



**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Brighton & London

Appeal reference: TC/2021/02447

PAYE – determination and penalty – employee benefit trust contributions made via service provider – loan from sub trust – whether inaccuracies in returns were careless – yes – whether carelessness caused the loss of tax – yes – appeal dismissed

Heard on: 26 and 27 April, 12 July 2023

Judgment date: 29 August 2024

Before

**TRIBUNAL JUDGE ANNE FAIRPO
TRIBUNAL MEMBER JULIAN SIMS**

Between

JANET BRAY LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Boch, of counsel, instructed by X5 Chartered Accountants

For the Respondents: Ms Lemos, of counsel, and Mr Bignall, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

Introduction

1. This is an appeal by the appellant, Janet Bray Limited ('JB Ltd') against two determinations made under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (PAYE Regulations 2003) (the 'Regulations') and penalties raised under Schedule 24 Finance Act 2007 ('FA 2007') as follows:

- (1) a determination for the year 2009/10, made on 5 April 2016. This was originally assessed at £235,760 and later revised to £91,486.80;
- (2) a determination for the year 2010/11, made on 3 March 2017. This was originally assessed at £252,935.20 and later revised to £102,933.60;
- (3) a penalty of £19,212.22 for 2009/10, issued on 30 March 2021; and
- (4) a penalty of £21,616.03 for 2010/11, issued on 30 March 2021.

2. The determinations and penalties arose as a result of JB Ltd's use of a tax scheme (described further below). It was agreed that the scheme did not provide the anticipated tax savings. The determinations were challenged on the basis that, first, there had been no carelessness justifying an extension of the time limit for making an assessment and, second or in the alternative, if there had been carelessness, it did not lead to the relevant loss of tax. The penalties were challenged on the basis that any inaccuracies in returns had not been brought about carelessly.

3. The Tribunal was provided with a bundle of documents and a bundle of authorities. Witness statements and oral evidence were provided by Officer Orekhov for HMRC, Janet Bray, director of JB Ltd, and Mr Alderton, the accountant for JB Ltd. A witness statement was provided by Cameron Bray, the company secretary of JB Ltd (and brother of Ms Bray); he did not provide oral evidence to the hearing. His witness statement was short and largely repeated information also provided by Ms Bray. As Mr Bray was unavailable to be cross-examined, we placed limited weight on his statement.

4. The Tribunal heard the witness evidence over two days in April 2023. The parties' main submissions were made later, in July 2023. Written submissions were also provided over a period of time, with the final submissions being provided to the panel in March 2024 (albeit apparently received by the Tribunal some time earlier).

Background and facts

5. We considered the oral evidence and the documentary evidence to which we were referred. All findings of fact were made on the civil standard of proof. That means that they were reached on the basis that they are more likely to be true than not.

6. The general background facts were not significantly disputed and our relevant findings are set out as follows.

7. JB Ltd provides consultancy services in pharmaceutical medicine. Ms Bray is its sole shareholder and director. Ms Bray trained as a pharmacist and worked as such for a number of years before becoming a writer and consultant providing services to the pharmaceutical industry and subsequently setting up JB Ltd to provide such services.

8. Mr Bray stated that he provided support to Ms Bray but had never generated any revenue for the business. Ms Bray's evidence in the hearing was that JB Ltd was a "one woman show" and that she undertook every function in the company, including that of the employment committee and human resources department. We find that Mr Bray had no significant involvement in the company beyond his formal appointment as company secretary; we

consider that any support provided to Ms Bray derived from their family relationship rather than any employment by JB Ltd.

9. During the relevant periods Mr Alderton's firm (KAT) provided accountancy services to JB Ltd and to Ms Bray personally. KAT was part of the Probiz network of accountants and, through this network, became aware of a scheme offered by Clavis Tax Solutions Limited (Clavis). Mr Alderton introduced the scheme to Ms Bray, who decided that JB Ltd would enter into the scheme arrangements.

The scheme

10. The scheme was (in summary) intended to obtain a tax advantage as follows:

(1) following Schedule 24 Finance Act 2003 (and later s1290 Corporation Tax Act 2009 ('CTA 2009')), no deduction was available for contributions to an employee benefit trust until those contributions were applied to benefit an employee. Income tax (via PAYE) and national insurance contributions (NICs) would therefore generally need to be payable in respect of the benefits applied in order for a corporation tax deduction to be available.

(2) the scheme purported to provide tax-free amounts to employees through the use of an offshore employee benefit trust (EBT) whilst also providing an immediate deduction for corporation tax for the contributions made to the EBT and the fees for use of the scheme.

(3) the scheme relied for the corporation tax deduction on an exception in s1290(4) CTA 2009 for payments which were "consideration for goods or services provided in the course of a trade or profession".

11. The scheme involved the following outline steps (the specific steps taken in JB Ltd's implementation of the arrangements are set out in the section on implementation below):

(1) a Jersey company, Herald Employment and Recruitment Services Limited ('HERS'), would offer the employer company a review of the business in order to make recommendations as to how key employees, such as the company directors, should be rewarded and incentivised. The performance of this service would be outsourced to Herald Employment Services LLP ('HES LLP'), a UK LLP. The members of this LLP included directors of Clavis;

(2) the recommendations were set out in a report from HERS which included details of various possible methods of reward, including payment of a dividend or bonus. The recommendation as to method would invariably be that the reward should be provided by settling an amount into an offshore (Jersey) EBT from which the employees could benefit;

(3) at the same time that HERS sent the report to the employer company, they would send an invoice for an amount made up of their fees for implementing the recommendation and the amount recommended be made available to incentive the employees. The employer company was required to pay the invoice in order to implement the recommendation. After deduction of fees, the balance would be settled on the EBT in the name of the employer company;

(4) a sub-trust of the EBT would be set up for each employee benefiting from the arrangements. A proportion of the funds would be allocated to the sub-trust, and the funds then loaned to the employee. No PAYE or NICs would be accounted for by the employer company (or anyone else) in respect of these loaned amounts;

(5) the employer company would claim a corporate tax deduction for the invoice payment made on the basis that the payment amounted to fees paid to HERS.

12. We were not provided with all of the agreements that would presumably have been entered into between the various Herald entities but there was no dispute raised in the hearing as to the general outline set out above.

13. After JB Ltd entered into this scheme, the Supreme Court concluded that amounts contributed to an EBT in order to remunerate employees should be treated as earnings of those employees at the time of the contribution to the EBT (*RFC 2012 Plc (in liquidation) (formerly the Rangers Football Club Plc) v Advocate General for Scotland* [2017] UKSC 45 (*'Rangers'*)). Mr Alderton accepted in his evidence that the scheme was not effective, given this decision. As noted above, the determinations were not appealed on the basis that the scheme planning was effective.

Advice regarding scheme

14. Ms Bray was invited to a meeting in December 2009 at KAT's offices on 15 December 2009, as Mr Alderton considered that she might be interested in a tax planning idea. The meeting included a presentation on the Probiz network and an overview of the scheme given by an associate of Mr Alderton who had introduced KAT to Probiz.

15. This was followed by a further presentation in January or February 2010 at which Ms Bray was shown a slide pack presentation of the scheme, including two slides with extracted short sentences from opinions provided by Andrew Thornhill KC (the slides did not say to whom the opinions had been provided). She was advised that a group of over 400 accountants had been trained on facilitation of the arrangements and took assurance from the involvement of tax counsel and a large number of accountants with regard to the scheme. Ms Bray believed that Mr Alderton had been trained to understand the "nuts and bolts" of the scheme.

16. The slide pack was produced in evidence. We note that the fourth slide states (inter alia) that "Nothing is 100% guaranteed", that tax strategies are regularly legislated against, and that it is possible that any legislation which might counter the scheme could be retrospective.

17. Ms Bray also had telephone conversations with Mr Alderton to discuss the scheme, which she described as the loan arrangements. Her understanding of the scheme was that it was a tax planning product that, following a process of assessment to check her suitability, would enable her to take a loan from JB Ltd in a tax efficient manner. Ms Bray's evidence was that she did not understand the particular tax mechanisms involved and trusted that her advisers did so. She stated that she asked many questions about the aetiology of the scheme, the background to EBTs, and the number of people who had used the scheme. She had obtained confidence from the answers. She did not consider that she needed to understand the tax or accounting aspects of the scheme, as she relied on her advisers to know. She had understood that hundreds of people had used the scheme and relied on her advisers to tell her anything that she needed to know. She had not asked for any specific assurance regarding any tax technical analysis of the scheme.

18. Ms Bray's evidence was that she knew that Mr Alderton's role was to implement the scheme. She did not check what he understood about the scheme, believing that he would understand enough to be able to introduce it to clients. She did not know whether he was getting a commission from the introduction of the scheme to her; she did not think it was any of her business to ask whether he might have received such a commission.

19. Ms Bray understood that Probiz had undertaken technical analysis with regard to the scheme. She accepted that they were selling the scheme. She had full confidence in Probiz and did not consider that anyone else would be in a better position to advise her as to the tax aspects.

Her evidence as to Probiz's role was somewhat inconsistent, stating both that they were acting on her behalf and also stating in evidence that she did not seek advice from them. She thought she must have engaged them to act for her, although she was not aware of specifically doing so and could not recall signing any engagement letter with them. She thought that she had paid their invoices for administering the process, although she also could not recall their heading on an invoice. Our comments and findings in respect of this are set out later.

20. Ms Bray signed an engagement letter with Clavis which specifically excluded the provision of tax advice from the engagement. In evidence in the hearing she stated that she had thought that she had understood the letter but stated that she did not know what the term 'tax advice' really meant.

21. Ms Bray stated that she did not seek second opinions: where she was obtaining advice from a professional, she did not engage another professional to confirm the position. She believed that she had obtained independent advice with regard to the scheme, but also stated that she would not know who to ask for tax advice about the scheme.

Mr Alderton and Probiz

22. Mr Alderton's evidence was that his role with regard to the scheme was to introduce clients and facilitate administration once the client had decided to proceed with the arrangements. His role with regard to the accounts and returns was to ensure that the disclosures therein matched the directions given by Clavis. He was not instructed by Ms Bray or JB Ltd to evaluate the scheme or the actions to be taken in implementing the scheme. He had been provided with training by Clavis, although such training was not on the technical detail of the scheme but, rather, on the nature of the product, suitable clients, and how to complete the documentation involved.

23. Mr Alderton confirmed that his firm had not engaged the scheme creators, nor any barrister, to provide advice regarding the scheme. He had heard Mr Thornhill and another barrister discuss the scheme at marketing conferences but had not directly engaged their advice. He considered that it was important to have a general understanding of the scheme, although he was specifically not giving advice on the scheme to his clients.

24. He understood that Probiz would have made enquiries about the scheme and undertaken a technical review before offering it through their network, although he did not know exactly how they reviewed such products. He relied on Probiz having undertaken due diligence on the products which they made available to the network. It had not occurred to him to obtain another opinion, as he considered that Probiz had done that for the network as a group.

25. The technical expertise was, he understood, with Clavis. He considered they provided the advice as to whether the product was suitable and would tell him what to put on the relevant returns. He did not check the wording of such information, only the amounts that were to be included.

26. Mr Alderton confirmed that Ms Bray, and JB Ltd, were not advised by counsel and further that neither were they advised by Probiz or by KAT with regard to the scheme. He thought that any advice to Ms Bray and JB Ltd was provided by Clavis.

27. Considering the evidence before us, we find that neither JB Ltd nor Ms Bray had engaged counsel, KAT, or Probiz to provide tax advice regarding the scheme. Although Ms Bray's evidence on the question of whether Probiz had advised her was unclear, we consider that Mr Alderton's evidence was clear that Probiz had not provided Ms Bray or JB Ltd with any tax advice.

Clavis

28. JB Ltd did engage Clavis to provide services. The engagement letter in respect of the services states, under the heading 'Excluded Services', that "[Clavis] will not be providing tax advice". The engagement letter was signed by Ms Bray as director of JB Ltd.

29. We find therefore that Clavis were not engaged by either JB Ltd or Ms Bray to provide tax advice regarding the scheme.

Scheme implementation

30. In order to establish what actually happened in JB Ltd's implementation of the scheme, we set out below the sequence of events undertaken in respect of JB Ltd's use of the scheme arrangements, as far as we have been able to identify them from the evidence provided to us.

First use of the arrangements

22 December 2009

31. Following the scheme introduction meeting in December 2009, on 22 December 2009 KAT emailed to Clavis signed board minutes of JB Ltd dated the same day. The minutes recorded the following information:

- (1) the only person present was Ms Bray
- (2) the meeting had been called to consider the arrangements for rewarding employees of JB Ltd for their services for the period 1 July 2008 to 31 December 2009 and to provide incentives for them. The arrangements were to reward "all directors and senior employees who made a substantial contribution to earning those profits".
- (3) the amount of profit set aside for rewards was stated to be £300,000.
- (4) Ms Bray was stated to be the only "potentially suitable person" for inclusion within the arrangements.
- (5) a final decision regarding allocation and level of appropriate rewards would be made at a later date, after a final review of the candidates, and the potential involvement of an independent third party to advise and assist in the process. The final decision would not effect (sic) the amount of profit set aside for rewards.

32. On 31 December 2009, despite the resolutions above, a letter from JB Ltd was sent to Cameron Bray stating that he had been nominated as a possible candidate to receive an award from the amount allocated to reward and incentivise key employees. There was no clear explanation as to why this letter was sent to Mr Bray when the company had resolved that only Ms Bray was a suitable candidate.

7 January 2010

33. On 7 January 2010, KAT emailed Clavis to say that he had signed JB Ltd as a new "spt". In context, the abbreviation referred to "special purpose trust". On 8 January 2010, Clavis emailed "SPT sign up documents" for JB Ltd to KAT, with a step-by-step guide for single trusts.

34. A Probiz "basic customer questionnaire" was completed by KAT in respect of JB Ltd, confirming that Ms Bray was the only potential beneficiary and wanted an interest-bearing loan. The 'sign-up' pack from Probiz was requested for 11 January 2010. An evaluation review sheet was also produced on 7 January 2010, noting that JB Ltd's budget for rewards was £334,000. The only employee being considered for an award was Ms Bray.

35. A Probiz company information sheet was also completed. The accountant conducting the initial fact-finding interview was stated to be Mr Alderton. This contained the following information (inter alia):

- (1) key factors affecting turnover and profit levels: incidence of contracts obtained from client. US & UK exchange rates.
- (2) current major projects: FACE epilepsy education programme; MAP anxiety education programme
- (3) future target areas: bio pharmaceuticals
- (4) SWOT analysis: strengths - experience, in-depth knowledge, client base; weaknesses - dependance (sic) on few employees, changes in industry practices; opportunities - experience in biological compounds; threats - industry wide economic pressures, pipeline failures
- (5) Ms Bray was stated to be responsible for establishing the business, responsible for all strategic decisions of the business in the short and long term, the driving force behind the growth and ongoing development of the company, responsible for all marketing and promotional activities (utilising extensive contacts within industry leaders), responsible for financial control and management (maintains records and close control), the main point of contact for key customers (makes frequent visits to US and rest of world), responsible for technical research. Both Ms Bray and Mr Bray were stated to be responsible for recruitment and ongoing personnel matters, and to look after office administration.
- (6) Mr Bray was stated to be responsible for management development for the director, training, input on development of strategy, providing companion services in training and development if required by clients. Advice on employment law, contracting, commissioning freelancers.
- (7) Ms Bray was stated to be the substance matter expert and business development principal and either undertakes or oversees delivery of all products and services of a medical nature to clients. Her contractual pay was £19,000 per year.
- (8) Mr Bray was stated to have been involved since the inception of the business providing input and guidance on all personnel aspects of the business, and non-substance matter competency development of the principal eg: managing conflicts among clients, presentation training, meeting conduct and chairmanship training and development. His contractual pay was £6,000 per year.

18 February 2010

36. On 18 February 2010, KAT sent Clavis various documents relating to JB Ltd; these were signed as necessary but not dated:

- (1) letter of engagement (the copy provided in evidence was dated 23 February 2010 and Ms Bray's signature was dated 25 February 2010, see below)
- (2) board minute establishing employment committee (not provided in evidence)
- (3) copy letter sent to employee not present at board meeting (not provided in evidence)
- (4) outsourcing agreement (no dated copy provided in evidence)
- (5) employee committee minute authorising signature of outsourcing agreement (subsequently dated 25 February 2010, see below)

- (6) company and employee information sheets
- (7) Herald service agreement (not identified in evidence)

22 February 2010

37. Loan application letters and letters of wishes for both Ms Bray and Mr Bray were forwarded to Clavis by KAT on 22 February 2010. Correspondence indicates that Mr Bray was involved because an additional potential beneficiary was apparently required for “Fee Protection requirements”.

23 February 2010

38. The letter of engagement between JB Ltd and Clavis was dated 23 February 2010 and advises that the scope of work is to “assist in the implementation of [corporate incentivisation and reward] arrangements, liaising with appropriate third parties in that connection”. The letter states that the arrangements were not approved by HMRC Revenue and Customs and that it could not be guaranteed that HM Revenue and Customs would accept the technical analysis and consequences of the arrangements. Clavis stated that their assistance would extend to providing representation at or advice in relation to, a hearing before the General or Special Commissioners of HM Revenue and Customs in respect of a single test case, but no further. Under the heading ‘excluded services’, the letter states that Clavis “will not be providing tax advice”. The fee for the engagement would be confirmed but would not exceed £2000 plus VAT. Clavis’ aggregate liability for the services was limited to the amount of the agreed fee.

39. A short questionnaire and draft loan agreement between Herald Trustees Ltd and Ms Bray was sent to Clavis by KAT. In the same email KAT confirmed that they had sent Ms Bray revised minutes for the board meeting of 22 December 2009 to show the accrual as £334,000 rather than £300,000.

24 February 2010

40. On 24 February 2010, Clavis confirmed to KAT that no loan agreement was required from Mr Bray as Ms Bray would be the only beneficiary and would receive “the full 100%”.

25 February 2010

41. Ms Bray’s signature on the engagement letter between JB Ltd and Clavis was dated.

42. The bundle included an undated “outsourcing agreement” between JB Ltd and HERS. It would appear that this was, or should have been, dated 25 February 2010 as it is so referred to in HERS’ invoice of 2 March 2010. The agreement appointed HERS to evaluate JB Ltd’s employees, conducting interviews with them and the company, to produce a report to the company recommending the type of benefits to be provided and the approximate costs. HERS was to propose an overall fee to cover the benefits to be provided and also cover their costs of both providing this evaluation and report and also implementing the agreed proposals.

43. The date was added to the minutes of the employment committee of JB Ltd of a meeting to consider the outsourcing contract with HERS. The contract was accepted. The minutes state that only Ms Bray was present at this meeting.

44. HES LLP wrote to HERS to confirm that “following our meeting” with JB Ltd, they recommended that an overall benefit and incentive budget of approximately £290,000 to £355,000 should provide a sufficient level of benefits to motivate, reward and retain the employee. They recommended that Ms Bray should participate, and their preliminary view was that a budget of between £290,000 and £310,000 would be appropriate. They recommended that no reward be provided to Mr Bray. Again, there was no explanation as to why, when the board had concluded in December 2009 that Mr Bray was not a suitable candidate, his data was included. Copies of evaluation sheets were enclosed.

45. Ms Bray's evidence was that she had had a long telephone call with someone from HERS at some point in late February 2010 and that this had been a "very rigorous and in-depth interview [using] a prepared questionnaire". She recalled having to provide a lot of information about the nature of the consultancy business, and that HERS had conducted a SWOT analysis and asked about plans for future trading and growth of the company. Ms Bray considered that the subsequent report captured the discussion and made recommendations accordingly. We note that the report from HES LLP states that any such call to Ms Bray was made by HES LLP, not by HERS.

46. The HERS "company information sheets and employee performance evaluation sheets" repeated the information provided by Mr Alderton in the Probiz sheets (set out above), using exactly the same words (including certain typographical errors). There was no additional information about the company in the HERS sheets; the only new information included was that Ms Bray and Mr Bray were both rated as "outstanding" with regard to their overall performance. Mr Bray's witness statement made no mention of any contact with HERS (or HES LLP on behalf of HERS); his witness statement does refer to Ms Bray having contact with HERS and so we conclude that, if he had also spoken with them, Mr Bray would have described this in his witness statement. We find therefore that neither HERS nor HES LLP did not contact Mr Bray in order to complete their report.

26 February 2010

47. HERS wrote to Clavis with a copy of the draft report and requested that Clavis provide tax advice to HERS in respect of the tax effectiveness of the potential benefits set out in the report.

48. Clavis wrote to HERS with a letter of engagement for the provision of tax advice in connection with the JB Ltd report. The fee for the work would be confirmed "in due course".

49. Correspondence indicates that, at some point between 23 February and 26 February 2010, the 22 December 2009 board minutes of JB Ltd were revised to show the accrued budget for reward as £334,000.

1 March 2010

50. HERS agreed to the engagement letter with Clavis for the provision of tax advice.

51. Clavis provided a summary of potential discretionary incentive and reward arrangements to HERS. We find that this summary is generic and lists various possible rewards without any consideration as to whether or not they would be suitable for JB Ltd, despite the report on JB Ltd having been provided to Clavis. For example, the report included details of various different types of share schemes: given that JB Ltd had only one shareholder (with no reported plan to bring in any other shareholder) and that shareholder was the only person to be purportedly incentivised by the reward, the use of any share scheme would seem somewhat unlikely to provide a meaningful incentive but no explanation is given as to why the details are included nor how such a scheme might provide an incentive to the sole shareholder.

2 March 2010

52. HERS issued their report to JB Ltd. The report, the invoice (referred to below), and the employment committee meeting minute (also referred to below) were sent by email from HERS to KAT at 4:12pm.

53. The report contained company background and information that was, unsurprisingly, identical to the information in the HERS evaluation sheet which (as already noted) the same as the information in the Probiz sheets completed by Mr Alderton. The employee evaluation and recommendations also contain the same information, this time expressed in complete sentences

rather than bullet points. There was no additional information included: the changes from the HERS and Probiz evaluation sheets are stylistic rather than substantive.

54. The report then included “Targeted Incentives for Consideration”. This section was identical to the summary advice provided by Clavis the day before. The report concludes that the “reward and incentive arrangements” should be provided and that the amount should be £290,000 to £310,000. The report recommends that this should be provided by either or both of cash bonuses or the use of a special purpose trust but does not give any reason for selecting between these options. The final conclusion of the report was that the overall benefit budget should be £334,000.

55. HERS invoiced JB Ltd for £334,000, as the “agreed fee for services” under the outsourcing agreement between JB Ltd and HERS of 25 February 2010. A letter from HERS asks JB Ltd to settle the invoice if they wish to proceed.

56. Minutes of a meeting of JB Ltd’s employment committee (provided by HERS, as noted above) state that the report was considered and “would have the effect of motivating, rewarding and helping to retain the employees (sic)”. The minute does not state which of the two recommendations in the report (cash bonus or special purpose trust) should be accepted. The committee resolved to settle HERS’ invoice. The minute states that Ms Bray and Mr Bray were present at the meeting.

3 March 2010

57. The JB Ltd employment committee minutes were sent to Clavis.

5 March 2010

58. HES LLP invoiced HERS for their services in connection with the evaluation of JB Ltd, for £8,250.

59. Clavis invoiced HERS for their services in providing the report on JB Ltd, for £24,750.

8 March 2010

60. A settlement agreement was entered into between HERS and Herald Trustees Limited.

61. Herald Trust confirmed to Clavis that they had received the JB Ltd funds.

10 March 2010

62. Ms Bray signed a letter of wishes in respect of the trust.

63. Herald Trustees wrote to Ms Bray to confirm that the settlement and a sub-trust in her name had been set up. The letter states that “there will be tax implications flowing from the provision of benefits out of this sub-trust. We would advise that you contact your nominated accountant/tax adviser for the appropriate guidance”.

64. Herald Trustees wrote to Mr Bray to confirm that the settlement and a sub-trust in his name had been set up, although no such sub-trust had been created. This letter contains the same sentence advising that tax advice should be sought.

10 March 2010

65. Herald Trustees advised Clavis that the JB Ltd loan was available for consideration on 11 March 2010 if all documentation was in place and that an interest bearing loan for the maximum amount should be processed.

11 March 2010

66. £293,305 was withdrawn from the sub-trust and paid to Ms Bray.

8 April 2010

67. Ms Bray met with Mr Alderton at his offices to review and sign paperwork. It was not specified what this paperwork was.

Second use of the arrangements

25 August 2010

68. Probiz emailed a “Trigger Form for Top up of SPT” to Clavis in respect of JB Ltd for a review period of 1 January 2010 to 31 August 2010.

26 August 2010

69. Clavis emailed “top up paperwork” for JB Ltd to KAT. The email stated that “As they will now exceed the 500,000 limit on their sub trust a further sub trust will be opened”. The top-up paperwork includes a “Herald Trust Service Agreement for Special Sub-Trusts” and a “Letter re Multiple Beneficiaries and husband and wife”

Undated but between 26 August 2010 and 1 October 2010

70. Minutes of a board meeting of JB Ltd resolved to set aside £302,250 in rewards to employees for the period 1 January 2010 to 31 August 2010. Although the minutes contain a section to be completed stating who were potentially suitable persons for reward, no name is included in that section. The minutes were signed by Janet Bray.

1 October 2010

71. KAT sent the completed paperwork to Clavis, including a service agreement.

72. HES LLP wrote to JB Ltd to say that they would arrange for one of their representatives to be in contact to take matters forward.

5 October 2010

73. HES LLP wrote to HERS with their findings. The letter, including amounts recommended, is identical to that sent on 23 February 2010.

6 October 2010

74. HERS wrote to Clavis with a copy of the draft report and requested that Clavis provide tax advice to HERS in respect of the tax effectiveness of the potential benefits set out in the report.

75. Clavis wrote to HERS with a letter of engagement for the provision of tax advice in connection with the JB Ltd report. The fee for the work would be confirmed “in due course”.

7 October 2010

76. HERS signed the Clavis engagement letter.

77. Clavis provided a summary of potential discretionary incentive and reward arrangements to HERS. Only the first page was provided in evidence. The first page is identical to that of the summary provided on 1 March 2010, including a typographical error (double spacing after a comma in the second line of the second paragraph).

8 October 2010

78. Clavis emailed the HERS report, invoice and minute to pay the invoice to KAT. The email requests that JB Ltd hold a board meeting to consider and formally accept the report and agree to pay the invoice. No such board minute was provided in evidence.

79. HERS provide a report to JB Ltd (not included in evidence) covering the evaluation of employees and a review of the types of benefit available, and their proposals.

80. HERS invoiced JB Ltd for £336,497.50, although the undated board minute provided in evidence for this review period set aside an amount of £302,250. The invoice is stated to be the agreed fee for services under the agreement between JB Ltd and HERS dated “25 February 2010”.

14 October 2010

81. JB Ltd paid £336,497.50 to HERS.

82. Clavis invoiced HERS for £24,935.62 for tax advice provided to HERS in connection with the JB Ltd potential incentives.

83. HES LLP invoiced HERS for £8,311.88 for professional services in connection with the JB Ltd evaluation.

15 October 2010

84. KAT emailed minutes of the JB Ltd Employment Committee reviewing the report and approving payment of the invoice to Clavis. No copy of the minutes was provided in evidence.

18 October 2010

85. Ms Bray and Mr Bray each signed a letter of wishes in respect of the “Janet & Cameron Bray sub-trust no.2”

19 October 2010

86. HERS wrote to Ms Bray to confirm that “a discretionary settlement has been established” although it appeared from earlier correspondence that the existing settlement would be used, with only a new sub-trust being required. The letter confirms that a sub-trust would be established in Ms Bray’s name. The same advice that tax advice should be sought is given, as in the letter of 10 March 2010.

87. HERS confirmed to Clavis that the JB Ltd loan was available for consideration on 20 October 2010 if all necessary papers were held.

88. KAT emailed Clavis to advise that the maximum amount available should be transferred.

89. £302,150 was transferred from the main trust account to the sub-trust no.2 account. No explanation was given as to what happened to the balance of approximately £34,000 remaining of the funds transferred on 14 October 2010.

20 October 2010

90. Clavis advised HERS that the maximum amount should be transferred.

91. HERS invoiced Herald Trustees for £300 in respect of the JB Ltd loan.

92. The sub-trust transferred £295,555 to Ms Bray.

Transaction reporting

93. Mr Alderton’s evidence was that the arrangements were reported by his firm in accordance with instructions from Clavis and that disclosures which had been prepared by counsel were provided for inclusion in those returns. His firm had only verified the figures; they had not considered or advised on the reporting aspects any further.

94. Ms Bray’s evidence was that she trusted Mr Alderton and signed the returns when required but did not have any particular expertise that would enable her to check the returns in detail.

95. It was contended that there had been no carelessness in the completion of the returns, as these had been prepared in accordance with the instructions given by Clavis and that the loss

of tax had arisen as a result of the eventual decision in Rangers, rather than any carelessness by or on behalf of JB Ltd.

96. Given our findings below, we do not consider that the reporting of the transactions in JB Ltd's accounts and tax returns makes any particular difference to our decision in this appeal. HMRC contended (in summary) that a competent tax adviser would have identified flaws in the structure of the scheme when completing the returns and would not have completed the returns as advised to do so by Clavis. As set out below, we find that no tax advice was taken and that this was careless. The subsequent manner of completion of the returns is part of that carelessness, rather than being a separate matter, and so we have not set out the details of the transaction reporting further.

Relevant law

Statute

97. Regulation 80 of the PAYE Regulations 2003 (as at the relevant time) stated:

(1) This regulation applies if it appears to HMRC that there may be tax payable for a tax year

under regulation 68 by an employer which has neither been –

(a) paid to the Inland Revenue, nor

(b) certified by the Inland Revenue under regulation 76, 77, 78 or 79.

(2) HMRC may determine the amount of that tax to the best of their judgment, and serve notice

of their determination on the employer.

...

(5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment,

appeals, collection and recovery) as if –

(a) the determination were an assessment, and

(b) the amount of tax determined were income tax charged on the employer,

and those Parts of that Act apply accordingly with any necessary modifications.

98. s34 Taxes Management Act 1970 (TMA 1970) provides that the ordinary time limit for an assessment is four years. s36 TMA 1970 provides for an extended time limit of six years where a loss of tax is brought about

99. carelessly by or on behalf of the relevant person. s118(5) TMA 1970 provides that a loss of tax or situation is brought about carelessly by a person if the person fails to take reasonable care to avoid bringing about that loss or situation.

100. Schedule 24 FA 2007 provides that a penalty is payable where (inter alia) a return for the purposes of the PAYE Regulations 2003 is given to HMRC and contains an inaccuracy which amounts to or leads to an understatement of a liability to tax and that the inaccuracy arose from a failure to take reasonable care on the part of the person filing the return, or on the part of a person acting on their behalf.

Case law meaning of 'careless'

101. The meaning of "careless" is set out *Hicks* [2020] UKUT 12 (TCC), [2020] STC 254. Although that decision related to self-assessment returns, both parties accepted (and we find) that the decision applies equally to PAYE returns.

102. The Upper Tribunal held that whether acts or omissions are careless involves a factual assessment having regard to all the circumstances of the case. The conduct of the taxpayer is to be assessed by reference to a prudent and reasonable taxpayer in the position of the taxpayer in question.

103. The decision in *Collis* [2011] UKFTT 588 (TC) at [29] confirms that the same test of carelessness applies in the context of penalties under Schedule 24 to FA 2007.

104. We note that the test for carelessness is therefore an objective test: we are required to assess the acts and/or omissions of JB Ltd by reference to what a reasonable and prudent taxpayer in its position, exercising reasonable care, would have done.

105. Other case law, as relevant, is set out in the discussion below.

Discussion

106. The following is not intended to address every point of evidence or resolve every contention made by the parties. We have made the findings necessary to resolve the legal dispute before us. Where findings have not been made or are made in less detail than the evidence presented, that reflects the extent to which those areas were relevant to the issues and the conclusions reached.

Time limits - validity of determination

107. JB Ltd initially disputed the date on which the determination for 2009/10 was made, contending that the determination may have been made outside the six-year time limit provided by s34 Taxes Management Act 1970. The date on the determination was 5 April 2016; it was received six days later on 11 April 2016. Counsel for Ms Bray stated that HMRC should have provided evidence that the determination was made on 5 April 2016 and not on a later date before it was received.

108. Officer Orekhov provided evidence in his witness statement and in oral evidence in the hearing that he had checked HMRC's records as to the date on which the determination was made, and that he had found that the determination was made on the date set out of at the beginning of this decision. That evidence was not challenged. Counsel for Ms Bray contended that this was not enough to satisfy the evidential burden on HMRC to show that the determination was made on the date stated.

109. We disagree. The logical implication of the submission being put to us was that HMRC had put an earlier date on the determination to ensure that it appeared to have been made within the relevant time limit. This would be a very serious allegation and we consider that a statement under oath that HMRC's records show that the decision was made on the date set out on the letter is sufficient to discharge the evidential burden on HMRC in the absence of anything other than speculation regarding a six day interval between the date on the document and the date of receipt of that document.

110. We find that the determinations were validly issued.

Carelessness

111. It was contended (in summary) that the threshold applied by HMRC in respect of carelessness was too high and that JB Ltd (through Ms Bray) had indirectly received tax advice as Ms Bray knew that there was a counsel's opinion, had attended a presentation and had asked questions. Her accountant had read the counsel's opinion and had assured her that it seemed reasonable. It was contended that this meant that reasonable care had been taken.

112. There was considerable discussion, particularly in evidence, as to questions being asked by Ms Bray about the arrangements at the time that the transactions took place, with Ms Bray emphasising that she had asked many questions about the arrangements of Probiz and Clavis.

In the hearing she explained that she had asked about the history and aetiology of EBTs. She also stated that it was not important for her to understand all of the detail of the arrangements, as she trusted her advisers and that she considered it was normal to trust the professionals that she engaged. She stated that her basic understanding was that the arrangements would enable her to have a tax efficient loan from her company, JB Limited. Ms Bray also stated that she considered that, as the description of the arrangements given to her included very brief extracts of opinions from a tax barrister, that gave her confidence that the arrangements were “sound”. She had not read the opinions and did not know if Mr Alderton had read them.

113. Although we accept that Ms Bray asked questions about the arrangements, we do not consider that these questions were aimed at understanding the specific arrangements in any detail: from her evidence, we find that Ms Bray was asking about EBTs in general and how often this scheme had been used, and how many other people had used it. She did not seek any technical knowledge as to the tax aspects of the arrangements. On that basis, we do not consider that Ms Bray’s raising of questions at the time provides any particular assistance in determining whether or not JB Limited, or someone acting on its behalf, acted carelessly.

114. In her witness statement Ms Bray described herself as being “required to have great attention to detail” in respect of her professional work, and that she had “applied a level of scrutiny beyond that which could be expected of a lay person” to the Clavis arrangements. In the hearing, however, Ms Bray stated that she did not consider that her analytic skills outside her professional domain were beyond those of an ordinary person. With regard to these arrangements, she could not recall signing engagement letters for advice in respect of these arrangements and was unclear as to who she had paid or indeed whether she had paid anyone for tax advice in respect of these arrangements. On balance, in the context of the documentary evidence, we consider Ms Bray’s evidence in the hearing is more likely than the description in her witness statement to be an accurate reflection of her approach to these arrangements.

115. Ms Bray confirmed in the hearing that Mr Alderton had told her that he could not give tax advice in respect of the arrangements. She said that she thought Probiz had been engaged to act on her behalf, although she was not aware of specifically engaging them to provide her with advice. As noted above, we find that Probiz were not engaged to act on behalf of either Ms Bray or JB Ltd.

116. Although she considered that Mr Thornhill’s opinions provided some level of confidence in the arrangements, she confirmed that those opinions were not provided to her. There was no evidence that either she or JB Ltd was entitled to rely in any way on those opinions.

117. The engagement letter with Clavis which Ms Bray signed on behalf of JB Ltd makes it clear that the arrangements were not approved by HMRC and there could no guarantee that the arrangements would be accepted by HMRC. The letter also expressly states that Clavis were not providing tax advice to JB Ltd.

118. From the evidence provided to us we find that none of the various professionals involved in this use of the scheme were engaged to provide tax advice to Ms Bray or to JB Ltd and that this should have been clear to Ms Bray.

119. We do not agree that JB Ltd (or Ms Bray) could be said to be ‘indirectly’ advised in respect of the arrangements: the evidence provided makes it clear that the various professionals involved had specifically stated that they were not advising JB Ltd or Ms Bray on the tax aspects of the arrangements. There was no evidence that the counsel’s opinions which had been obtained by Clavis could be relied on by anyone other than Clavis.

120. Ms Bray’s evidence was that she did not consider it necessary or appropriate to get a second opinion when she took advice from a professional. Given our findings above, we find

that Ms Bray (personally or on behalf of JB Ltd) did not in fact obtain even a first opinion or any advice as to the tax implications of the scheme.

121. We consider that a reasonable prudent taxpayer, entering into a tax-saving scheme of this nature with the caveats in the presentation and the engagement letter with Clavis and knowing that their accountant was not providing tax advice, would not have relied on (at best) an assumption that someone involved with the scheme must have been providing tax advice. They would have checked that a professional was in fact engaged to advise them on the tax aspects of the scheme in their particular circumstances and so would have realised that no-one was in fact providing them with tax advice as to the arrangements. We consider that such a person would then have sought such tax advice. As no tax advice was sought with regard to the arrangements by or on behalf of JB Ltd, we conclude that there was a failure to take reasonable care to avoid the inaccuracies.

122. For Ms Bray, it was contended that there was no requirement to obtain independent tax advice in respect of the arrangements in order not to be careless. However, as set out above, we find that no tax advice was obtained by JB Ltd: this is not a case of reliance on inadequate advice (as in, for example, *Portview Fit Out Ltd* [2021] UKFTT 447, although we also note that that case is not binding on us) or reliance on advice from a person who is not independent of the scheme. Instead, there was reliance on an unchecked assumption that advice was being provided by someone; that is not reliance on advice and does not amount to reasonable care having been taken.

Causation - whether JB Ltd took reasonable care to avoid a bringing about a loss of tax

123. In the alternative it was contended that, even if there was carelessness, the loss of tax arose from the failure of the scheme. At the time the arrangements were entered into, it was contended that it was not clear that loan schemes did not work, as the case law at the time (principally *Dextra* [2005] UKHL 47) and *Sempra Metals* [2008] UKSPC SPC698) had indicated that loans from trusts were not subject to income tax. It was submitted that the current position on these schemes was not formally established until the decision in *RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) v Advocate General for Scotland* [2017] UKSC 45. For the appellant, it was therefore contended that any tax loss did not arise from any failure to take reasonable care by or on behalf of JB Ltd in implementation of the arrangements, including the completion of the returns in which the tax position was reported.

124. In connection with this, the parties provided submissions on the recent decisions in *Magic Carpets (Commercial) Limited* [2023] UKFTT 700 (TC) and *Delphi Derivatives Limited* [2023] UKFTT 722 (TC). These cases reached opposing views on the point; neither is binding on us and we consider that both were decided on their particular facts and were therefore of limited assistance.

125. In this case, the background facts are rather different to those in both *Magic Carpets* and *Delphi Derivatives*. JB Ltd was a single person company; as set out above, Ms Bray was the sole shareholder and director. Ms Bray's evidence was that it was a "one woman show" and she was entirely responsible for all revenue earned by the business. It is clear that the funds which could be made available through the scheme (or otherwise allocated to Ms Bray) had been earned by JB Ltd due to Ms Bray's efforts alone as her evidence was that she undertook every function in the company. Her evidence was that Mr Bray's involvement was limited to occasional administrative assistance and clearly shown to be so limited in the questionnaire and report conclusions. Further, as sole shareholder and director Ms Bray had complete control over whether or not any money available for extraction from JB Ltd was paid to her. No-one else could require that any of those monies be paid to them.

126. Mr Alderton suggested in the hearing that the evaluation process was similar to that of an employee asking their employer for a pay increase, that it could be refused by the evaluators. We do not agree that the process is equivalent. Looking at the questionnaire, we consider that the factors taken into account could only lead to the conclusion that Ms Bray should receive the full award. We find that it was inherently implausible that any evaluator would conclude that the sole person involved in a “one woman show” should not be awarded the entirety of the amount available for rewarding the person’s contribution to the company.

127. Mr Alderton’s evidence was that he had known that amounts awarded had been changed in some cases, although the only circumstances he was aware of were those in which the accounts of the company involved did not support the size of the proposed loans, rather than that any evaluation or exercise of evaluation (or subsequent trustee discretion) had reached a conclusion that a particular person should not receive a particular amount by way of reward under the scheme. These examples had been repeated to him by Clavis; he had no personal experience of a requested amount not being given as a result of the evaluation.

128. Ms Bray’s evidence was that the amount agreed in the board minutes was the amount she expected to receive, rather than a budget from which an amount would be recommended. She also stated that she believed that JB Ltd would be repaid anything that was not awarded to her from the amounts paid over by JB Ltd. This indicates that Ms Bray did not pay any particular regard to any suggestion that the trustees might have a genuine discretion as to the amount to award from any settlement into an EBT made by JB Ltd. Indeed, we consider that it is clear from evidence that Ms Bray expected throughout that she would receive the full amount that was transferred to the trust.

129. We find that there was no realistic prospect that any evaluation would conclude that Ms Bray should be awarded anything other than the full amount proposed to be available for allocation. In making this finding, we emphasise that this does not mean that we have concluded that the arrangements were a sham. We consider that in this case that no-one applied any consideration to whether the arrangements were suitable for a one-person company in these circumstances.

130. Mr Alderton’s evidence was that he did not think that this was a point that he needed to consider, although he had been told that there would need to be an evaluation process to consider what the individual had contributed to the company. Mr Alderton’s evidence was that he had had training on the operation of the arrangements and that he had spoken to the barristers who had provided opinions. However, his evidence was also that he considered the scheme was outside the scope of anything that he had personally done, and that he had relied on Probiz and others to ensure that his firm was introducing something robust. Nevertheless, he understood that the effectiveness of the scheme was based on the incentive being independently evaluated and not pre-determined.

131. We consider that this evidence is clear that Mr Alderton’s review of the scheme was generic and aimed at ensuring that his firm was not introducing something to clients that was obviously flawed in general terms. However, we find that he did not consider whether the arrangements were specifically suitable to JB Ltd’s circumstances. In particular we find that, although he knew that the evaluation process was important to the success of the scheme, he applied no consideration as to whether the evaluation process could reasonably reach any conclusion other than to make the maximum budgeted reward available in a single person company such as this.

132. We find that JB Ltd formally resolved to enter into the arrangements on 2 March 2010, when the report was received and the invoice from HERS was also received with instructions

to make payment if JB Ltd wished to proceed with the arrangements, and the employee committee meeting was held to approve the arrangements.

133. Even if they had not previously considered whether or not there was a realistic prospect of any discretion in the evaluation or by the trustees, we consider that by this date it should have been clear to Ms Bray (and therefore JB Ltd) and/or KAT (who were acting on behalf of JB Ltd), that they should be asking questions about the implementation of the arrangements.

134. The amount recommended was known before the report was produced, as Mr Alderton asked JB Ltd to amend the December 2009 minutes accruing the incentive amount to match that set out in the report before the report was produced. On 7 January 2010, the Probiz evaluation sheet had also been completed with £334,000 as the budget for rewards, although the board minute produced barely two weeks earlier stated that the amount accrued for rewards was £300,000.

135. The day before the outsourcing agreement was entered into and the draft report and recommendations produced, Clavis confirmed to KAT that Ms Bray was the only trust beneficiary and would receive “the full 100%”. This is not consistent with any discretion being able to be applied.

136. The report produced by HERS was a copy of the information provided by KAT and Clavis, with no evidence of any consideration by HERS of JB Ltd’s circumstances. Although Ms Bray’s evidence was that there was an ‘in-depth interview’ held with her, there was nothing in the final report that suggested that HERS made any use of any information that might have been obtained in such an interview. The draft report was produced on the same day that the outsourcing agreement for the production of the report was stated to have been entered into. The final report contained generic tax information on various types of reward with no analysis as to whether any of those rewards might be appropriate to JB Ltd.

137. The report recommended, with no clear explanation for the recommendation, two incentive options for Ms Bray: either or both of cash bonuses or the use of a special purpose trust. It did not specify which option might be preferred and neither the report nor the covering email from HERS to KAT asked JB Ltd to make a choice between those options. The report also did not set out how a special purpose trust would provide an incentive; there was no mention of a loan from the trust, for example.

138. The minutes of the JB Ltd employment committee simply documented an agreement to pay the HERS invoice, and there was no evidence that any choice was made by that committee (or JB Ltd separately) as to which option to adopt. We conclude that JB Ltd agreed to pay £334,000 to HERS (and further funds in the second implementation) without any clear evidence in the documentation as to what they were actually paying for.

139. There was no evidence that anyone made a choice between the options presented. There was no evidence that anyone had given any indication to the trustees as to which of the options had been chosen so that Ms Bray could receive the purported incentive. It is clear that it was assumed from the outset that the arrangements would result in a loan being made from a special purpose trust, given that the initial correspondence on 7 January 2010 between KAT and Clavis describes JB Ltd as a new special purpose trust client and Ms Bray was clear that she expected throughout that the arrangements would result in a loan to her, although she described it as obtaining a loan from JB Ltd.

140. Again, and noting also that we had no witness evidence from the trustees and HERS, our conclusions on this point should not be taken to be a specific finding that the arrangements were a sham or deliberately pre-ordained but rather that we consider that it would have appeared to a reasonable and prudent taxpayer that the implementation process of the

arrangements was not consistent with the description given of the key requirements of the arrangements (ie: that the appropriate reward had to be genuinely independently evaluated).

141. We find that a reasonable and prudent person would have questioned, at least by the time that they came to consider the arrangements on 2 March 2010, whether any independent evaluation of the business by HERS had actually taken place, given the virtually identical information in the report compared to the information sheets completed by KAT, and whether any evaluation of appropriate reward could result in any conclusion other than to transfer the full proposed amount to Ms Bray, in circumstances where it was known that such evaluations were required not to be pre-ordained in order for the scheme to be effective.

142. We conclude that, for these reasons, a reasonable and prudent person would not have entered into these arrangements without ensuring that they had taken tax advice from a suitably experienced adviser to check whether the arrangements as implemented would achieve the tax savings sought. As set out above, we find that no such advice was obtained and so there was a failure to take reasonable care.

143. This is not, for the avoidance of doubt, a general finding that a taxpayer must take independent advice in order to be considered to have taken reasonable care. It was agreed for JB Ltd that a taxpayer must take reasonable measures to assure themselves as to arrangements such as these, such as obtaining advice from a suitably qualified person: we find that JB Ltd did not take such reasonable measures because there was no such advice obtained, as noted above. Indeed, it seems there was very little real thought applied to the arrangements by and on behalf of JB Ltd overall: we find that the evidence shows that there was a general assumption by those involved that all that was needed to was to follow the processes set out by Clavis and/or Probiz without considering whether the specific arrangements were in fact appropriate for JB Ltd and whether the desired outcome could be achieved by JB Ltd.

144. For JB Ltd it was argued that, if tax advice had been taken, although there might have been some uncertainty as to what would have been advised regarding corporation tax, the PAYE figures reported would not have been different and so any carelessness in respect of the corporation tax aspects did not lead to the loss of income tax.

145. We consider that it is very unlikely that, had tax advice been obtained, a tax adviser would have concluded that the arrangements as implemented in JB Ltd's circumstances would achieve the corporation tax savings sought, given that we consider that the assessment of reward could not be anything other than pre-ordained in JB Ltd's circumstances. Considering the evidence before us, we find that the arrangements were marketed and undertaken as a single scheme. There was no indication that, for example, the corporation tax elements could be omitted - and the fees associated with those forgone - and only the PAYE elements undertaken. We consider that a reasonable and prudent person having received the advice set out above, and noting that substantial fees were being requested for the arrangements, would not gone ahead with the arrangements. Accordingly, we conclude on balance that the insufficiency in respect of income tax arose from the overall failure to obtain tax advice on the implications of the arrangements whether affecting corporation tax or income tax/PAYE.

146. Whilst it is possible that JB Ltd might, on receiving such advice, undertaken some alternative PAYE tax saving arrangements we consider that the possibility that hypothetical alternative arrangements might have been undertaken which would also have led to similar inaccuracies and a loss of tax does not mean that the actual loss of tax arising in this case was not caused by a failure to take reasonable care by or on behalf of JB Ltd.

147. We have referred specifically to the first implementation of the scheme by JB Ltd; it follows that the same points and conclusion apply in respect of the second implementation of the arrangements by JB Limited between late August 2010 and October 2010 as there was no

evidence that any advice was obtained by or on behalf of JB Ltd in respect of those arrangements either.

148. Accordingly, we conclude that the loss of tax was brought about by a failure to take reasonable care by JB Ltd (or a person acting on its behalf) for the purposes of s36 TMA.

149. We also conclude that the inaccuracies in JB Ltd's returns were careless for the purpose of paragraph 3, Schedule 24 FA 2007 as they arose from the failure of JB Ltd (or a person acting on its behalf) to take reasonable care.

Other contentions

150. As our conclusions above are sufficient to dispose of this appeal, we have not set out the parties' other submissions in detail as these did not affect our findings above. We did consider all the submissions made by the parties and include short details below of the main points for completeness.

151. It was contended that a lack of reasonable care was indicated by the fact that documents, particularly minutes of meetings of JB Ltd, were not dated when signed but, instead, either apparently remained undated or were dated by Clavis at a later time. For Ms Bray and JB Ltd it was contended that this was nothing out of the ordinary and similar to the position in conveyancing where, for example, documents are signed in anticipation of completion but not actually dated until completion takes place. We do not agree with this latter contention; conveyancing documents may be signed in advance, but the date required to be inserted is the actual date of completion which is generally not known at the date of signature. In contrast, we consider that minutes of meetings which are subsequently dated by a third party with no reference to the actual date of the meeting cannot be an accurate minute of such a meeting. It was also not apparent why the minutes could not have been dated when signed, with the date of the actual meeting. Nevertheless, we consider that, in isolation, the provision of undated documents might not amount to a lack of reasonable care. In the circumstances of this appeal, we find that it was consistent with the general approach to these arrangements which was that steps were followed without any particular thought as to whether or not they were appropriate to JB Ltd.

152. There were submissions made as to whether or not the transfers from the sub-trust to Ms Bray were genuine loans, with HMRC contending that the purported loans were not intended to be repaid and so could not have led to the corporation tax benefits sought. There was little documentary evidence to show that the loan agreements had been properly completed; the drafts provided to the Tribunal were not complete. Ms Bray was somewhat uncertain whether she had seen copies of the completed loan agreements. Mr Alderton thought that the completed agreements had been in the bibles of documents provided after the arrangements had been completed each time. Given the limited evidence, and our conclusions above, we have not addressed these submissions further as we consider that the concerns regarding any loan agreements or arrangements would not make any difference to our conclusions.

153. It was suggested that, as it was known that the evaluation had to be independent, that the fact that one of the members of HES LLP was Clavis Solutions LLP should have raised questions as to whether the required independence was in place. We do not agree that a taxpayer should have to check the full details of every single entity involved in a process, particularly when they have no contractual involvement with that entity (the outsourcing agreement was with HERS, which further outsourced work to HES LLP); it might be appropriate for a tax adviser to undertake such checks when advising on the tax implications of arrangements such as these but, as there was no tax advice obtained, this is not something on which we consider it is necessary to make any findings in this case.

154. There were also submissions made as whether this Clavis scheme was defective in general terms, irrespective of the eventual decision in Rangers. Our findings above relate to the particular circumstances of JB Ltd and the way in which the arrangements were implemented for JB Ltd. For the avoidance of doubt, we do not consider that there was sufficient evidence available to us as to the way in which the arrangements might have been implemented by other companies to be able to make any findings in respect of the scheme which might be of more general application.

Conclusion

155. For the reasons set out above, the appeal is dismissed and the determinations and penalties upheld.

Right to apply for permission to appeal

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

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 29 August 2024