[2018] UKFTT 0247 (TC)

TC06479

Appeal number: TC/2017/05887

INCOME TAX – accelerated payment notice – penalty – whether genuine belief that judicial review proceedings would succeed afforded a "reasonable excuse" – no – whether "penalty date" had been reached – yes – whether tax demanded pursuant to a Regulation 80 determination was "disputed tax" – yes – penalties validly issued

FIRST-TIER TRIBUNAL
TAX CHAMBER

SHEILING PROPERTIES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at Taylor House, Rosebery Avenue, London on 19 March 2018 and having considered additional submissions from the parties dated 16 April 2018

Ben Elliott, instructed by Blackstar Group Limited, for the Appellant

Matthew Beattie, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. The appellant company (the "Company") is appealing against penalties that HMRC imposed under Schedule 56 of the Finance Act 2009 for late payment of accelerated payments demanded in an accelerated payment notice ("APN") issued pursuant to s219 of the Finance Act 2014 ("FA 2014").

2. The parties have agreed that I should determine all issues relevant to this appeal as preliminary issues and then formally stay the appeal pending the conclusion of judicial review proceedings to which the Company is party, challenging the lawfulness of the underlying APN. Then, if the Company is successful in judicial review proceedings, HMRC will withdraw the penalty. If the Company is unsuccessful in judicial review proceedings, it will withdraw its appeal. The benefit of this approach from the Company's perspective appears to be that it prevents HMRC from collecting a penalty until the judicial review proceedings are concluded and protects the Company against the theoretical risk of HMRC refusing to withdraw the penalty even if it is determined that the underlying APN was unlawful.

3. I will not stand in the way of what the parties have agreed in this case. However, this should not be the usual approach. In future, I would expect taxpayers who are party to judicial review proceedings to draw this to the Tribunal's attention when they submit their Notice of Appeal (providing the full court reference for those proceedings so that the Tribunal can identify precisely which proceedings are referred to). Taxpayers should then say expressly whether they are requesting a stay behind the judicial review proceedings and, if they are not requesting a stay, give reasons.

4. In this appeal, the Company requested at an early stage of proceedings that its appeal should not be stayed. The Tribunal duly listed a hearing and both the parties and the Tribunal have allocated resources in dealing with the appeal. Those resources might have been wasted if, as events turn out, the taxpayer succeeds in its application for judicial review. Since both parties are evidently happy for the final outcome of this appeal to await the determination of judicial review proceedings, the much better course would have been for this appeal to have been stayed shortly after it was made.

Evidence

5. Mr Stephen Houchen, a director of the Company, provided a witness statement on behalf of the Company and gave oral evidence. Mr Beattie cross-examined him. I was satisfied that Mr Houchen was an honest and reliable witness. HMRC did not rely on witness evidence.

6. Both parties also made submissions by reference to a bundle of documents.

Facts

7. Relatively few facts were in dispute (although the parties had different views as to the conclusions I should draw from those facts). The facts set out at [8] to [32] were either determined by me or were agreed.

The background and the penalties that have been charged

8. In the tax year ended 5 April 2012, the Company entered into arrangements that were notified under the "DOTAS" regime in Finance Act 2004, and which HMRC allocated a scheme reference number. Under the arrangements the Company made payments to two directors in return for those directors incurring obligations to subscribe for partly paid shares in the Company.

9. On 17 February 2016 HMRC issued a determination (a "Regulation 80 determination") under Regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (the "PAYE Regulations") determining that the Company owed tax, under the PAYE Regulations, of £118,000 in relation to the payments referred to at [8]. Also on 17 February 2016, HMRC issued decisions under s8 of the Social Security Contributions (Transfer of Functions etc) Act 1999 ("section 8 decisions") that the Company was liable to pay primary and secondary Class 1 national insurance contributions ("NIC") totalling £71,801.12 on those payments.

10. On 25 February 2016, the Company appealed to HMRC against the determinations and decisions set out at [9] (the "substantive appeal") and applied for postponement of the tax in dispute.

11. On 16 March 2016, HMRC acknowledged the substantive appeal and agreed to postpone payment of PAYE due, pursuant to the provisions of s55 of the Taxes Management Act 1970 ("TMA 1970").

12. On 19 July 2016, HMRC sent two APNs to the Company requiring advance payment of PAYE totalling £118,000 (the "PAYE APN") and NIC totalling £67,452.06 (the "NIC APN"). HMRC stated that the amounts demanded had to be paid by 20 October 2016.

13. On 19 September 2016, HMRC received representations from the Company objecting to the issue of the APNs arguing, in summary, that Conditions A and C set out in s219 of Finance Act 2014 ("FA 2014") had not been met.

14. On 4 October 2016, HMRC confirmed that the APNs would not be altered and informed the Company that the amount demanded pursuant to those APNs was due no later than 9 November 2016.

15. The Company did not pay the amounts demanded by 9 November 2016. Nor did it pay those amounts by 9 December 2016 or by 9 May 2017[1]. It had still not paid the amounts demanded by 19 March 2018, the date of the hearing.

16. In November 2016, the Company and a number of other taxpayers who had received similar APNs issued a claim for judicial review challenging the validity of their APNs in *R (on the application of Adviser Business Solutions Limited and others) v HMRC.*

[1] Which, for reasons set out later in this decision, I have concluded are respectively the "penalty date" for the purposes of Schedule 56 of Finance Act 2009 and five months after that "penalty date".

Those judicial review proceedings alleged a number of failings by HMRC in discharging their public law duties in connection with the APNs including:

> (1) a breach of the taxpayers' legitimate expectation that no tax or NIC would be payable until the conclusion of their substantive appeals (a similar issue to that arising in *R (on the application of Dickinson) v Revenue & Customs Commissioners.*
>
> (2) that the APNs were issued *ultra vires* (relying on the decision of the *High Court in R (Vital Nut) v HMRC* [2016] EWHC 1797).

The judicial review proceedings were stayed pending the determination of similar claims concerning the lawfulness and validity of APNs including *Rowe and others v the Commissioners for Her Majesty's Revenue & Customs* [2015] EWHC 223 (Admin).

17. On 22 December 2016, HMRC issued the Company with two penalty notices (one for each APN that had been issued). The penalty notice in respect of the PAYE APN imposed a penalty of £5,900 (5% of the PAYE demanded of £118,000). The penalty notice relating to the NIC APN imposed a penalty of £3,372.60 (5% of the NIC demanded of £67,452.06).

18. On 12 January 2017, the Company appealed, within applicable time limits, to HMRC against the penalties (the "penalty appeal"). The Company's grounds of appeal were stated shortly as:

> Sheiling Properties Limited [is] a participant in a Judicial Review claim which has been filed (*R oao Adviser Business Solutions Ltd & Others v HMRC*).

19. On 6 March 2017, HMRC provided their "view of the matter" explaining that they did not consider that the fact that the Company was party to judicial review proceedings prevented the penalties being due. HMRC offered the Company a review of that decision.

20. On 31 March 2017, the Company wrote to HMRC to accept the offer of a review. In its letter, the Company gave a much fuller explanation of why it considered the penalties were not due than it had in its letter of 12 January 2017.

21. On 9 May 2017, HMRC wrote to the Company to set out the conclusions of their review. Their conclusion, on review, remained that the Company had no reasonable excuse for its failure to pay the amount demanded on time and that no "special reduction" of the penalty was appropriate. HMRC's review letter invited the Company to tell HMRC if there were any other circumstances, not referred to in that letter, that the Company thought should be taken into account.

22. On 25 May 2017, in response to HMRC's invitation to inform them of other relevant circumstances, the Company sent further arguments to HMRC. On 12 June 2017, HMRC responded stating that they had already considered those arguments when conducting their review and that they would not perform a further review. The

Company notified its appeal to the Tribunal against the first APN late payment penalty on 13 July 2017[2].

23. Meanwhile, on 30 May 2017, HMRC issued the Company with second late payment penalties of £5,900 (in relation to the PAYE APN) and £3,372.60 (in relation to the NIC APN). The Company appealed to HMRC against those second penalties on 6 June 2017. HMRC provided their view of the matter on the second penalties on 21 July 2017. HMRC offered a review of their decision which the Company accepted on 1 August 2017. HMRC set out the conclusions of their review of their decision on the second set of penalties in a letter dated 17 October 2017. I was not shown a document that notified the Company's appeal against the second penalties to the Tribunal. However, both parties proceeded on the basis that there was an appeal against both the first and second late payment penalties that was validly before the Tribunal and I will do the same.

24. By direction dated 18 December 2017, the Tribunal stayed the substantive appeals (as distinct from the appeals against the penalties) pending determination of a claim in the High Court for rectification. Those proceedings (the "Rectification Proceedings") involve a claim for a declaration that the transactions summarised at [8] never took place.

The reasons why the Company did not pay the amounts demanded under the APNs

25. The Company has taken professional advice from Blackstar Group, a firm of tax advisers, in connection with the APNs.

26. On 13 October 2015, Blackstar Group sent a circular email to a number of their clients who had been involved with tax planning involving partly paid shares similar to that effected by the Company. That email noted that HMRC had recently sent letters warning that APNs were about to be issued and that APNs could therefore be expected. The email explained that a client who received an APN had four options described as:

> 1. Comply with and pay the amount stated in the APN
>
> 2. Seek an HMRC review
>
> 3. Seek a judicial review. This is an independent review by a judge and the course of action we are recommending.
>
> 4. Do nothing. We do not recommend that you choose this option under any circumstances.

The email then gave further information on Blackstar's recommended route (taking judicial review proceedings) in the following terms:

[2] I consider that HMRC's review was concluded on 12 June 2017 when, having invited the Company to provide any further relevant information, HMRC concluded that the information provided did not change their mind. Therefore, the Company's notification of its appeal to the Tribunal was a day or so late. HMRC have not objected to the Company being given permission to make a late appeal and I will permit it to do so.

> Apart from making a request for statutory reconsideration offered in the APN, judicial review is the only, and best, route of challenging the decision to issue APNs. Although the recent decision in the Ingenious judicial review was favourable to HMRC, we expect that decision not to be the end of the story both in that case and the wider challenge of HMRC. Furthermore, judicial review is fact sensitive and any challenge to HMRC's decision to issue APNs in relation to particular planning should be brought on its own facts and merits. It is quite likely that HMRC will issue APNs for both PAYE and Class 1 NIC an analysis that we strongly disagree with. We believe that this will provide strong grounds for challenging the decision to issue APNs
>
> …
>
> Blackstar has nearly 800 clients that have utilised [the relevant DOTAS scheme reference]. Pinsent Masons has agreed to provide its services in relation to a Judicial Review for APNs received, however, they cannot formally engage with clients until such time as HMRC gives formal notices that APNs are to be issued.

The email also gave information on the likely costs that would be involved in taking judicial review proceedings.

27. The email from Blackstar Group referred to above was not the only communication that the Company received from a professional adviser on the likelihood of success of judicial review proceedings. The advice that the Company received from its professional advisers resulted in Mr Houchen considering that there was a good prospect that the APNs had been issued unlawfully. Mr Houchen was not, however, certain that the APNs were issued unlawfully (not least because his advisers did not say that the APNs were definitely unlawful).

28. Mr Houchen held the belief referred to at [27] at the time all APNs fell due for payment. He continued to hold the belief at the date of the hearing on 19 March 2018 although he acknowledged that it now appears likely that there is to be no appeal to the Supreme Court against the decisions of the Court of Appeal in *Rowe* and *Vital Nut* and that this "undermines (to some extent but not completely) the strength of its position that the APNs are invalid".

29. Mr Houchen is not a lawyer or particularly knowledgeable on tax issues. Therefore, he did not formulate his own reasons for concluding that the APNs were issued unlawfully. He relied on his advisers' view and was not able to explain the reasons that underpinned his advisers' view. I was not, therefore, provided with any detailed explanation as to why Blackstar Group (or any of the Company's other advisers) gave the advice they did.

30. The Company's business involves the construction of properties. The Company therefore receives income when construction is complete and the property sold. However, the Company must pay contractors and suppliers while a property is being built. The property market has been volatile over the past few years. At all times material to this appeal, the Company has experienced periodic cash flow issues. It has

borrowed money from its directors as it found it difficult to obtain funding from banks. I have accepted Mr Houchen's unchallenged evidence that:

> If the APNs had been paid, this would not have left sufficient funds in the business to continue trading, and it might have been at risk of not being able to pay its contractors who would have ceased work and therefore terminated [projects that contractors were working on].

31. In his witness statement, Mr Houchen linked the Company's decision not to pay the accelerated payments with the advice that the Company received. For example, at [22] of his witness statement he said:

> During a meeting of the directors held on 20th December 2016 the matter of the APN was discussed at length. In conclusion it was the opinion of the Directors that paying the APN would cause severe damage to the company and the validity of the APN was still in question and had been formally challenged in the judicial review. Directors believed that the High Court would prove that the APNs are unlawful and therefore made the decision not to pay the APNs.

32. Mr Houchen was pressed in cross-examination on the precise reasons why the Company has not paid the accelerated payment to date. From Mr Houchen's evidence, I have concluded as follows:

(1) The financial consequences to the Company of paying the accelerated payments would have been extremely serious. As noted at [30], the Company's very viability could have been under threat. The Company naturally wanted not to suffer those serious financial consequences.

(2) Given the professional advice that the Company had received, it had a genuine belief that there were good grounds for considering the APNs had not been issued lawfully.

(3) It therefore considered that it was justified in not paying the accelerated payments demanded while the debate as to the lawfulness of the APNs was resolved in judicial review proceedings.

(4) Professional advice that the Company has received following the decision of the Court of Appeal in *Rowe* and *Vital Nut* caused it to question the strength of its argument that the APNs were unlawfully issued. While it still considers that it has good arguments, it believes that its arguments are somewhat less strong than it formerly believed. For that reason, it has started discussions with HMRC with a view to arranging a "time to pay agreement" in relation to the accelerated payments that HMRC are demanding.

Relevant statutory provisions

Statutory provisions dealing with APNs

33. The circumstances in which an APN may be issued are set out in s219 of FA 2014. That section provides, so far as relevant to this appeal, as follows:

219 Circumstances in which an accelerated payment notice may be given

(1) HMRC may give a notice (an "accelerated payment notice") to a person ("P") if Conditions A to C are met.

(2) Condition A is that…

(b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been –

(i) determined by the tribunal or court to which it is addressed, or

(ii) abandoned or otherwise disposed of

(3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular arrangements ("the chosen arrangements").

(4) Condition C is that one or more of the following requirements are met—

…

(b) the chosen arrangements are DOTAS arrangements;

…

(5) "DOTAS arrangements" means—

(a) notifiable arrangements to which HMRC has allocated a reference number under section 311 of FA 2004,

(b) notifiable arrangements implementing a notifiable proposal where HMRC has allocated a reference number under that section to the proposed notifiable arrangements, or

…

34. The Company's APNs were issued after it had made the substantive appeals to HMRC. In those circumstances, s221 of FA 2014 sets out certain information that must be specified in the APNs.

35. Section 222 of FA 2014 entitles a person receiving an APN to make representations to HMRC objecting to the APN on the grounds that Conditions A to C referred to in s219 are not satisfied, or objecting to the amount of accelerated payment that is required. Any such representations must be made within 90 days of the date the notice was given and HMRC are obliged to consider any representations that are made.

36. There is no statutory right of appeal to this Tribunal against HMRC's decision to issue an APN. As will be seen, however, there is an appeal to this Tribunal against a penalty that is imposed in consequence of a taxpayer's failure (or alleged failure) to make an accelerated payment.

37. Where, as in the circumstances of this appeal, an APN is issued under 219(2)(b) of FA 2014, the APN operates so as to disapply any postponement of tax that, prior to issue of the APN, took effect under s55 of the Taxes Management Act 1970 ("TMA

1970"). That is achieved by the following provisions of s55 as in force at the times relevant to this appeal:

> (8B) Subsections (8C) and (8D) apply where a person has been given an accelerated payment notice or partner payment notice under Chapter 3 of Part 4 of the FA 2014 and that notice has not been withdrawn.
>
> (8C) Nothing in this section enables the postponement of the payment of (as the case may be)—
>
> (a) the understated tax to which the payment specified in the notice under section 220(2)(b) of that Act relates,
>
> (b) the disputed tax specified in the notice under section 221(2)(b) of that Act, . . .
>
> (8D) Accordingly, if the payment of an amount of tax within subsection (8C)(b) is postponed by virtue of this section immediately before the accelerated payment notice is given, it ceases to be so postponed with effect from the time that notice is given, and the tax is due and payable—
>
> (a) if no representations were made under section 222 of that Act in respect of the notice, on or before the last day of the period of 90 days beginning with the day the notice or partner payment notice is given, and
>
> (b) if representations were so made, on or before whichever is later of—
>
> (i) the last day of the 90 day period mentioned in paragraph (a), and
>
> (ii) the last day of the period of 30 days beginning with the day on which HMRC's determination in respect of those representations is notified under section 222 of that Act.

38. Section 55(8D) of TMA 1970 therefore provides for tax which had, prior to issue of an APN, been postponed under s55 to become due and payable again once an APN is issued. The parties referred to this at the hearing as tax becoming "unpostponed". The tax that is "unpostponed" is the "disputed tax" which is defined in s221(3) of FA 2014 as:

> (3)…so much of the amount of the charge to tax arising in consequence of –
>
> (a) the amendment or assessment to tax appealed against, or
>
> (b) where the appeal is against a conclusion stated by a closure notice, that conclusion,
>
> as a designated HMRC officer determines, to the best of the officer's information and belief, as the amount required to ensure the counteraction of what that officer determines as the denied advantage.

39. The Company takes a point on this definition in relation to the PAYE APN. It argues that the PAYE which HMRC were demanding, and against which the Company appealed in the substantive appeals, was not demanded pursuant to an "amendment",

or an "assessment" or a "closure notice" but rather pursuant to an HMRC "determination" under Regulation 80 of the PAYE Regulations. I will address that argument in the "Discussion" section below.

40. Section 55 of TMA 1970 does not apply for NIC purposes. Rather, for NIC purposes, the position is as follows and, since there was no dispute between the parties as to how these provisions apply, I will not set out the statutory provisions in full:

> (1) The general position in s117A of the Social Security Administration Act 1992 ("SSAA 1992") is that, if an appeal has been brought against a section 8 decision, any proceedings for the collection of the NIC in dispute must necessarily be adjourned until after that appeal has been determined.
>
> (2) However, Paragraph 18(2) of Schedule 2 of the National Insurance Contributions Act 2015 ("NICA 2015") varies the position where an APN has been served. In that case, the NIC specified in the APN falls due for payment either (i) 90 days after the APN is given (if the taxpayer makes no representations under s222 of FA 2014) or (ii) (if the taxpayer does make representations), the later of the date in (i) and 30 days after HMRC's determination of those representations is notified under s222.
>
> (3) In addition, paragraph 18(3) of Schedule 2 of NICA 2015 provides that the mandatory adjournment under s117A of SSAA 1992 does not apply to the NIC specified in the APN.

The law relating to the penalties

41. Where tax is "unpostponed" pursuant to s55(8D) of TMA 1970, a penalty is due, under Schedule 56 of Finance Act 2009 ("Schedule 56") if that tax is not paid by the date specified in s55(8D). Schedule 56 does not just apply to tax that has become "unpostponed" following the issue of an APN; it imposes penalties for late payment of tax in a variety of circumstances. Paragraph 1 of Schedule 56 is the basic penalty provision that provides, relevantly as follows:

> **1 Penalty for failure to pay tax**
>
> (1) A penalty is payable by a person ("P") where P fails to pay an amount of tax specified in column 3 of the Table below on or before the date specified in column 4.
>
> (2) Paragraphs 3 to 8 set out—
>
> (a) the circumstances in which a penalty is payable, and
>
> (b) subject to paragraph 9, the amount of the penalty.
>
> (3) If P's failure falls within more than one provision of this Schedule, P is liable to a penalty under each of those provisions.
>
> (4) In the following provisions of this Schedule, the "penalty date", in relation to an amount of tax, means the day after the date specified in or for the purposes of column 4 of the Table in relation to that amount.

42. Therefore, if a particular tax is not paid on or before the "penalty date", a penalty becomes due under Schedule 56. The penalty date is to be established by consulting the table in paragraph 1 of Schedule 56. Item 2 of the Table reads as follows:

	Tax to which payment relates	*Amount of tax payable*	*Date after which penalty incurred*
2	Income tax	Amount payable under PAYE regulations	The date determined by or under PAYE regulations as the date by which the amount must be paid.

43. Regulation 67A of the Social Security (Contributions) Regulations 2001 ("SSCR 2001") provide for Schedule 56 to apply to late payment of Class 1 NIC as if (i) the Class 1 NIC were an amount of tax falling within Item 2 above and (ii) references to the PAYE regulations were references to SSCR 2001.

44. The parties had different perspectives on which entry in the table applies to PAYE that is "unpostponed" pursuant to s55(8D) of TMA 1970 following service of the PAYE APN[3]. The Company argued that entry 18 in the table is relevant. Entry 18 provides as follows:

	Tax to which payment relates	*Amount of tax payable*	*Date after which penalty incurred*
18	Income tax or capital gains tax	Amount payable under section 55 of TMA 1970	The date falling 30 days after the date determined in accordance with section 55(3), (4), (6) or (9) of TMA 1970

HMRC argued that the relevant entry was entry 24 which provides as follows:

	Tax to which payment relates	*Amount of tax payable*	*Date after which penalty incurred*
24	Tax falling within any of	Amount (not falling within any of items 18 to 20) shown in an	The date falling 30 days after –

[3] Given the way that Mr Elliott put his argument, that involved a detailed analysis of s55 of TMA 1970, given that s55 of TMA 1970 does not apply to "unpostponed" NIC, I have concluded that there was no dispute as to how Schedule 56 applies in the context of the NIC APN. Mr Elliott's skeleton argument also linked his point on the Table only to PAYE which reinforces me in that conclusion.

	items 1 to 6, 9 or 10[4]	assessment or determination made by HMRC in circumstances other than those set out in paragraph 2[5]	(a) the date by which the amount must be paid, or (b) the date by which the assessment or determination is made whichever is later.

45. I will deal with this issue in the "Discussion" section of this decision. For the time being, I will only outline its significance. If the Company's argument is correct (so that entry 18 in the Table is relevant), it argues that the only "date" specified in s55(3), (4), (6) or (9) of TMA 1970 is found in s55(9). That date is the date on which the substantive appeal is determined. It follows that the Company's argument is that the "penalty date" in relation to the PAYE APN has not yet occurred (as the substantive appeal has not yet been determined) with the result that it is not liable to a penalty in relation to the PAYE APN. By contrast, under HMRC's approach (which relies on entry 24 of the Table), the Company became liable for a penalty when the accelerated payment specified in the PAYE APN remained unpaid 30 days after it was due which, in turn was, by virtue of s55(8D) of TMA 1970, the date falling 30 days after HMRC dealt with the Company's representations under s222 of FA 2014.

46. Paragraph 3 of Schedule 56 provides for multiple penalties to be charged. Whether the tax in dispute falls within Item 18 or Item 24 of the Table, the first penalty (equal to 5% of the amount unpaid) is chargeable if tax is not paid by the "penalty date". A further penalty (also equal to 5% of the amount unpaid) becomes chargeable if the tax is not paid within 5 months of the penalty date.

47. Paragraph 13 of Schedule 56 sets out a right of appeal against penalties charged under Schedule 56 as follows:

> **13 Appeal**
>
> (1) P may appeal against a decision of HMRC that a penalty is payable by P.
>
> (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

48. Paragraph 16 of Schedule 56 sets out a defence of "reasonable excuse" as follows:

> **16 Reasonable excuse**

[4] Which would include income tax or capital gains tax since those taxes fall within item 1.

[5] Paragraph 2 of Schedule 56 applies to determinations that HMRC make in circumstances where taxpayers do not make returns. Paragraph 2 is of no relevance in the context of this appeal.

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

49. Paragraph 15 of Schedule 56 sets out the scope of the Tribunal's jurisdiction on an appeal as follows:

15

(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make….

Discussion

50. During the course of the dispute with HMRC, and in its Notice of Appeal to the Tribunal, the Company has made a number of arguments as to why the penalties charged are not due. However, at the hearing, Mr Elliott confirmed that he wished to pursue only three broad grounds of appeal:

(1) The Company is entitled to the defence of "reasonable excuse" set out in paragraph 16 of Schedule 56. The "reasonable excuse" in question centres on the Company's belief that the APNs were invalid.[6]

(2) Because of the specific drafting of the term "disputed tax", the PAYE APN did not actually result in the PAYE that had previously been postponed as described at [11] becoming "unpostponed". It followed that no penalty could be charged in relation to the PAYE APN.

(3) Because of the point outlined at [44] above, there has not as yet been any "penalty date" for the purposes of the PAYE demanded under the PAYE

[6] Mr Elliott confirmed that the Company is not seeking to argue that there are "special circumstances" which, pursuant to paragraph 9 of Schedule 56, would enable the penalties to be reduced.

APN with the result that no penalty can be charged for any failure to pay that PAYE.

I will deal with those specific grounds of appeal first since, in considering them, I will reach various conclusions as to how the relevant provisions should be construed that will enable me to conclude whether the penalties are due or not.

Ground 1 - Reasonable excuse

51. I respectfully agree with what Judge Berner said about the concept of "reasonable excuse" in *Barrett v HMRC* [2015] UKFTT 329 (TC):

> The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.

52. I also respectfully agree with the way that Judge Hellier approached the taxpayer's argument, in *Francis Chapman v HMRC* [2017] UKFTT 0800 (TC), that a belief in the likely success of judicial review proceedings, amounted to a reasonable excuse for non-payment of an accelerated payment demanded pursuant to an APN. Like Judge Hellier, I do not consider that there is any rule of law that prevents such a belief from amounting to a reasonable excuse. Neither FA 2014 nor Schedule 56 set out any such limitation. Nor can any such rule of law be inferred from various statements that the courts have made in judicial review proceedings on the lawfulness of particular APNs (for example the judgment of Simler J at first instance in *Rowe* that Judge Hellier referred to in his decision).

53. However, even though there is no rule of <u>law</u> that precludes the excuse that the Company is putting forward from being a "reasonable excuse", I consider that the reasonableness or otherwise of that excuse has to take into account the effect of the statutory regime on APNs that Parliament has enacted. As Simler J noted at [30] of her decision at first instance in *Rowe*, the APN regime was enacted to ensure that, where a tax avoidance scheme is involved, HMRC, and not the taxpayer, hold the tax in dispute while the efficacy or otherwise of the avoidance scheme is determined. To achieve that legislative purpose, Parliament has enacted a regime that permits HMRC to demand accelerated payment of amounts of tax that are in dispute following implementation of an avoidance scheme. Of course, Parliament enacted various safeguards to protect the interests of taxpayers, including the right to make representations under s222 of FA 2014. However, in assessing whether it is reasonable for the Company to withhold payment of an accelerated payment, I must take into account that Parliament has legislated specifically to permit HMRC to demand accelerated payment and has done so to combat what it regards as the "mischief" of tax avoidance schemes. Given the regime that Parliament has enacted, I respectfully agree with Judge Hellier's

observation at [72] of his decision in *Chapman* that in deciding how to respond to an APN, a reasonable taxpayer would not lightly assume that HMRC have acted unlawfully in issuing an APN. On the contrary, given the statutory background, the taxpayer would need to demonstrate that, viewed objectively, there is a high degree of confidence that the APNs are invalid. Judge Hellier gave some examples of the kind of factors that might to such a high degree of confidence (for example, if it is clear that a decimal point has been put in the wrong place on the APN). Judge Hellier's examples are not, of course, binding on me and cannot set out an exhaustive list of when it will, or will not, be reasonable for a taxpayer to refuse to pay an accelerated payment because it believes the APN to be invalid. However, his examples neatly illustrate the point that a high degree of confidence in the invalidity of the APNs that is objectively justified is likely to be necessary.

54. As I have found, the Company had, at material times, a genuine belief that it has a good case for arguing that the APNs were issued unlawfully. Mr Elliott in his submissions sought to argue that the Company's case also objectively was a strong one. I agree with the observations that Judge Rupert Jones made in *Beadle* v *HMRC* [2017] UKFTT (0829) to the effect that the Tribunal is placed in a difficult position when it is required to speculate on the strength of a case being advanced in judicial review proceedings before the High Court which have not been concluded and are completely outside the Tribunal's jurisdiction. However, I would not go as far as saying that the Tribunal simply has no power to perform that exercise given the width of excuses potentially encompassed by the concept of "reasonable excuse" and the points I make at [52].

55. I accept that the High Court has given the Company permission to bring judicial review proceedings which demonstrates that the High Court considers that those proceedings have a reasonable prospect of success. However, Mr Elliott's submissions as to the strength of the Company's case on judicial review, rested mainly on general statements that courts had made in judicial review proceedings about defects in HMRC's internal procedure, which added little to the question of whether it was reasonable for the Company to conclude that its specific APNs were invalid. For example, Mr Elliott placed considerable reliance on McCombe LJ's statement, at [223] of the decision in *Vital Nut* that HMRC had, in that case, issued APNs "oblivious to the proper operation of statutory procedure". However, the fact that HMRC did not follow proper procedure in that case does not demonstrate that HMRC failed to do so when issuing the Company's APNs. Moreover, in both *Vital Nut* and *R (on the application of Dickinson) v Revenue and Customs Commissioners* [2017] EWHC 1943 (Admin) the courts concluded that, even if HMRC had followed proper procedure, it was highly likely that they would have issued identical APNs. In neither case was the remedy of judicial review granted (in reliance on s31(2A) of the Senior Courts Act 1981). Therefore, even if there were defects in the procedure that HMRC followed before issuing APNs to the Company, it certainly does not follow that those APNs were necessarily unlawful. Moreover, at the time the APNs fell due for payment, the relevant statement of the law was that set out in Charles J's judgment at first instance in *R (on the application of Vital Nut Co. Limited) v HMRC* [2016] EWHC 1797. Charles J, at [35] of his judgment, decided that a designated officer's duty to check whether a claimed tax advantage was available before issuing an APN was less exacting than the

Court of Appeal determined it to be. Therefore, an argument that the APNs were void because HMRC had failed to follow correct procedure was weaker in 2016 than it was following the Court of Appeal's decision.

56. I was not shown the reasoning that underpinned the view of Blackstar Group (or indeed any other adviser) that judicial review proceedings had a good prospect of success. The principal record of Blackstar Group's advice was the email referred to at [26]. That contains an assertion that there were "strong grounds" for judicial review. That falls far short of a categoric assurance that judicial review proceedings would succeed. The email noted that every application for judicial review "should be brought on its own facts and merits" but did not analyse the "facts and merits" relevant to the Company's specific APNs and indeed could not do so because it was written before the APNs were even issued. Therefore, Blackstar's email did not contain a record of their reasoning and, while I have accepted that the Company received other assurances that its judicial review proceedings had a good prospect of success, without seeing the relevant advisers' reasoning I cannot accept Mr Elliott's submission that the Company has an objectively strong case. I should not, of course, be taken as saying that the Company's case is weak.

57. Therefore, while I accept that the Company genuinely believed, at all material times, that it had a good prospect of establishing that the APNs were invalid, I am not satisfied that it had a sufficiently high degree of certainty, that was objectively justified, to give it a reasonable excuse for not paying the sums that HMRC demanded.

58. There is another reason why I do not consider the Company had a reasonable excuse. I have concluded that the predominant reason why the Company did not pay the accelerated payments was because it was worried about its cash flow and was concerned that, if it paid HMRC, it could suffer severe financial consequences (see [32] above). The Company's genuine belief that it had a good prospect of demonstrating that the APNs were unlawful caused it to believe that it was justified in not paying the accelerated payments, or that it might not suffer consequences for failing to do so. However, the predominant reason for non-payment was insufficiency of funds. That could be a reasonable excuse only if the insufficiency in question was attributable to events outside the Company's control. Mr Houchen's evidence gave little specific reason for the Company's insufficiency of funds beyond alluding to difficult conditions in the construction industry and the difficulty of obtaining bank finance. I am not, therefore, satisfied that the Company's insufficiency of funds was attributable to events outside its control.

59. For all those reasons, I do not consider that the Company had a "reasonable excuse".

Ground 2 – the argument that the PAYE APN does not specify an amount of "disputed tax"

60. This argument relates only to the PAYE APN. It is summarised at [39] above. As noted, the argument proceeds on the basis that s55(8D) of TMA 1970 provides only for "disputed tax" to be "unpostponed". The Company argues that the PAYE in question became due following a Regulation 80 determination, (rather than an "assessment" or

"amendment") and so is not "disputed tax". It follows, in the Company's submission, that the PAYE APN did not cause any sum to be "unpostponed" with the result that there has been no late payment of PAYE on which a penalty under Schedule 56 can bite.

61. I do not accept the Company's argument. Regulation 80(5) of the PAYE Regulations provides that:

> 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…

I agree with Mr Elliott that this is not a general "deeming provision". It does not provide that Regulation 80 determinations are treated for all purposes as "assessments". However, it does provide that Part 5 of TMA 1970 (which includes s55(8D)) must be applied as if the Regulation 80 determination were an assessment.

62. Section 55(8D) provides for "disputed tax" to be "unpostponed". Because, s55(8D) must be applied as if the Regulation 80 determination were an "assessment", when the statutory definition of "disputed tax" in s221(2)(b) of FA 2014 is applied for the purposes of s55(8D), that definition must also be read as if a Regulation 80 determination were an assessment. Mr Elliott's answer to this line of reasoning was that Regulation 80(5) is not expressed to apply for the purposes of s221(2)(b), but that approach involves reading the statutory provisions as if they were a computer program or a line of algebra. As I have noted, statutory provisions need to be construed in a purposive manner and, in Regulation 80(5), Parliament has shown a clear purpose that, when s55(8D) is being applied, it should be applied as if a Regulation 80 determination were an "assessment". Therefore, any question of whether tax is "unpostponed" has to be determined on the footing that a Regulation 80 determination is an assessment. Understood in those terms, Parliament's intention is clear.

63. Mr Elliott also referred to Schedule 2 of NICA 2015 which provides expressly that, for the purposes of FA 2014, all references to "assessments" include decisions relating to NIC. He suggested that, since Parliament chose not to make a similar provision in relation to Regulation 80 determinations, they intended Regulation 80 determinations not to be treated as "assessments" when deciding whether tax should be "unpostponed" or not. I do not accept that argument. Given the clear indication of Parliament's intention set out at [62], the fact that Parliament chose to spell out the position in relation to NIC (which is a completely different tax from income tax) says nothing about its intention in relation to Regulation 80 determinations. I therefore reject the Company's argument under Ground 2.

Ground 3 – the argument that the "penalty date" in relation to the PAYE APN has not yet occurred

64. In order to determine this ground of appeal, I will start by determining the question, referred to at [45] above, of what entry in the Table contained in Schedule 56 is relevant in the context of the PAYE APN.

65. Neither party argued that Item 2 in the Table determined the penalty date in connection with the PAYE APN. I paused slightly on this question, but have concluded that the parties were right. If Item 2 applied, then the penalty date would be set by reference to the due date determined by the PAYE Regulations. That would take no account of the fact that the PAYE in dispute was initially postponed under s55 of TMA 1970 (until service of the APN caused that PAYE to be "unpostponed"). The effect of applying Item 2 in the Table would be that the penalty date arose even before the APN was served and at a time when the PAYE had lawfully been postponed pursuant to s55 of TMA 1970.

66. I have not accepted Mr Beattie's submission that Item 24 is relevant. The first point to note is that the Table itself ensures that Item 18 takes priority over Item 24 since Item 24 cannot apply to amounts of tax that fall within Items 18 to 20. Since it was s55 of TMA 1970 that caused the PAYE to fall due when it was "unpostponed", and since s55 of TMA 1970 specified a revised due date for payment (after HMRC had dealt with the Company's representations under s222 of FA 2014), on any fair reading of the Table the relevant PAYE was an amount payable "under" s55 of TMA 1970.

67. Of course the wellspring of the PAYE was HMRC's Regulation 80 determination which was made under the PAYE Regulations. I have, therefore, considered whether Item 18 cannot apply on the grounds that the PAYE was payable "under" the PAYE Regulations and not "under" s55. However, if that were the case, then Item 2 of the Table would be engaged with the corresponding difficulties outlined at [65]. Moreover, Parliament would have been aware, when enacting Schedule 56, that s55 of TMA 1970 is not a provision that itself imposes charges to tax; rather it provides for charges to tax imposed by other provisions of the taxes acts to be postponed, or "unpostponed". Therefore, in asking whether tax is chargeable "under" s55 of TMA 1970, Parliament cannot have been asking whether s55 is the relevant charging provision (since s55 is not a charging provision in relation to any tax).

68. Having concluded that Item 18 applies, I must then determine the "penalty date" that Item 18 produces. That penalty date is "30 days after the date determined in accordance with section 55(3), (4), (6) or (9) of TMA 1970 as the date by which the amount must be paid". Mr Elliott argued that of the sections listed, only s55(9) specifies any date for payment, and that date can only fall after the substantive appeals are determined. If the list of sections specified in Item 18 had included s55(8D) of TMA 1970, he accepted that the position would be clear. However, Parliament has chosen not to include s55(8D) in the list and he submitted that the Tribunal should not fill the gap caused by Parliament's oversight.

69. I do not accept Mr Elliott's submissions as I consider that they amount to an over-literal interpretation of the statute which is at odds with its clear purpose. Having enacted a regime that provides for income tax to be "unpostponed" when an APN is issued, with a new due date for payment specified, Parliament cannot have intended that no penalty could be charged if the "unpostponed" tax is not paid in time. It is right, therefore, that Item 18 is given a "purposive" construction.

70. Once that is appreciated, the position becomes clear. Item 18 does not require the date to be "specified in" s55(3), (4), (6) or (9), only that the due date for payment be determined "in accordance with" those sections. Section 55(3), (4) and (6) variously determine the amount of tax that can be postponed. Sections 55(3), (4) and (6) are ousted by s55(8C) and s55(8D) that provide that tax that is the subject of an APN cannot be postponed and, if it has previously been postponed, for it to be "unpostponed". Sections 55(3), (4) and (6) cannot be understood without reference to s55(8C) and s55(8D). Therefore, having due regard to the purpose of the provisions, I consider that where tax is "unpostponed", the due date for payment is determined "in accordance with" s55(3), (4) and (6) because that due date for payment is derived by applying statutory exceptions to those provisions that are intended to modify and qualify the general scheme set out in s55(3), (4) and (6).

71. There is a further reason why Mr Elliott's interpretation cannot be correct. Item 18 of the Table directs attention to "the date by which the amount must be paid". Mr Elliott submits that the relevant date is found in s55(9). However, s55(9) is dealing with tax that is postponed. The tax in issue for the purposes of this appeal is "unpostponed". Therefore, whatever view one takes as to how the references to s55(3), (4) and (6) should be construed, on no view can the "penalty date" be supplied by s55(9).

72. I therefore reject the Company's argument under Ground 3.

Overall conclusion

73. Even though, as noted at [50], the Company is disputing the penalty only on certain focused grounds, this is a penalty appeal and HMRC have the burden of proving the facts that result in the penalties being due (except to the extent the Company has specifically agreed relevant facts). In the context of this appeal, that means that HMRC must prove all of the following facts:

(1) That the documents issued to the Company were APNs. If they were some other kind of document (for example a mere suggestion that the Company's exposure to interest would be mitigated if he made a payment on account) there would be no statutory penalty for failing to pay the amount specified.

(2) That the Company had not made payment in full by the relevant date.

(3) That HMRC have calculated the penalties correctly.

74. As regards the matters set out above I have concluded:

(1) I am satisfied that the documents referred to at [12] were APNs.

(2) The PAYE and NIC in dispute became "unpostponed" on or around 9 November 2016 (30 days after HMRC's decision to confirm the APNs in response to the Company's representations under s222 of FA 2014). The "penalty date" for the purposes of Schedule 56 fell 30 days later on 9 December 2016. The five-month anniversary of the "penalty date" fell on 9

May 2017. It was common ground that the PAYE and NIC demanded had not been paid by 5 May 2017 (or indeed by the date of the hearing).

(3) HMRC correctly calculated the penalties by applying the figure of 5 per cent to the amount unpaid.

75. I do not consider that in this appeal, HMRC have the burden of proving that Conditions A to C set out in s219 of FA 2014 and Mr Elliott did not argue that HMRC have that burden.[7] I have therefore concluded that HMRC have discharged their burden on the factual matters outlined at [73].

76. Since I have concluded that HMRC have discharged their burden of proving that the penalties are due, and since I have rejected the Company's grounds of appeal, my overall conclusion on the preliminary issues before me is that, unless the APNs are determined to be unlawful in judicial review proceedings, the Company is liable to the penalties as charged.

77. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 1 May 2018

[7] If, contrary to this conclusion, HMRC had the burden of proving that the planning the Company effected involved "DOTAS arrangements" for the purposes of Condition C, they would not have discharged that burden. HMRC did demonstrate that the arrangements had been allocated a "scheme reference number". However, the definition of "notifiable arrangements" in s219(5) of Finance Act 2014 appears to envisage both that the arrangements must actually be notifiable arrangements under Finance Act 2014 and that HMRC have allocated those arrangements a scheme reference number. HMRC did not produce any evidence as to the nature of the underlying planning that could satisfy me that it was actually a "DOTAS arrangement".