[2018] UKFTT 290 (TC)

TC06520

Appeal number: TC/2017/3897

FOLLOWER NOTICE PENALTY – whether payment of APN is corrective action – no – whether reasonable not to take corrective action – no – whether penalty should be further reduced for cooperation – yes – whether penalty disproportionate – no – request for anonymity refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOSEPH HUTCHINSON **Appellant**

- and -

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

TRIBUNAL: JUDGE Barbara Mosedale

Sitting in public at Taylor House, Rosebery Avenue, London on 2 May 2018

The appellant in person

Mr P Shea, HMRC officer, for the Respondents

DECISION

1. On 10 February 2016 HMRC assessed the appellant to a penalty of £64,162.40 under s 208 Finance Act 2014. The appellant appealed the assessment to HMRC; that appeal was not successful and on 10 May 2016 the appellant lodged his appeal with the Tribunal.

2. Mr Hutchinson was unrepresented in the hearing before me but provided written representations from (a) his accountants, BSG Valentine, on 19 April 2018, and (b) counsel he had instructed (unnamed). I took these into account and refer to them in my decision.

The facts

The evidence

3. I had documentary evidence contained in HMRC's bundle which included both parties' documents; I also had a doctor's note provided by the appellant.

4. Mr Hutchinson gave oral evidence. I accepted his evidence in very large part: he appeared to give evidence to the best of his recollection and did not claim to remember, for instance, posting the corrective action form, when there was a dispute over whether or not it was posted. But, as he accepted, he did not have particularly clear memories of what happened some 4 years ago which had been (for reasons described below) a difficult time of his life. I had concerns about one element of his evidence and I discuss this below at §§22-31.

Findings

5. The appellant entered into a tax avoidance scheme colloquially referred to as 'Working Wheels' pursuant to which he made in his 2007/2008 tax return a claim for repayment of tax of £256,694.60.

6. Slightly less than £40K of this claim was immediately realised by Mr Hutchinson as he set it against his tax liability on income he was otherwise liable to pay for tax year 07/08. However, the greater part of the claim arising from the scheme was for a tax repayment, which HMRC did not pay. Instead, HMRC opened an enquiry into the return on 4 August 2009.

7. I understand the enquiry was stalled for some years pending a test case going forward to Tribunal.

8. In June 2013, Mr Huthinson gave up his employment of 16 years to start up his own company. This company went on to employ some 40 people but ultimately failed in 2017.

9. At some point, Mr Hutchinson changed personal tax advisers from Thomas Eggar (solicitors) to Pinks (accountants). He could not remember exactly when; as the change was not reflected in the SA notes before the Tribunal, I find that it must have been before September 2013 (the earliest date in the SA notes before me).

10. On 20 February 2014, the FTT released its decision in an appeal involving a different taxpayer who had also implemented the Working Wheels tax planning: *Flanagan and others* [2014] UKFTT (TC). That decision was final as it was not appealed. The Tribunal concluded that the scheme was ineffective to reduce the taxpayer's tax liability.

11. I accept Mr Hutchinson's evidence that 2014 was a difficult year for him. He had just set up his new company. He then discovered in March 2014 that his wife was having an affair. He moved out of the family home and went to stay with his parents, only visiting the family home in order to see his children.

12. The doctor's letter referred to above showed that Mr Hutchinson had consulted him in July 2014 'presenting with acute stress and anxiety' and the letter stated it was caused by his marriage breakdown and left him unable to attend to other important matters in an organised manner. Indeed, in the hearing, Mr Hutchinson accepted that at this stage in his life he did not open all his post and was not dealing with matters in the way he ordinarily would have done.

13. He returned to live at the family home in July 2014 to attempt reconciliation, but this failed before the end of the year and Mr Hutchinson moved out of the family home a second time. He moved into rented accommodation. Some time later he moved back in order to try to sell the property. However, he did not suggest that he did not receive post sent to Lancaster Gate whether or not he was living there at the time: as I have said, he accepted that at that point in his life he was not good at opening nor dealing with post.

14. Relying on its new legislative powers, HMRC issued a warning letter to the appellant on 28 November 2014 stating that they intended to issue a 'follower notice' in respect of his participation in the Working Wheels scheme. Such a notice was issued on 17 December 2014 ('the Follower Notice'). It required the appellant to take corrective action by 24 March 2015. I explain 'corrective action' below but in brief corrective action is a withdrawal by the taxpayer of the claim to the tax advantage the subject of the disputed tax arrangements. Accompanying the Follower Notice was a draft corrective action form, with certain pre-populated details, which would enable the appellant to take corrective action by inserting the tax figure, signing and dating the form, and then returning it to HMRC.

15. The appellant was issued with an accelerated payment notice ('APN') on the same day as he was issued with the Follower Notice: however, as I have said, the greater part of the claim made by Mr Hutchinson in his 07/08 return had never been paid to him by HMRC. Following receipt of the APN, he did pay in February 2015 the (approximately) £40K tax which he had taken by way of offset against his 07/08 tax liability. In respect of the greater part of the claimed tax relief, HMRC accepted

that, as Mr Hutchinson had not received the tax benefit, he had no liability to pay it under the APN.

16. In the meantime, on 9 January 2015, HMRC were notified by the appellant of the appointment of his new representatives (BSG Valentine) for his personal affairs: BSG had been his company's advisers for some time already. HMRC updated their systems to reflect BSG's appointment. On 27 January 2015, BSG filed Mr Hutchinson's 13/14 tax return (the due date for which was four days later).

17. It was accepted that Mr Hutchinson neither filed representations nor completed and returned the corrective action form by 24 March 2015. On 14 August 2015, HMRC issued a warning letter that penalties would be charged.

18. In correspondence, BSG produced to HMRC a signed and completed corrective action dated 27 August 2015. HMRC accepted that the form had been signed on that date but did not accept it had been sent to HMRC at this time. I agree with HMRC on this because (a) BSG Valentine's own records indicate that they left it to Mr Hutchinson to post the form; (b) Mr Hutchinson had no particular recollection of being left with the form to post and no actual recollection of posting it (although he says he was 'sure' he would have done) (c) had HMRC received the form, I accept it was more likely than not that they would not have closed the enquiry into Mr Hutchinson's 7/08 tax return as the corrective action form, by withdrawing the claim, would have made closing the enquiry unnecessary.

19. As HMRC did not receive the form, on 19 November 2015, HMRC closed the enquiry into the appellant's 07/08 tax return, amending it to deny the claimed tax advantage. Mr Hutchinson has never sought to appeal that amendment and it is now final.

20. On 24 December 2015, HMRC issued a further letter warning of their intention to assess a penalty. On 6 January 2016, the appellant (via his agents) filed the signed corrective action form with HMRC. BSG's letter said that the Follower Notice was overlooked as it was issued at a time when Mr Hutchinson was in transition from Pinks to BSG. They also, as I have said, explained that the corrective action form was prepared at the end of August but left to Mr Hutchinson to post.

21. On 10 February 2016, HMRC issued the penalty charge at (roughly) 25% of the denied tax advantage.

The reasons why the corrective action form was not filed until January 2015

22. A number of reasons where advanced as to why the corrective action form was not filed by the due date. They were:

(a) Prior to the compliance date, it was overlooked due to the change in advisers;

(b) Mr Hutchinson had left it to his advisers to sort out.

(c) Mr Hutchinson thought that he had taken corrective action by paying so much of the APN as he was required to pay;

23. Of perhaps less significance, as it was late either way, was the question of why the corrective action form was served in January 2015 rather than August 2014 when it was signed. The evidence as to why it was not filed in August 2014 was conflicting.

24. On the one hand, the evidence pointed to a mere oversight on the part of Mr Hutchinson. This is because BSG's evidence is that they were instructed to prepare the form and Mr Hutchinson gave evidence that he was 'sure' he posted it even though he had no recollection of it (see §18). Moreover, Mr Hutchinson has not challenged the amendment to his 07/08 tax return closing his enquiry. All three of these strands of evidence suggest that, by mid-2014, Mr Hutchinson did not intend to dispute the matter any further and did intend to file the corrective action form giving up his claim to the tax relief.

25. On the other hand, Mr Hutchinson specifically said in oral evidence that in respect of the August 2015 letter, he thought he had taken corrective action by settling the APN and he thought that was the end of the matter, and nothing further needed doing.

26. These two explanations obviously conflict: it cannot have been a mere oversight which led to the failure to file the form in August if Mr Hutchinson had taken a positive decision that he did not need to file the form because he had paid the APN. As the appellant's evidence conflicted on this point, I was not able to accept it as reliable.

27. This inconsistency in Mr Hutchinson's evidence also exists in relation to the reason why the corrective action was not taken by the due date.

28. The first reason given (see §22(a) above) was that it was overlooked due to the change in advisers. I accept, as the facts make clear, that Mr Hutchinson changed his personal advisers at around the time that he received the Follower Notice. I find the notice was posted to Mr Hutchinson and Pinks. HMRC did not post it to BSG. BSG's position was that they did not know about the Follower Notice until the summer of 2014 (after the compliance date); Mr Hutchinson's rather vague evidence was that he forwarded 'everything' to BSG and relied on them to settle matters with HMRC. Mr Hutchinson' case is therefore that BSG overlooked it; BSG's position is that Mr Hutchinson and/ or Pinks overlooked it, but either way they knew nothing about it.

29. I don't accept Mr Hutchinson's rather vague evidence on this as reliable. His statement he forwarded 'everything' to BSG appeared more like an admission that he did not specifically remember forwarding the Follower Notice to BSG. It was also shortly after a time of his life where even he accepts he was not good at opening or dealing with post. So I don't think BSG overlooked it: indeed they were prompt at filing their new client's tax return (§16).

30. But it is also difficult to accept that that the reason corrective action was not taken at the due date was because Mr Hutchinson actually overlooked sending the Follower Notice to his advisers and carried on in the belief they were dealing with it. This is difficult to accept because Mr Hutchinson's statement that he thought settling the APN was the end of the matter was repeated in his submissions and appeared to cover the entire period and not just the August 2015 letter. So in other words, he suggested he failed to meet the compliance date because he thought he had taken corrective action and needed to do nothing else.

31. The conflict in his evidence on this left me uncertain as to the reason why Mr Hutchinson did not take corrective action by the due date and why he did not take corrective action when he signed the form in August 2015: I find therefore that Mr Hutchinson has failed to prove the reason why he did not comply by the due date and why the form was not posted until January 2016. In conclusion, I do not know why corrective action was not taken on the due date or in August 2015.

32. I move on to consider the legislation and the legal position on the facts in so far as I have found them to be.

The Legislation

33. The legislation relating to follower notices is set out in the Finance Act 2014. So far as it is relevant, it provides as follows:

> **S 204 Circumstances in which a follower notice may be given**
>
> (1) HMRC may give a notice (a 'follower notice') to a person ('P') if Conditions A to D are met.
>
> (2) Condition A is that –
>
> (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
>
> (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 tax arrangements ('the chosen arrangements').
>
> (4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements.
>
> (5) Condition D is that no previous follower notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements, judicial ruling and tax period.

> (6) A follower notice may not be given after the end of the period of 12 months beginning with the later of –
>
> (a) the day on which the judicial ruling mentioned in Condition C is made, and
>
> (b) the day the return or claim to which subsection (2)(a) refers was received by HMRC or (as the case may be) the day the tax appeal to which subsection (2)(b) refers was made.

34. In other words, a follower notice can only be given in certain circumstances. Those circumstances are where conditions A-D are satisfied and the time limit in (6) is met.

35. Even if it is valid for HMRC to issue a follower notice, the legislation sets out certain conditions that a follower notice must meet to be valid:

> **S 206**
>
> A follower notice must –
>
> (a) Identify the judicial ruling in respect of which condition C in section 204 is met.
>
> (b) explain why HMRC considers that the ruling meets the requirements of section 205(3).
>
> (c) explain the effects of sections 207 to 210.

36. S 207 gives the taxpayer the right to challenge the follower notice by making representations to HMRC within 90 days of receiving it. S 207 sets out the grounds on which an objection may be made. No representations were made by Mr Hutchinson.

37. S 208 imposes a penalty where the taxpayer does not take the 'necessary corrective action' before the due date:

> **S 208**
>
> (2) P is liable to pay a penalty if the necessary corrective action is not taken in respect of the denied advantage (if any) before the specified time.

38. There was no dispute over the amount of tax the subject of Mr Hutchinson's Follower Notice and APN. It was the amount of tax relief claimed to be generated by Mr Hutchinson's participation in the Working Wheels scheme (§5) and was the 'denied advantage' referred to in s 208(3).

Issues before the Tribunal

39. S 214 gives the taxpayer a right of appeal against a penalty imposed under s 208. It provides as follows:

> **S 214 appeal against a section 208 penalty**

> (1) P may appeal against a decision of HMRC that a penalty is payable by P under s 208
>
> (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P under s 208.
>
> (3) the grounds on which an appeal under subsection (1) may be made include in particular –
>
> > (a) that condition A, B or D in s 204 was not met in relation to the follower notice,
> >
> > (b) that the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements,
> >
> > (c) that the notice was not given within the period specified in subsection(6) of that section, or
> >
> > (d) that it was reasonable in all the circumstances for P not to have taken the necessary corrective action (see s 208(4)) in respect of the denied advantage.

40. A number of questions arise:

(a) What are valid grounds of appeal?

(b) Who must prove what?

(c) What is actually in dispute in this appeal?

What grounds of appeal does the Tribunal have jurisdiction to hear?

41. Is the penalty in the right amount? The Tribunal is expressly given jurisdiction to consider whether the penalty was imposed in the correct amount (s 214(2)). I also consider (and it was not in dispute) that the Tribunal has jurisdiction to consider whether the penalty should be reduced (or further reduced) for cooperation under s 210. This is clearly contemplated by S 214(2) and s 214(9) which indicate that the Tribunal can consider the amount of the penalty and substitute for HMRC's decision on the amount a decision which HMRC had power to make.

42. Is the follower notice valid? The Tribunal has jurisdiction to consider whether the penalty was properly imposed at all (s 2014(1)) and in doing so is given a limited jurisdiction to consider the validity of the follower notice. It can consider whether conditions A, B or D were met or not (s 214(3)(a)). By implication, it has no jurisdiction to consider whether condition C was met. Moreover, I doubt a claim that HMRC should not have issued the follower notice would be a valid ground of appeal in this Tribunal: this Tribunal has no judicial review jurisdiction and the language of s 214(3) appears to exclude wide ranging challenges to HMRC's discretion in any event.

43. Any of the other matters in s 214 can be grounds of appeal; but although the Tribunal's jurisdiction is limited, it is not limited to the factors set out at s 214(3) as it is clear on the face of the legislation that that list is not exhaustive (because it uses the word 'include'). So what are potential other valid grounds of appeal not listed in s 214?

44. Failure to take corrective action? I consider that the Tribunal can consider an appeal on the basis that the appellant asserts he took corrective action on or before the compliance date. This is not named as a ground of appeal in s 214(3). But, as I have said, the list is not exhaustive. Moreover, the question of whether the appellant took corrective action by the due date is a question of fact and not a matter of HMRC's discretion: it is therefore well within the Tribunal's jurisdiction to determine. So it must be possible to raise this as a ground of appeal in this Tribunal.

45. Follower Notice in improper form? It must also be a valid ground of appeal that the Follower Notice was not in proper form. If a valid Follower Notice was not issued, there could be no penalty for non-compliance. Moreover, the question of whether it was in proper form is a factual matter well within the ability of the Tribunal to determine: the requirements are set out in s 206 cited above at §35.

46. Proportionality? I consider that it would be a valid ground of appeal to claim that the penalty was disproportionate. This follows because the ECHR requires all penalties to be proportionate. Mr Hutchinson has raised this as a ground of appeal and I will consider it below.

47. Special reduction? The appellant put forward a number of other grounds of appeal. His amended grounds of appeal included a claim for a 'special reduction'. As was pointed out to him by the Tribunal earlier, 'special reduction' for special circumstances is a potential ground of appeal against certain penalties but not against penalties issued under s 208 FA 2014. In any event, I did not understand Mr Hutchinson to be putting forward as special circumstances anything other than matters that could be considered under the heading of 'reasonable not to comply', and in particular (a) his health (b) his alleged confusion between the two notices. And I will consider these matters under that heading.

48. Unjust enrichment: There is no possible ground of appeal that payment of a penalty unjustly enriches HMRC, other than if this is taken to be a ground of appeal that the penalty is (allegedly) disproportionate. And I will consider the proportionality of the penalty.

49. Equivalence/effectiveness: The most recent submissions from counsel included a claim that the penalty was a breach of the EU principles of equivalence and effectiveness. The EU principles of equivalence and effectiveness have no relevance to penalties imposed in respect of direct tax breaches, unless there was some kind of international element so that it might be said persons based in the EU are treated less favourably than persons based in the UK: Mr Hutchinson's claim, however, is that the follower notice regime for partners imposes a lesser penalty on partners than the normal follower notice regime imposes on individuals. Even if such discrimination exists, I see no grounds for saying it is directly or indirectly discrimination against EU nationals and therefore the EU principles of equivalence and effectiveness are simply inapplicable to this appeal and I will not consider them any further.

50. Unlawful fettering of discretion? Counsel's submissions also said that HMRC had unlawfully fettered their discretion in giving their officers a set table of %

reductions for particularly types of cooperation It is not for this Tribunal to determine whether or not HMRC unlawfully fettered its discretion by having tables setting out fixed % reductions for various types of disclosure: that is a matter for judicial review. However, as I have explained at §41 above, the Tribunal has full appellate jurisdiction to determine the appropriate % reduction. The Tribunal is therefore not fettered by HMRC's tables.

51. Notes unclear? Counsel also complained that the notes accompanying the APN and Follower Notice were unclear. Not only was this ground wholly unparticularised so that I was unaware of what notes were said to be unclear and why, the validity of the Follower Notice could only be affected by its failure to comply with the requirements of the legislation and the only requirements are those set out in s 206. It might also be reasonable not to comply with a follower notice if the notes were materially misleading (see *Onillon* [2018] UKFTT 33 (TC)) but Mr Hutchinson did not suggest that this was the case.

52. Delay by HMRC: Mr Hutchinson's advisers also complained about delay by HMRC. For reasons which were not explained to me, once the appellant lodged his appeal against the penalty on 26 February 2016, HMRC acknowledged it on 5 April 2016 but did nothing further until 22 February 2017 when they offered Mr Hutchison a review. While HMRC accept that this was 'regrettable' on their part, they say it is irrelevant. It has not prejudiced the appeal and in any event Mr Hutchinson could have taken matters into his own hands under s 49A Taxes Management Act 1970 and forced action, either by requiring a review or by notifying the appeal to the Tribunal.

53. I agree with Mr Shea that this does not amount to a ground of appeal which this Tribunal can consider. It post-dates the issue of the penalty and therefore cannot affect the question of whether the penalty was properly imposed or should be reduced or remitted. It might give the appellant grounds for complaint against HMRC but that is outwith the jurisdiction of this Tribunal. I will not consider this matter any further.

Who must prove what?

54. As this is a penalty case, HMRC accept that, to the extent it is in dispute, they must prove that the penalty was correctly imposed on the appellant. I find they must prove, to the extent it is in dispute, that (a) the follower notice was properly served, (b) the follower notice was valid, (c) that the appellant failed to take corrective action (both steps) and (d) that the penalty notice was properly served.

55. HMRC do not have to prove *every* factor that must be present for the penalty to be valid in this appeal: in an appeal they only have to prove what is in dispute. If this were not the case, the person with the burden of proof would need to waste time and money on proving a case that is not in dispute. Mr Hutchinson does not challenge the validity of the follower notice nor that both it and the penalty notice was correctly served on him: if the appellant does not expressly or impliedly dispute a matter which must be proved by HMRC, I should proceed on the basis that the appellant has accepted that the matter is proved.

What is actually in issue in this appeal?

56. HMRC do not accept that the question of whether timely corrective action was taken is a ground of appeal that should be considered by the Tribunal on the basis this ground of appeal was only raised very late in proceedings: it was a point raised by Mr Hutchinson in the hearing and in the submissions produced shortly before it from his advisers. It was not in his original nor amended grounds of appeal. Mr Shea invited the Tribunal to refuse to consider this on the basis it was procedurally unfair for a new point to be raised so late in the dispute as it deprived HMRC the opportunity of properly responding to it. I revert to this below at §61.

57. In summary, the issues which are in dispute and which I am required to resolve are:

(1) Was the follower notice in proper form?

(2) Was corrective action taken by the compliance date (with the prior question of whether it should be admitted as a ground of appeal)?

(3) Was it reasonable for the appellant not to take corrective action by the compliance date?

(4) Should the penalty be further reduced for cooperation?

(5) Was the penalty disproportionate?

(1) Was the Follower Notice in proper form?

58. Mr Hutchinson's counsel complained that the Notes received with the Follower Notice only referred to the three reasons for which a penalty could be reduced contained in s 210(1) and not other possible grounds of appeal (set out in s 214). This point was not raised in the hearing but even if true, I find that s 206 only requires s 207-210 to be summarised. It does not require the grounds of appeal in s 214 to be set out.

59. While it is for HMRC to satisfy me, to the extent that there was a dispute about it, that the Follower Notice was in proper form, I am satisfied it was correct for the notice not to refer to the grounds set out in s 214. This ground of appeal is dismissed.

(2) Was corrective action taken?

60. HMRC, as I have said, consider the appellant raised this issue too late. However, HMRC are not prejudiced by my considering the matter, because I find that they have, for the following reasons, clearly proved that the appellant failed to take corrective action. In any event, I would be inclined to admit it in any event as it is an important point in an appeal important to the appellant; and HMRC had had some forewarning of it.

61. The corrective action is described in s 208(4) as being two steps, set out in (5) and (6) as follows:

> (5) The first step is that –

(a) in the case of a follower notice given by virtue of s 204(2)(a), P amends a return or claim to counteract the denied advantage;

(b) in the case of a follower notice given by virtue of section 204(2)(b), P takes all necessary action to enter into an agreement with HMRC (in writing) for the purpose of relinquishing the denied advantage.

(6) the second step is that P notifies HMRC –

(a) that P has taken the first step, and

(b) of the denied advantage and (where different) the additional amount which has or will become due and payable in respect of tax by reason of the first step being taken.

62. This was a case where the follower notice was given under s 204(2)(a) because it was a case where there was an enquiry in progress in relation to the tax return in which Mr Hutchinson claimed the tax advantage.

63. S 208(2) requires the corrective action to be taken before 'the specified time'; s 208(8)(a) defines 'the specified time' where there are no representations (there were none here) as being 'the end of the 90 day post-notice period'. And that phrase is then defined in the same subsection as meaning 'the period of 90 days beginning with the day on which the follower notice is given'. So, as stated above, the compliance date was 24 March 2014.

64. The law requires the appellant to take both stages of corrective action by that date. I find he did neither. He was required to amend his return or claim or counteract the denied advantage (in other words, the claim to the tax relief which HMRC disputed). He did not do this by 24 March 2014. In fact, he never made an effective amendment to his 07/08 tax return which contained the claim: HMRC closed the enquiry on 19 November 2015, amending his return to remove the claim. Mr Hutchinson's later filing of the corrective action form in January 2016 was too late to amend the return: it was already amended.

65. Mr Hutchinson's position is that paying the APN was corrective action. I find as a matter of law it was not. The definition of 'corrective action' requires, as the first step, for the taxpayer to amend his return of claim in such a way that the tax advantage challenged by HMC is counteracted.

66. 'Counteract' is not a defined term but its meaning appears clear from the context. If an enquiry is still open (as in this case), the taxpayer is required to amend his tax return to negate the claim to the tax advantage (s 208(5)(a)); if the enquiry is closed and an appeal against the amendment is in progress, the taxpayer is required to settle the appeal in such a way that he relinquishes the claim to the tax advantage (s 208(5)(b)). In other words, 'counteract' means that the taxpayer must irrevocably give up his claim to the tax advantage, either by amending his return so that the claim to the tax advantage is no longer a part of it, or by settling his appeal on terms that his claim to the tax advantage is given up.

67. Paying an APN does not have that effect. While the APN relates to exactly the same tax advantage claimed by a taxpayer in his or her tax return, the effect of paying the APN is that the payment is:

> 'to be treated as a payment on account of the understated tax'

The understated tax was defined in s 220(4) as the additional amount of tax that would be due and payable if the specified corrective action were taken (s 220(4)(a)).

68. What this all means is that the APN required the taxpayer to pay the tax in dispute while it remained in dispute: paying the APN does not bring the dispute over the liability to the tax or entitlement to the relief to an end. It simply deprives the taxpayer of the timing advantage of keeping the money pending resolution of the dispute.

69. If the dispute continued, and ultimately the taxpayer was successful, any money he had paid under the APN on account of the tax would have to be repaid to him by HMRC.

70. A follower notice is quite different: a follower notice requires the taxpayer to bring the dispute to an end on terms favourable to HMRC. It requires the taxpayer to accept that he or she was wrong to claim the tax relief/tax advantage concerned and to irrevocably give up the claim to it. Doing so would of course trigger the liability to the tax. This would be a payment of the tax liability and not an amount on account of the disputed tax liability.

71. I accept that Mr Shea was right to say that the APN and follower notice regimes were two distinct regimes, the first with the object of depriving the taxpayer of the timing advantage of keeping hold of the tax the subject of the dispute during the course of the dispute; while the follower notice was intended to pressurise the taxpayer into bringing the dispute to an end on HMRC's terms (but only in cases where there was a final judicial ruling that the scheme the subject of the dispute was ineffective). It was possible, as happened here, for the taxpayer to be the recipient of both kinds of notice but they were distinct. Complying with one did not amount to compliance with the other.

72. I find as a matter of law, paying an APN did not amount to taking corrective action as it did not result in the tax return being amended nor (where the matter was under appeal) did it result in a settlement of the dispute over the correct tax liability. I am satisfied that HMRC have proved that Mr Hutchinson did not take corrective action by the compliance date, either by paying the APN or otherwise, and therefore whether or not this new ground of appeal should be admitted makes no difference, as the appellant cannot succeed on it.

73. I also note in passing that Mr Hutchinson's advisers made the point that the 'corrective action' form supplied by HMRC (and ultimately signed and returned by Mr Hutchinson) was not prescribed by the legislation and there was no obligation on the taxpayer to use it. I agree and Mr Shea did not suggest otherwise. His point was that HMRC supplied the pre-populated form as a convenience to the taxpayer to make

taking corrective action easy. The question for the Tribunal is whether or not Mr Hutchinson actually took corrective action, and not whether he completed and returned the pre-populated form supplied by HMRC. Nevertheless, had he completed (correctly) that form, signed and returned it by the due date, it would have been corrective action. He did not. Nor did he do anything else that amounted to corrective action. In particular, he did not amend his 07/08 return to remove the claimed tax advantage from it.

(3) Was it reasonable not to take corrective action?

What is the test?

74. Mr Shea suggests that reasonable must be construed objectively and not subjectively. He suggests that the taxpayer must have done what a prudent and reasonable hypothetical person would have done in the same situation taking into account the facts and 'legislative context'. By this he refers to the purpose of the legislation which is, he says, to discourage taxpayers from pursuing a dispute once the scheme has been shown to fail in another taxpayer's litigation.

75. HMRC consider that the propositions set out in *Onillon* on this are correct. There Tribunal Judge Rupert Jones said:

> [171] …the starting point must be that there is no need to add any gloss to the words contained in the statute.
>
> [172] …The purpose [of the legislation] is to discourage taxpayers from pursuing their dispute in avoidance cases once their scheme has been shown to fail in another party's litigation…..To avoid a penalty, therefore, it cannot be sufficient merely that the taxpayer believes they might be right, it must be reasonable in light of all the circumstances for them to take this position.
>
> ….
>
> [175] ….'reasonable' must be construed objectively, not subjectively. This means that the taxpayer must have done what a prudent and reasonable hypothetical person would have done in his situation in light of all the facts and the legislative context.

76. The appellant did not take issue with this statement of the law and I agree with it so far as it goes. However, what it does not address is whether the test requires causation. In other words is the test whether, objectively speaking, it would have been reasonable for a taxpayer not to comply with the notice *or* is the test whether, objectively speaking, it was reasonable for the taxpayer not to comply with the notice for the reasons that the taxpayer did not in fact comply with the notice? In other words, does the taxpayer simply have to show that there was an objectively good reason for not complying with the notice, or does he have to go further and show that that objectively good reason was the reason he did not comply?

77. This is not semantics: here Mr Hutchinson failed to prove the reason why he did not comply with the notice (see §31). Does that mean I do not have to consider s 214(3)(d) any further?

78. Considering this matter in more detail, as I have said, corrective action requires the taxpayer to give up his claim to the tax advantage and can only be required where there has been a final judicial ruling that the scheme which generated the claimed advantage has failed (s 204(4)). Nevertheless, it seems implicit in s 214(3) that it is reasonable for a taxpayer to refuse to take corrective action if, despite the adverse ruling, the taxpayer wishes to contest his own liability through the legal system and his case is (objectively speaking) arguable. If this were not so, the legislation would be penalising a taxpayer for taking an appeal through the courts in circumstances where it was reasonable to do so.

79. If a taxpayer fails to take corrective action because, say, although he intended to, he forgot, can he avoid liability for the penalty if he can show that nevertheless it would have been objectively reasonable to continue to dispute the matter in the court system, even though he personally did not intend to fight on?

80. I had no representations on this matter and it does not appear straightforward. While the wording of s 214(3)(d) appears to focus on 'P' (the taxpayer) and therefore implicitly is looking at the reasons why P failed to take corrective action, at the same time it seems wrong in principle to penalise someone for failing to withdraw a claim that it is reasonable to pursue despite the adverse judicial ruling. However, on balance, I think that the most natural reading of s 214(3)(d), despite my misgivings, is that P is required to show that his failure to take corrective action was for a reason that was objectively reasonable.

81. The effect of that conclusion is that Mr Hutchinson's appeal must fail on this point as he failed to prove the actual reason why he did not take corrective action. Nevertheless, in case I am wrong on that interpretation of s 214(3)(d) I go on to consider whether it was objectively reasonable not to take corrective action by the compliance date.

Was it objectively reasonable not to take corrective action?

82. Arguable case? Mr Hutchinson was quite clear in his evidence that he did not intend, at any time after receiving the Follower Notice, to contest his own liability. Nor did he put forward a case that it would have been objectively reasonably to have continued to pursue the matter despite the ruling in *Flanagan*: indeed the tenor of what he said is that he thought he was mis-sold the planning scheme.

83. I find therefore that he has not proved (nor even attempted to prove) that it was objectively reasonable not to take corrective action because it was reasonable to fight on.

84. Change of agents? As I have said, I have not been able to accept as a matter of fact that the non-compliance was because he changed agents: I do not accept that

either Pinks or BSG were instructed to deal with the matter of the follower notice before the compliance date nor that any failures by them led to Mr Hutchinson's failure to comply by the compliance date. It would not have been objectively reasonable to rely on agents who were not instructed; even if they were instructed, I do not think it is objectively reasonable to rely on them because as a matter of policy I do not think a person can avoid their duty by passing it on to a third party.

85. Confusion with APN? This seemed to be a new ground of appeal, and one to which HMRC objected being admitted. I have admitted it as explained above at §61 but I do not think the appellant has made it out.

86. Firstly, I am not satisfied as a matter of fact (see §31) that the reason Mr Hutchinson did not take corrective action by the due date was because he was confused and thought that by paying the APN he had satisfied the Follower Notice.

87. In any event, even if I had accepted that evidence or was wrong about the test as set out at §80, I would not consider that it was objectively reasonable for Mr Hutchinson not to take corrective action because he had paid the APN. Firstly, the APN and Follower Notice were separate matters and HMRC required separate action (payment of the APN on the one hand, and completion of the pre-populated corrective action form (or a suitable alternative) on the other hand. It was open to Mr Hutchinson to check with HMRC or his advisers whether payment of the APN amounted to satisfaction of the Follower Notice. But I find he did not. And while the submissions provided by his counsel complain that the Guidance Notes supplied to him were inadequate and/or confusing, he did not refer me to any passage from them and so I do not understand his concerns, and am unable to conclude that there was anything misleading in them.

88. I do not consider that receiving an APN and Follower notice at the same time is inherently confusing; and Mr Hutchinson has not satisfied me that he was confused or that any confusion on his part was reasonable.

89. Mr Hutchinson's health: Mr Shea accepted that in 2014 Mr Hutchinson had suffered with stress and anxiety in line with the doctor's letter that was produced. He did not accept that that made it reasonable for Mr Hutchinson not to take corrective action.

90. I agree. While I accept that Mr Hutchinson suffered with stress and depression from both his marriage failure and his business worries well into 2015 and beyond, he only consulted his doctor about it in 2014 and throughout the period he was able to carry on working. A stressful life is not sufficient, in my view, to justify failing to deal with one's tax affairs, at least not unless it is so bad that it prevents the person carrying on a normal life. Here Mr Hutchinson appears to have been very active in his business. He was also able to take the decision to change accountants in or just before January 2015 and to give them sufficient instructions for them to complete and file his tax return for 13/14 before the due date of 31 January 2015. In conclusion, I do not think that his stress and anxiety made it reasonable for him not to have taken

the corrective action by the compliance date of 24 March 2015 (and that is even more true of his failure to submit the form in August 2015).

Conclusion on whether reasonable not to take corrective action

91. I do not accept that the appellant has shown that it was reasonable for him not to have taken the corrective action by the compliance date.

(4) Should the penalty be reduced further for cooperation?

92. The penalty is specified in s 209(1) as 50% of the denied advantage; s 210 permits HMRC to reduce the penalty to reflect the quality of any cooperation from the taxpayer. S 210 defines cooperation as follows:

> P has cooperated with HMRC only if P has done one or ore of the following –
>
> (a) provided reasonable assistance to HMRC in quantifying the tax advantage;
>
> (b) counteracted the denied advantage;
>
> (c) provided HMRC with information enabling corrective action to be taken by HMRC;
>
> (d) provided HMRC with information enabling HMRC to enter an agreement with P for the purposes of counteracting the denied advantage;
>
> (e) allowed HMRC to access tax records for the purpose of ensuring that the denied advantage is fully counteracted.

93. S 210(4) provides that the penalty cannot be reduced below 10%.

94. On appeal, s 208(9) provides that the tribunal has the power to substitute for HMRC's decision any decision HMRC had power to make; so this Tribunal can alter the percentage to a lower one than the 25% actually charged , but not to one less than 10%, as HMRC had no power to impose a penalty lower than 10%.

95. HMRC have tables under which they allocate a % to each of the types of cooperation set out in the legislation. The types of cooperation are set out in the second column below and reflect s210; HMRC's allocation set out in the 'available % reduction' column in the below table and is *not* statutory. The final column shows the actual reductions given to Mr Hutchinson. Mr Hutchinson was given the full % reduction for all types of cooperation *except* (b) countering the tax advantage. HMRC gave him one quarter of the % allocated to that kind of cooperation on the basis, that although he had not countered the tax advantage, they accepted that he intended to do so by late August 2015.

section		Available % reduction	Actual % reduction given to appellant
a	Assisting quantifying tax	20	20
b	Counteracting denied advantage	50	12
c	Providing information for corrective action	10	10
d	Providing information for settlement	10	10
e	Access to records	10	10
		100%	62

This table might be slightly confusing: the 100% referred to 100% of the amount of the penalty which could be mitigated. In other words 100% = 40% of tax advantage. The mitigation was deducted from the full penalty of 50% of the tax advantage. So a 100% mitigation meant the penalty was only 10% of the tax advantage.

96. Mr Hutchinson's 62% mitigation was calculated as 62% of 40% of £256,694.60 (£63,660.26) and then deducted from the maximum penalty of £128,347.30 (50% of £256,694.60). That resulted (on HMRC's maths) in the penalty charged of £64,162. (My calculations suggest a slight error in HMRC's maths but to the taxpayer's advantage). In any event the penalty was approximately 25% of the tax advantage.

97. It is for Mr Hutchinson to satisfy me that the penalty should be reduced further. It would be open to him to persuade me that he should be given a larger % reduction for the cooperation HMRC accepted that he demonstrated; it is open to him to persuade me that he gave greater cooperation to HMRC than HMRC allowed him.

Is payment of the APN relevant?

98. His counsel relied on his payment of the APN as corrective action. I have already said that it was not. Moreover, Mr Hutchinson's payment of the APN did not inform HMRC one way or the other on whether or not Mr Hutchinson was planning to fight on over the substantive tax dispute, as he was required to pay the tax over even if he intended to continue to dispute his liability. The payment of the APN was quite irrelevant to the requirement to comply with the Follower Notice and so I do not consider he should be credited with payment of the APN when considering the appropriate penalty for non-compliance with the Follower Notice. The credit for timely payment of the APN is that Mr Hutchinson received no penalty in respect of the APN.

Should a greater share of the mitigation be allocated to matters other than (b)?

99. In practice, apart from his counsel's statement that HMRC unlawfully fettered their discretion, he did not attempt to persuade me that the % allocated to the various

types of cooperation specified in the Act were wrong. In any event, I am not fettered by them and can consider the matter afresh.

100. Mr Shea explained that the lion's share of the mitigation was allocated by HMRC to (b) because 'countering the denied advantage' was perceived by MRC to be the most important form of cooperation.

101. I do not agree that HMRC is right to divide up the mitigation in this way. For instance, item (d) is clearly only relevant to a taxpayer who has already lodged an appeal and the corrective action to be taken can only be settlement (s 208(5)(b) – see §61 above). Items (b) and (c) also seem mutually exclusive. Nevertheless, I am conscious that Mr Hutchinson was given full credit under item (d) even though (d) would not appear to be applicable to his circumstances.

102. The tables do not dictate the outcome in the Tribunal in any event.

103. It seems to me that the mitigation is to be given in relation to events that happen after (as well as before) the compliance date. That is implicit in s 210(3) which refers to counteracting the tax advantage: if that had happened before the compliance date, the penalty regime would be irrelevant, so it must be referring to cooperation after the compliance date.

104. When looking at post compliance date cooperation, and in particular at counteraction, it seems to me that the mitigation should reflect the range of possible behaviours by taxpayers, and where Mr Hutchinson falls on that scale. I think it is implicit in s 210(3)(c) that credit should be given where the taxpayer cooperates with counteraction by HMRC: in other words, I think HMRC should have given Mr Hutchinson credit for the fact that he did not appeal the HMRC amendment to his tax return but permitted HMRC's amendment to stand. Moreover, while I think the length of time which elapses between the compliance date and actual counteraction is relevant, I also think his advisers are right to say that the penalty should reflect the fact that Mr Hutchinson's delay in counteracting the tax advantage did not put HMRC to a great deal of extra work (they were required to close the enquiry but not to fight an appeal).

105. HMRC's overall assessment put Mr Hutchinson's cooperation at the half way point between a completely uncooperative taxpayer and one who (although he missed the compliance date) complied fully in a short time thereafter. I do not think that was a fair assessment.

106. Mr Hutchinson did not put HMRC to the expense of an appeal; he did not actively defend the Working Wheels scheme at all. It appeared easy for HMRC to close the enquiry which they did on the information they already possessed. While, on the other hand, Mr Hutchinson could clearly have been more cooperative in that he could have filed the corrective action form many months before he actually did, his failure to do so did not appear to create much work for HMRC.

107. I substitute for HMRC's mitigation of 62% a mitigation of 80%. Recalculating the penalty results in the following liability: the maximum of £128,347.30 minus (80% of 40% of £256,694.60) = £46,205.02.

Disproportionate penalty?

108. Mr Hutchinson described the penalty as excessive and exorbitant and said he was flabbergasted by the size of it. His advisers said much the same: they considered it unfair and unjustified and out of proportion to the offending.

109. The Tribunal has jurisdiction to consider the proportionality of a penalty because the European Convention of Human Rights confers a right to property, and a person cannot be deprived of his property (such as by the imposition of a penalty) unless in exercise of the right of the government to levy tax and enforce laws. In doing so, the Government must act proportionately. What that means was explained in *International Transport Roth* [2002] EWCA Civ 158 where it was said that to lack proportionality a penalty must be 'not merely harsh but plainly unfair'

110. The leading cases on proportionality in cases involving tax penalties are *Total Technology* [2012] UKUT 418 (TCC), *Bosher* [2013] UKUT 579 (TCC) and *Trinity Mirror* [2015] UKUT 421 (TCC). These cases indicate that the penalty legislation as a whole can be found to be disproportionate; or alternatively, an individual penalty can be found to be disproportionate, without the entire scheme of the legislation being disproportionate. As Mr Hutchinson was not clear which type of lack of proportionality he is alleging, I consider both.

The scheme as a whole

111. The penalty is tax geared and is payable at a maximum of 50% of the tax once the due date passes without compliance.

112. I see nothing disproportionate in the penalty being tax geared (in other words, set as a % of the tax). The purpose of follower notices is to require a taxpayer to give up his dispute over a tax arrangement once a judicial ruling has held the arrangement to be ineffective; the purpose of the penalty is to penalise him if he does not do so (without good reason) by a certain date. The higher the amount of tax in dispute, the greater the prejudice to HMRC (and the public purse) in the amount remaining in dispute.

113. I accept that 50% of the tax is a harsh penalty where the offending does not involve dishonest behaviour. The offending is to persist (without good reason) in the position that the taxpayer's tax liability is lower than a final judicial ruling in a similar case has indicated that it is. The prejudice to HMRC that it is put to the trouble and expense of defending the appeal which, because there is no good reason for the persistence, HMRC considers that it should not have been.

114. Nevertheless, follower notices can only be given in respect of rulings on 'tax arrangements' which are defined in s 201(3) as being where:

> '…it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements'

So it seems to me that the size of the penalty was to some extent intended to reflect society's moral disapproval of such arrangements. Moreover, the taxpayer is given 90 days to comply and can extend the time of compliance if he chooses by making representations to HMRC under s 207. And the amount of the penalty can be mitigated down to 10% for cooperation. Overall, I do not think that I can conclude that the penalty regime as a whole is 'plainly unfair' because of the scale of the penalty.

115. I also note that the legislation has no sliding scale: the full 50% is due whether the appellant is one day late complying or never complies. However, as I have just said, the penalty can be mitigated for cooperation which takes place after the date of compliance. The regime therefore does make a distinction between compliance which is late and a complete failure to comply. I do not think that it is plainly unfair.

The penalties in this particular case

116. In this case, Mr Hutchinson has a penalty of £64,162 (now only £46,205) in circumstances where the only benefit he achieved from the Working Wheels scheme was to have the use of (nearly) £40K from when he submitted his tax return in 2009 until payment of the APN in early 2015. Moreover, as his advisers say, his late compliance was not a great prejudice to HMRC: the effect was that they had to close the enquiry but no other work was required as Mr Hutchinson never appealed the amendment.

117. Nevertheless, Mr Hutchinson did fail to proactively inform HMRC that he no longer maintained the position in his 07/08 return that the Working Wheels scheme was effective, despite knowing that the planning scheme he had entered into had failed in Tribunal and despite having no intention to actively pursue the claim in his 07/08 tax return any further. While I accept the penalty was harsh (particularly before I mitigated it down) I do not think it plainly unfair when considered against the offending, taking into account the scale of the tax advantage claimed.

Overall conclusion

118. The appeal is allowed in part: the penalty is upheld but reduced to the figure of £46,205.

Application for confidentiality of personal issues

119. Although Mr Hutchinson did not mention this matter in the hearing, his advisers had made a request in a letter that the Tribunal not mention in the decision Mr Hutchinson's personal difficulties.

120. As a matter of law, the principle of open and public justice would require all cases to be published in full without protecting anyone's identity, but it is recognised

that in some exceptional circumstances justice would not be served if identities were made public. In *Banerjee* [2009] EWHC 1229 (Ch) the High Court said that when determining whether anonymity should be ordered, the court must have regard to the need to protect confidential material and a person's right to private life (§26). The Tribunal should also should have regard to the fact that a person's tax affairs are particularly sensitive, while at the same time that tax matters are of general public interest (§35).

121. It can be appropriate to protect the identity of taxpayers who have personal difficulties. In *An Appellant* [2016] UKFTT 839 (TC) I did not name the appellant who had a severe and enduring mental illness, namely paranoid schizophrenia. That was because it would be wrong for mental illness to be a bar to challenging HMRC decisions, so it was, I considered, right to grant anonymization of that decision, so other litigants with similarly severe mental illness would not be discouraged from appealing through fear of being named and their illness made public.

122. In that case, the details of the appellant's mental illness were relevant to her appeal: my only choice was to anonymise the decision or not. I could not simply omit mention the details of the illness in the decision notice. The same is true here: the extent of Mr Hutchinson's incapacity was relevant to the decision. So I am unable to do what his advisers suggest which is to simply omit the details of his health history. My only option is to name Mr Hutchinson or anonymise the decision.

123. And I do not think anonymization appropriate in this appeal. The evidence was that Mr Hutchinson, very understandably taking into account his marital difficulties, suffered with stress and anxiety. The stress and anxiety is in the past and marriage breakup is common. I do not think Mr Hutchinson's identity needs protecting nor that other litigants in a similar position would be rightly put off appealing if I do not anonymise this decision. The position is wholly different to that in *An appellant.*

124. I refuse the application for any kind of anonymity.

125. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 4 JUNE 2018