the information and documents in the Notice are reasonably required to allow HMRC to carry out this enquiry.

46. The checking may therefore include an investigation into how the arrangement
10 should be characterised for the company given the terms of the documents used and, based on HMRC's conclusion, checking whether the company's return of the transaction is full and correct. The checking must be based on the arrangements that the company has implemented. This checking may or may not result in a corporation tax charge or amendment to the company's tax computation. The fact that Mrs Woolston has suggested that the scheme could be treated as giving rise to remuneration, a loan or a dividend does not limit the "checking" to a consideration of these possibilities in order to determine if the corporation tax return is correct or whether a closure notice should include an adjustment for the remuneration expense or a charge under section 455. For example, if the company's corporation tax computation includes an adjustment for the write down of its investment in the subsidiary as part of the DRS, but no adjustment for the professional and legal fees incurred, HMRC's "checking" may include a determination of whether relief has been claimed for fees incurred in connection with the DRS and if so whether the claim should be allowed.

25 *Tax Avoidance Scheme / Lead case*

47. Both parties made submissions that refer to the fact that the items in the Notice relate to arrangements entered into by the company for purposes of the tax avoidance scheme registered under DOTAS number 19509036.

48. HMRC's position is summarised in the statement made in the independent review of its decision that "the company has used a tax avoidance scheme, the items requested pertain to that tax avoidance scheme, it follows that those items are reasonably required by HMRC to check the company's tax position." At the hearing Mr Shea took this submission further to say that the Tribunal should stand back and see what HMRC is seeking to check and then consider whether the list of items is reasonably required for the purpose of checking what the scheme is and how it was implemented, notwithstanding that certain items may have no immediate relevance in isolation.

49. It is to be expected that HMRC's powers to obtain information may be used when they suspect that tax has been avoided using a marketed scheme, but there is no different test to be applied under Scheme 36 in these circumstances. I have considered each item of information or document on the basis that it may only be requested if it is reasonably required for the purpose of checking Cliftonville's corporation tax position.

50. Mr McDonnell seeks to rely on the fact that the DRS has been disclosed, and that extensive enquiries into the implementation of the scheme by other taxpayers have concluded in rule 18 litigation that seeks only to charge the individual to tax, as evidence that HMRC cannot reasonably require the items listed in the Notice to check the company's tax position and that a more reasonable approach would be to await the outcome of the lead cases.

51. HMRC have opened an enquiry into Cliftonville's corporation tax return and issued the Notice in relation to its tax position, but it is not at the stage of litigation nor is its shareholder within the rule 18 direction relating to the lead cases. It is not open to Cliftonville to seek to delay either process behind the lead cases that concern litigation in relation to the tax treatment of the scheme for individual beneficiaries of the first sample of cases. Each item in the Notice must be considered in the context of whether it is reasonably required to check the corporation tax position of Cliftonville based on its implementation of the scheme.

15 *Consideration of the Specific Requirements of the Notice*

52. The Notice, as amended on review, is set out in full in the Appendix 1 to this decision. The letters and numbering used below refer to those used in the Notice set out in Appendix 1. Appendix 2 sets out the list of items in the Notice as varied in accordance with my decision on each item.

20 Information item a – disclosure of reference number to other parties

53. HMRC submits that it requires this information to check whether the company passed on details of the scheme reference number to the shareholders or if not whether this was considered. Ms Woolston suggested at the hearing that this information is required to establish if the company may be liable to penalties for failure to disclose its use of the scheme.

54. Cliftonville submits that the information requested does not relate to the company's tax position.

55. I do not accept that, in the circumstances of an enquiry into the company's use of a tax scheme, HMRC have established that information about whether the company has considered its duty to provide the prescribed information relating to the reference number to any other person is reasonably required for the purpose of checking the company's corporation tax position. I have deleted this item in the Notice.

56. I note that as HMRC have established that the company has implemented a tax avoidance scheme and that it has not filed a CT600J, they do not reasonably require any further information in relation the fact that it did not file these pages in order to determine if they were required or if a penalty is due.

Information item b – investments in subsidiary

57. HMRC's evidence is that this information will confirm the extent and period of involvement in the arrangement. Cliftonville submit that the information, so far as

relevant to the company, is disclosed in the accounts and that is all that is reasonably required.

58. I accept HMRC's submission that information of the dates, amounts of investments made and details of the shares which were acquired are all reasonably required for the purpose of checking the implementation of the scheme for the reasons set out in paragraphs 45 and 46 above.

Information item c – full name and Trustee details

59. HMRC's evidence is that the identity of the trustee of the Interest in Possession (IIP) trust is information that will provide detail of a critical step in the arrangement 10 and that it will assist in demonstrating whether it follows the pattern seen in other cases.

60. I do not accept that this satisfies the test as the identity of the trustee and whether it follows the pattern in other cases is not required for the purpose of checking the company's corporation tax position. I do however accept that HMRC should obtain a 15 copy of the IIP under document item 4 below. I have deleted this item.

Information item d – beneficiaries of IIP

61. HMRC's evidence is that they reasonably require this information in order to ensure that the parties involved have disclosed their involvement and that they have 20 enquiries made of them. I agree with Cliftonville that the personal information about the beneficiaries does not relate to the company's corporation tax position. I do however accept Mrs Woolston's evidence that HMRC reasonably need to know if the company is a beneficiary of the IIP for its tax position and to determine if the transfer of value to the other beneficiaries could be treated as remuneration or a loan rather than a dividend. I have varied the drafting of this item to provide information on 25 whether the company is a beneficiary and to state the link between the company and each other beneficiary.

Information item e – working arrangements of director

62. HMRC's evidence is that the details of the director's working arrangements will assist in considering whether the DRS has any remuneration implications.
- 30 63. Cliftonville submits that this information is not relevant to any tax issue. No tax payable by the company depends (for example) on the number of days or hours worked.

64. As noted above, I accept Mr McDonnell's submission that the question of whether the company is liable to operate PAYE is not information reasonably required to 35 check the company's corporation tax position. It is therefore a question of whether the working arrangements can affect the company's corporation tax position.

65. The company's accounts show salaries and related costs of just £5,000 for both 2011 and 2012. If these costs were reduced or increased in connection with the

implementation of the DRS this could assist HMRC's consideration of whether the DRS has any remuneration implications, but the facts of the working arrangements are not reasonably required for the purpose of this analysis. A general consideration of the split between remuneration and dividend payments, or the deductibility of the remuneration paid does not come within HMRC's declared purpose of checking whether the DRS has any remuneration implications. I have deleted this information item from the list, but have considered the question of remuneration further in relation to the documents requested at 15 below.

Information item f - guarantees

10 66. Mrs Woolston explained at the hearing that this information is required to determine if any contractual obligations were created in connection with the DRS. Mr McDonnell challenged both the relevance of the guarantees and the period for which they are required.

15 67. I agree that it is necessary to check the terms of any liabilities of the company, including the guarantees, in order to determine the company's corporation tax position, but I have amended this item to reflect the reason given by HMRC which limits the information to guarantees given in connection with the DRS.

Document 1 – copy of bible of documents

Document 2 – copy of share certificates

20 Document 3 - .copy of nominee deed

Document 4 – copy of IIP deed

25 68. HMRC's evidence is that these are key documents used to give effect to the transactions and they are required to check that the scheme was implemented as the promoter disclosed. These key legal documents will show what happened, when and how. The share certificates are required to determine the substance of the arrangements. The nominee deed is required to check the nominee arrangement. The IIP deed is a key component to be checked in order to determine the tax position.

30 69. Cliftonville submits that the implementation relates to the tax analysis for the individual and not that of the company as the lead litigation shows.

35 70. I confirm the request for key legal documents used to give effect to the transactions as they are reasonably required for the purpose of checking Cliftonville's corporation tax position for the reasons set out in paragraphs 45 and 46 above. I have however amended document 1 to reflect HMRC's reasons for the documents in the bible, and in order to ensure that documents included in the full bible that are not documents used to give effect to the DRS, such as the engagement letter, are not required.

Documents 5 and 6 – Engagement letter and Advice letter

40 71. HMRC's evidence is that these documents will help them to understand how the scheme was expected to work by reference to the specific needs and requirements of the business. It may also help HMRC to consider the nature and purpose of the

company's expenditure. Cliftonville submits that these documents relate to the tax position of the individuals rather than that of the company. Cliftonville also claim that advice cannot determine a company's tax position.

5 72. I find that an engagement letter is not reasonably required to determine how a scheme such as the DRS was in fact implemented and is not reasonably required for the purpose of checking a company's corporation tax position. However, if Cliftonville claimed a corporation tax deduction for the fees incurred under the terms of the engagement letter, it is reasonably required in order to determine the company's corporation tax position. I have amended document 5 accordingly.

10 73. I note with regard to document 6 that a taxation advice letter in the company's hands falls outside the restrictions in paragraph 25 Schedule 36, and that Mr McDonnell has not raised any of the other restrictions in Part 4 Schedule 36 in relation to the advice letter. I therefore have to consider whether I am satisfied that HMRC reasonably require the advice letter for the purpose of checking the company's corporation tax position.

15 74. I agree with Cliftonville that advice cannot determine a company's tax position without more, but the inclusion of the restriction in paragraph 25 demonstrates that Parliament considered that there could be circumstances in which HMRC may reasonably require tax advice for the purpose of checking a company's tax position. 20 HMRC's evidence is that as the advice letter sets out how the DRS is to work by reference to the specific needs and requirements of the business, as compared to the generic scheme which HMRC is aware of, it is reasonably required to help them check the analysis of the company's corporation tax position. For example, it will assist them to consider the nature and purpose of the expenditure incurred and the payments made.

25 75. Cliftonville's submission that the advice letter relates to the tax position of the individual shareholder ignores the fact that the document requested is a letter addressed to the company that relates to its steps to implement and report the tax consequences of the DRS.

30 76. On the balance of probabilities I accept that this item is reasonably required for the purpose of checking the company's tax position because it will assist HMRC to consider the nature and purpose of the expenditure incurred and the payments made.

Document 7 – Board minutes considering investment in subsidiary and establishment of IIP trust

35 77. HMRC request these documents as part of the key legal documents that gave effect to the arrangements. They will show what, and the extent and timing of, any due diligence performed by the company.

78. Cliftonville submit that there is no possibility that a company's subscription for shares can result in tax charges for the company.

79. I accept that HMRC has satisfied the burden of proof that the documents in item 7 are reasonably required to determine how the arrangements were implemented for the purpose of checking the company's tax position for the reasons set out in paragraphs 45 and 46 above.

- 5 Documents 8 and 9 – Board minutes of subsidiary to resolve to pay a dividend and copies of all correspondence between the company or its officers and the shareholders relating to the implementation of the DRS

80. HMRC's evidence is that they require these documents to understand why the company chose to motivate, incentivise or reward shareholders using this arrangement.

10 81. Cliftonville submits that these documents have no bearing on the tax position of the company. The language "motivate, incentivise or reward" is a strange choice of words for the distribution of benefits to shareholders and HMRC appear to be fishing for a tax avoidance motive. Mr McDonnell said that the Cliftonville may no longer be the parent of the subsidiary and that there is no admission that the documents are in his client's possession.

15 82. I accept that the documents in items 8 and 9 are reasonably required to determine how the arrangements were implemented for the purpose of checking the company's tax position for the reasons explained in paragraphs 45 and 46 above. This is not a fishing expedition as the requests are limited to the minutes and correspondence that relate to the implementation of the DRS. Whether they demonstrate a motive, purpose, expectation or contractual obligation is not known, but it is reasonable to require these documents for the purpose of checking the company's tax position.

- 20 Documents 10, 11 and 12 – Correspondence between the company or its officers and the trustees of the IIP, the promoter of the scheme or the promoter's agents such as Browne Jacobson, and its subsidiary in which the investment was made

25 83. HMRC's evidence is that these documents will show what happened, when and how. They will enable HMRC to determine if the scheme was implemented as designed or if an implementation variation could affect the analysis. HMRC accept that the company is not required to produce documents in respect of which it claims legal professional privilege

30 84. Cliftonville submit that the documents relate to the individual's tax position and whether the scheme was implemented correctly relates only to the individual's tax position. This amounts to nothing more than a fishing expedition for a tax avoidance motive. Correspondence with Browne Jacobson may be privileged.

35 85. I accept that the documents in items 10, 11 and 12 are reasonably required to determine how the arrangements were implemented for the purpose of checking the company's tax position for the reasons explained in paragraphs 45 and 46 above. I have amended item 11 to make clear that correspondence in respect of which legal professional privilege is claimed are not required to be provided. As noted in relation to the correspondence with the shareholders, this is not a fishing expedition because

the requests are limited to correspondence that relates to the implementation of the DRS.

Documents 13 and 14 – Bank statements and evidence of payments

- 5 86. HMRC's evidence is that these documents will show what happened, when and how. They will enable HMRC to determine if the scheme was implemented as designed or if an implementation variation could affect the analysis. The evidence of the payments is also required to check if the scheme was implemented in the amounts and timeframe claimed.
- 10 87. Cliftonville claims these documents relate to the individual's tax position and whether the scheme was implemented correctly relates only to the individual's tax position. The documents requested to provide evidence of payments from the subsidiary to beneficiaries are not documents of the company.
- 15 88. The parties did not refer to whether the statements are part of the company's statutory records, but I accept that the documents in item 13 are reasonably required to determine how the arrangements were implemented for the purpose of checking the company's tax position for the reasons explained in paragraphs 45 and 46 above.
- 20 89. At the hearing HMRC suggested that Cliftonville's accounts may have been used to make payments to the beneficiaries of the DRS on behalf of the subsidiary. If this is the case, a loan could have arisen or the nature of the arrangements could be affected. I consider that statements showing such payments should be provided, but the bank statements showing the receipt in the accounts of the beneficiaries are not reasonably required to check the company's tax position. I have amended item 14 accordingly.

Document 15 – Employment terms

- 25 90. As noted in relation to information item e above, HMRC submit that these documents may indicate the extent to which certain employees had an entitlement to or an expectation of receiving rewards for their contribution to the business. The reward strategy may affect the tax analysis of the DRS.
- 30 91. Cliftonville submits that this request relates to the tax position of the individuals, not that of the company. The Notice does not extend to a PAYE enquiry or to a year of assessment, but to a corporation tax return for the accounting period ending 31 August 2012.
- 35 92. As noted in relation to information item e, a general consideration of the split between remuneration and dividend payments, or the deductibility of the remuneration paid does not come within HMRC's declared purpose of checking whether the DRS has any remuneration implications. If however there was any change to the remuneration in earlier or later years in connection with the implementation of the DRS this could affect the amount of the remuneration expenditure in the company's accounts and return. I have amended this item to limit

the request to documents that evidence any change to the employment terms of the individuals who were either directors and/or beneficiaries of the Trust involved in the arrangement in connection with the implementation of the DRS.

Decision

- 5 93. I confirm that Cliftonville must comply with the information notice as varied and set out in Appendix 2. As this appeal is representative of a number of appeals and arrangements will need to be made in relation to all of the companies concerned, I have not specified the period within which Cliftonville must comply, but it must comply within such period as is reasonably specified in writing by an officer of
10 Revenue and Customs following the release of this decision.

94. This document contains full findings of fact and reasons for the decision. There is no right of appeal in respect of this decision as stated in paragraph 32(5) Schedule 36 Finance Act 2008.

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**VICTORIA NICHOLL
TRIBUNAL JUDGE**

RELEASE DATE: 23 APRIL 2018

APPENDIX 1

Information and documents requested as varied following HMRC's review

5 Information and documents

Information

- a. Have the disclosure regulations (Part 7 FA 2004) been considered in respect of the arrangements under the scheme reference number 19509036 including the duty under s312A? (The duty under s312A is to provide, within the prescribed period, the prescribed information relating to the reference number to any other person who you might reasonably be expected to know is (or is likely to be) a party to the arrangements and who might reasonably be expected to gain a tax advantage in relation to any relevant tax by reason of the arrangements).
- b. The dates and amounts of all investments made in Pines Birchwood Ltd in connection with the implementation of scheme reference number 19509036. Please also detail the shares which were acquired as part of this investment.
- c. Full name and trustee details for the Interest in Possession (IIP) trust which was established as part of your use of scheme reference 19509036.
- d. Full details, to include names, addresses and dates of birth where known, of all persons who were detailed as beneficiaries for the purposes of the IIP trust outlined above. Please state the link between each beneficiary and the company. Please also state the proportion of benefit to be attributed to each person.
- e. If not specified in a formal contract of employment at 14 below, please also provide details of the directors working arrangements such as, but not exclusively, number of days and hours worked on average, range of duties, etc.
- f. Details of any guarantees over any liabilities of the company which any director, shareholder or any beneficiary of the trust involved in the arrangement has provided for the company in the period 6 April 2010 to 5 April 2013.

Documents

Please provide the following documents:-

1. Copy of the full bible of documents for the structure which was set up under scheme reference number 19509036.
2. Copies of all share certificates linked to the investments made in Pines Birchwood Ltd in the period ended 31 August 2012.

3. If not included in 1 above, a copy of the Deed under which RT Corporate Trustee Ltd was to hold an interest in a share as nominee, under the “Aikido” scheme arrangement.
4. If not included in 1 above, a copy of the IIP Trust Deed which was established as part of the structure for scheme reference number 19509036.
5. If not included in 1 above, a copy of the Letter of Engagement between the company and the promoter of this scheme.
6. If not included in 1 above, a copy of the Advice Letter returned to Premier Strategies Ltd by the company, to include the completed Confirmation of Advice Letter section.
7. If not included in 1 above, copies of all board meeting minutes considering any investment in Pines Birchwood Ltd and the establishment of the IIP Trust.
8. If not included in 1 above, copies of all board meeting minutes of the directors of Pines Birchwood Ltd at which it was resolved to pay a dividend(s) by Pines Birchwood Ltd.
9. Copies of all correspondence* between the company or its officers and the shareholders relating to the implementation of scheme reference number 19509036.
10. Copies of all correspondence* between the company or its officers and the Trustees of the IIP Trust established as part of the implementation of scheme reference number 19509036.
11. Copies of all correspondence* between the company or its officers and the promoter, or the promoter’s agents, such as Browne Jacobson, of this scheme.
12. Copies of all correspondence* between the company or its officers and Pines Birchwood Ltd in which the investment was made.
13. Copies of all bank statements or intercompany loan accounts, to evidence the flow of funds from the company to Pines Birchwood Ltd in respect of the investment made as outlined at b. above.
14. Reasonable documentary evidence of payments from Pines Birchwood Ltd to beneficiaries, such as a copy of any dividend vouchers, the bank statements of Pines Birchwood Ltd showing any payments out of the company bank account and copies of the corresponding bank statements of the beneficiaries, showing the deposit of the sum(s) received.
15. All documents** relating to the employment terms of the individuals who were either directors and/or beneficiaries of the Trust involved in the arrangement. This should include, but not be limited to, those individual’s contracts of employment and all documents concerning their compensation, remuneration, incentivisation and the provision of benefits to them during the period 6 April 2010 to 5 April 2013.

- * For the purposes of above the word correspondence should be considered to include (but not restricted to) letters, notes of meetings or telephone calls, facsimile transmissions, internal memoranda, computer records, statements, notices, minutes and other notes whether formal or informal.
- 5 ** “Documents” include anything formal or informal, paper or electronic.

Notes

In this context ‘document’ means anything in which information of any description is recorded. This includes any records held on computer, magnetic tape, optical disk (CD-ROM/DVD), hard disk, memory stick, flash drive, floppy disk or other recording media.

10

APPENDIX 2

Information and documents requested as varied by the Tribunal

5 Information and documents

Information

- a. The dates and amounts of all investments made in Pines Birchwood Ltd in connection with the implementation of scheme reference number 19509036. Please also detail the shares which were acquired as part of this investment.
- b. Please state if the company is a beneficiary of the Interest in Possession (IIP) trust which was established as part of your use of scheme reference 19509036. Please state the link between each other beneficiary of the IIP and the company.
- c. Details of any guarantees over any liabilities of the company which any director, shareholder or any beneficiary of the trust involved in the arrangement has provided for the company in the period 6 April 2010 to 5 April 2013 in connection with its implementation of scheme reference number 19509036.

Documents

Please provide the following documents:-

1. Copies of all documents in the full bible for the structure which was set up under scheme reference number 19509036 which, on their own or together with other documents, give effect to the implementation of the scheme.
2. Copies of all share certificates linked to the investments made in Pines Birchwood Ltd in the period ended 31 August 2012.
3. If not included in 1 above, a copy of the Deed under which RT Corporate Trustee Ltd was to hold an interest in a share as nominee, under the "Aikido" scheme arrangement.
4. If not included in 1 above, a copy of the IIP Trust Deed which was established as part of the structure for scheme reference number 19509036.
5. If a corporation tax deduction has been claimed in respect of fees incurred under the terms of the engagement letter, a copy of the Letter of Engagement between the company and the promoter of this scheme.
6. If not included in 1 above, a copy of the Advice Letter returned to Premier Strategies Ltd by the company, to include the completed Confirmation of Advice Letter section.

7. If not included in 1 above, copies of all board meeting minutes considering any investment in Pines Birchwood Ltd and the establishment of the IIP Trust.
 8. If not included in 1 above, copies of all board meeting minutes of the directors of Pines Birchwood Ltd at which it was resolved to pay a dividend(s) by Pines Birchwood Ltd.
 - 5 9. Copies of all correspondence* between the company or its officers and the shareholders relating to the implementation of scheme reference number 19509036.
 - 10 10. Copies of all correspondence* between the company or its officers and the Trustees of the IIP Trust established as part of the implementation of scheme reference number 19509036.
 11. Copies of all correspondence* between the company or its officers and the promoter, or the promoter's agents, such as Browne Jacobson, of this scheme, other than correspondence in respect of which legal professional privilege is claimed.
 - 15 12. Copies of all correspondence* between the company or its officers and Pines Birchwood Ltd in which the investment was made.
 13. Copies of all bank statements or intercompany loan accounts, to evidence the flow of funds from the company to Pines Birchwood Ltd in respect of the investment made as outlined at a. above.
 - 20 14. Reasonable documentary evidence of any payments made, either through the company's group banking arrangements or its accounts, from Pines Birchwood Ltd to beneficiaries, including the company, as part of the implementation of the scheme reference number 19509036.
 - 25 15. All documents** relating to any change in the employment terms of the individuals who were either directors and/or beneficiaries of the Trust involved in the arrangement if the change was made in connection with the implementation of the scheme reference number 19509036. This should include, but not be limited to, changes in those individual's contracts of employment or in other documents concerning their compensation, remuneration, incentivisation and the provision of benefits to them during the period 6 April 2010 to 5 April 2013.
- 30 * For the purposes of above the word correspondence should be considered to include (but not restricted to) letters, notes of meetings or telephone calls, facsimile transmissions, internal memoranda, computer records, statements, notices, minutes and other notes whether formal or informal.
- ** "Documents" include anything formal or informal, paper or electronic.

35 **Notes**

In this context 'document' means anything in which information of any description is recorded. This includes any records held on computer, magnetic tape, optical disk (CD-ROM/DVD), hard disk, memory stick, flash drive, floppy disk or other recording media.