



TC06584

Appeal number: TC/17/6107

***PENALTY – non-payment of APN – extent of Tribunal’s jurisdiction –
whether reasonable excuse – no – appeal dismissed***

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VIKAS VASUDEVA

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 28 March 2018

The appellant did not attend and was not represented

Mr K Birkin, HMRC officer, for the Respondents

DECISION

Non appearance of the appellant

5 1. No one appeared on behalf of the appellant. Rule 33 provides that if a party fails to attend a hearing, the Tribunal may proceed with the hearing but only if the Tribunal:

(a) Is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

10 (b) Considers that it is in the interests of justice to proceed with the hearing.

Notification of hearing?

2. I was satisfied that the appellant had been notified of the time and place of the hearing by the Tribunal; I was also satisfied that the appellant had received
15 notification of the hearing because he wrote to the Tribunal on a number of occasions referring to it.

3. In these circumstances, I was satisfied that the appellant knew of the hearing and/or reasonable steps had been taken to notify the appellant of the hearing.

Interests of justice?

20 4. The appellant had indicated in letters to the Tribunal that he did not intend to come to the hearing. He said that he did not wish to lose a day's pay by taking a day off to attend the hearing and that his case was contained in written submissions already made to the Tribunal. He did not ask for a postponement of the hearing nor suggest that if it was postponed to a later date he would attend.

25 5. Disputes should be resolved as quickly as possible and hearings should not be postponed without good reason. There was no reason to postpone this hearing; it did not seem that the appellant would attend whatever date the hearing was held. Moreover, by email of 24 March 2018 he said that he would not attend the hearing and understood that the Tribunal might make a determination in his absence.

30 6. So I considered it was in the interests of justice to proceed with the hearing.

7. The tribunal would, of course, take all of Mr Vasudeva's written submissions into account.

The appeal

35 8. The appellant was issued with an advance payment notification ('APN') for tax year 12/13 on 20 June 2016 for the required payment of £13,694.20 with a due date

for payment of 22 September 2016, later revised to 15 February 2017 (after consideration of the appellant's representations).

9. This APN had not been paid as at the date of the hearing.

10. The appellant was issued with a penalty for non-payment of the APN of £684.71 on 2 March 2017 which he appealed to HMRC, and following an unsuccessful review on 3 July 2017, to this Tribunal. It is the only matter the subject of this appeal (see §17 below).

11. However, while it is the only matter still under appeal, it is relevant to consider the full circumstances. Those circumstances were that on the same date as he was issued with the APN for 12/13, the appellant was issued with an APN for £9,022 in respect of the same trust for the following tax year (13/14). This was, however, a mistake by HMRC as the appellant received no income from that trust in that year. The APN for 2014, together with the penalties assessed for non-payment of it, were eventually withdrawn, after repeated representations from the appellant, on 25 September 2017.

12. The appellant was also issued with a second penalty for non-payment of the 12/13 APN. On review by HMRC, this penalty was withdrawn. Mr Birkin's position was that the review officer was in error and should not have withdrawn the penalty: while HMRC did not intend to reinstate it, Mr Birkin did not consider the review officer's decision was correct.

13. It is well-established that it is for HMRC to prove that the taxpayer is liable to a penalty; it is for the taxpayer to prove that he should be relieved from liability, for instance, because he has a reasonable excuse. I will look first at whether the appellant is liable to the penalty; then I will consider the relieving provisions.

25 **Grounds of appeal**

14. The appeal as originally lodged was against a penalty for failure to pay an APN by the due date and against the issue of the APN itself.

15. The specific grounds of appeal were stated to be:

30 (a) HMRC did not fully understand his participation in the scheme/trust and in particular were mistaken in believing he received income from it in 13/14 and that meant they should not have issued an APN for any period; and/or

35 (b) the validity of the APN regime as a whole was being challenged in the Administrative Courts so HMRC should not have issued him with an APN until that was resolved;

(c) HMRC's error in issuing him with an APN for 13/14 made it impossible for him to pay just the APN for 12/13;

(d) Insufficiency of funds

16. The Tribunal pointed out by letter of 20 September 2017 that it had no jurisdiction to consider an appeal against an APN; it gave the appellant 21 days in which to object to the appeal being struck out in so far as it purported to be an appeal against an APN.

5 **Strike out**

17. No objections were received. I consider that the legislation gives this Tribunal no power to allow an appeal against the issue of an APN and to the extent that the appeal purported to be an appeal against the issue of an APN, it is hereby struck out.

Liability to the penalty

10 18. The Tribunal is, however, given jurisdiction to consider appeals against penalties imposed for non-payment of an APN. So I do have jurisdiction to consider Mr Vasudeva's liability to the first APN for 12/13 (the only outstanding penalty of the ones in respect of which he lodged an appeal).

15 19. A taxpayer can only be liable to a penalty for late payment of an APN if he had been served with a valid APN which he failed to pay by the due date. That gives rise to the question of exactly what issues a Tribunal can or should consider when deciding whether the taxpayer has been served with an APN which he failed to pay by the due date. Can the Tribunal consider whether an APN is valid and must the Tribunal require HMRC to prove everything on which they have the burden of proof?

20 *Jurisdiction – can the Tribunal consider the validity of the APN?*

20. The grounds of appeal challenged the issue of the APN as well as the imposition of the penalties for non-payment of it. As set out at §15 above, the appellant considered that he should not have been issued with the APN because:

25 (a) HMRC did not fully understand his participation in the scheme/trust and in particular were mistaken in believing he received income from it in 13/14 and that meant they should not have issued an APN for any period; and/or

30 (b) the validity of the APN regime as a whole was being challenged in the Administrative Courts so HMRC should not have issued him with an APN until that was resolved;

21. To what extent (if any) do I have jurisdiction to consider these grounds of appeal? The applicable legislation (s226(7) Finance Act 2014) brings in the appeal provisions of Sch 56 of Finance Act 2009. That permits an appellant to appeal against 'a decision... that a penalty is payable' (§13(1)) and a decision as to its amount. It
35 does not otherwise indicate the scope of the Tribunal's jurisdiction.

22. Judge Richards in *Nijjar* [2017] UKFTT 175 (TC) expressed the view at [29] that Parliament did not intend the Tribunal to consider whether the conditions for issuing an APN were met on an appeal against a penalty. He reached this view

because Parliament did not give the taxpayer a right of appeal against the imposition of an APN.

23. It perhaps ironic, therefore, that the High Court in *PML* [2017] EWHC 733 (Admin) reached the view in relation to penalties for non-compliance with information notices that the Tribunal had no jurisdiction to consider the validity of the information notice because Parliament *did* give the taxpayer a right of appeal against the imposition of the information notice (see [60] and [68]).

24. The basis for the decision in *PML* was that a failure to exercise the right of appeal, or an unsuccessful exercise of the right of appeal, against the underlying obligation (the information notice in that case) meant that the matter was conclusively determined against the taxpayer. Having said that, the Judge in *PML* also indicated (obiter as it was not necessary for his decision) at [66-67] that reasons of statutory construction also suggested that there would in any event be no jurisdiction for the Tribunal to consider the validity of the information notice in an appeal against the penalty for not complying with it.

25. I have to say that I find the view expressed in *Nijjar* at [29] and (obiter) in *PML* at [66-67] difficult to understand. Where Parliament gives the Tribunal jurisdiction to consider the taxpayer's liability to a penalty, it seems to follow that the tribunal would have to consider whether the taxpayer was in breach of the underlying obligation for which the penalty was imposed; and that would include having to consider whether in law there was the underlying obligation the non-compliance with which HMRC had correctly penalised (save, as in *PML*, where that issue was already conclusively determined).

26. Parliament put no fetters on the Tribunal's jurisdiction when considering an appeal against a penalty: the jurisdiction is expressed very broadly. §13(1) FA 2009 (via s 226(7) FA 2014) allows the Tribunal to decide whether a 'penalty is payable' and a penalty is *not* payable if the taxpayer breached only a purported APN rather than an actual APN. So it seems to me that the Tribunal does have jurisdiction to consider whether an APN was issued to the appellant; if an APN was not issued to the appellant, but merely a document which purported to be an APN, there could be no liability to a penalty. It would only be a purported, rather than a real, APN if one or more of conditions A to C (s 219 FA 2014) were not met, and only a purported APN if the requirements of s 220(2) FA 2014 were not met.

27. I note in passing that if *Nijjar* at [29] is correct, this Tribunal could not have allowed the appellant's appeal against the APN for 13/14. That ground of appeal was (even if not phrased in these terms) that Condition B was not met. Condition B (s219(3) FA 14) is that the tax return is made on the basis that a particular tax advantage results from particular arrangements. Even HMRC now accept that the appellant's 13/14 tax return was *not* on the basis that a particular tax advantage resulted from the particular arrangements because (it is now agreed) that Mr Vasudeva did not use the DOTAS scheme for 13/14 as he was unemployed. I consider that, had the appeal against 13/14 penalties reached the Tribunal, the

Tribunal should have allowed the appeal on the basis the APN for 13/14 was invalid because Condition B was not met.

28. Another reason in support of seeing the scope of the Tribunal's jurisdiction as including the validity of the APN is because it is clear that the Tribunal does have jurisdiction on an appeal against an APN to consider whether the taxpayer has a reasonable excuse for non-compliance (see §16 of FA 2009). And a taxpayer is surely acting reasonably if he fails to comply with an invalid APN.

29. But just how wide is the scope of the jurisdiction? Paragraph 13 of Sch 56 Fa 2009 gives the Tribunal jurisdiction over 'a decision of' HMRC that a penalty is payable which appears extremely wide and might imply the Tribunal had jurisdiction to consider the exercise of HMRC's *discretion* in deciding to penalise the taxpayer for non-compliance and perhaps even its discretionary decision to impose the underlying obligation (the APN). The Upper Tribunal in *Birkett* [2017] UKUT 89 (TCC) stated that a Tribunal must interpret the particular statute conferring jurisdiction to decide what jurisdiction is conferred; nevertheless it seems to me that Parliament is unlikely to have intended the Tribunal to consider the legality of HMRC's discretionary decisions to exercise a statutory power to impose an obligation or penalty on a taxpayer and without express wording that effect, a jurisdictional provision should not be interpreted as conferring such wide jurisdiction. Indeed, in *Birkett* itself, having considered a penalty provision with identical wording to that in this case but in the different context of non-compliance with an information notice, the Upper Tribunal concluded that it did not confer jurisdiction to consider the legality of the exercise of HMRC's discretion: [38-39]. It concluded that the Tribunal's jurisdiction was restricted to whether there was failure to comply with an information notice. That conclusion is consistent with what I have said at §26: in an appeal against a penalty for non-compliance, the Tribunal can consider the validity of the APN in all respects except the question of whether it was lawful (in a public law sense) for HMRC to issue either the APN or the penalty for non-compliance with it.

30. My understanding of Mr Vasudeva's challenge to the 12/13 APN is that he considers HMRC should not have issued it or should have withdrawn it because

- (a) they did not fully understand his participation in the scheme/trust and in particular were mistaken in believing he received income from it in 13/14; and/or
- (b) the validity of the APN regime as a whole was being challenged in the Administrative Courts.

31. It follows from what I have just said is that both these challenges are to HMRC's discretionary decision to issue an APN and beyond the jurisdiction of this Tribunal. Neither amounts to a challenge to the decision that Mr Vasudeva's circumstances were within Conditions A to C nor that the formalities of s 220 were not met. And in passing, I comment that I do not believe that either of these challenges could succeed even if I did have jurisdiction to consider them: I see no reason why HMRC's error in relation to 13/14 would have any influence over their

decision to issue an APN for 12/13 nor do I see why a challenge to the APN legislation should cause HMRC to put on hold the issue of APNs.

32. So I dismiss the appellant's grounds (1) and (2) on the basis the Tribunal does not have jurisdiction to consider them.

5 *What do HMRC have to prove?*

33. HMRC has the burden of proving that a penalty is correctly imposed. I have concluded that that would include considering the validity of the APN, but not HMRC's discretionary decision to impose it. Nevertheless, I do not consider that having the burden of proof requires HMRC to prove every matter on which they have
10 that burden: a party is only required to prove the matters that are disputed.

34. I am aware that the decision in *Burgess and Brimheath* [2015] UKUT 578 (TCC) has been taken to mean that a party with the burden of proof must prove everything whether or not it is in contention. I do not consider that the case is authority for that proposition because the issue in that case was whether HMRC had
15 to prove a matter that *was* in contention and the Tribunal held (not surprisingly) that HMRC did have to do so. If the case should be understood as saying (at [43] and [49]) that HMRC must prove everything except that which has been *expressly* conceded, then the result would be that courts and tribunals would have to hold extended hearings and a great deal of non-contentious evidence would have to be
20 served and considered. For instance, in every case (unless expressly conceded) HMRC would have to, by documentary and written evidence, prove service and that every pre-condition for liability was met.

35. I do not think that is right. I am fortified in my view by what the Upper Tribunal said in *Fairford* [2014] UKUT 329 (TCC), particularly at [48], which was
25 that a person without the burden of proof must nevertheless make clear their case before the hearing to avoid unnecessary evidence being called. It seems to me that HMRC only have to prove what is in contention.

36. In conclusion, I do not need to consider whether the APN was a valid APN save to the extent that the appellant does not accept it was a valid APN. And Mr
30 Vasudeva's challenge is, as I have said:

(a) they did not fully understand his participation in the scheme/trust and in particular were mistaken in believing he received income from it in 13/14; and/or

(b) the validity of the APN regime as a whole was being challenged in
35 the Administrative Courts.

37. However, neither of these challenges is a challenge to whether the APN was correctly issued under the terms of the statute. His case does not amount to a challenge that any of the statutory preconditions were not met or that the notice was not in the required format. So I do not have to consider any of these matters. I find

the APN for 12/13 was valid. Properly understood, the appellant did not put that matter in dispute.

38. However, I note in passing that so far as I can see the APN was in fact valid. So far as Conditions A to C were concerned, it was HMRC's case that an enquiry was in progress (Condition A), and that the chosen arrangements were DOTAS arrangements (Condition C). I was not really addressed on Condition B but the appellant appears to have conceded that he did use the scheme/trust in 12/13. Nor did he suggest that the APN notice was not in proper form. Mr Vasudeva did not challenge the calculation of the APN nor the penalty. From the information provided to me, they appear correct. But the appellant did not suggest that any of these conditions were not met, and so I do not consider HMRC called upon to prove any of them.

39. Moreover, the appellant clearly admitted that he had not paid the APN (this was implicit in his third ground of appeal) and he did not dispute HMRC's case that it remained unpaid at the date of the hearing.

40. The only matters left for me to consider are, therefore, whether he had a reasonable excuse for non-compliance and whether the appeal should be allowed on the basis of 'special circumstances'.

Reasonable excuse

It was HMRC's fault that the APN was not paid?

41. The appellant's case (see §15 (c)) is that his failure to pay the APN was due to HMRC's error. His case appears to be that he could not afford to pay the APNs outright, nor could he agree a time to pay arrangement with HMRC as HMRC's debt management unit insisted that any such arrangement would have to relate to the full amount of both APNs, when, as was ultimately accepted by HMRC, he should not have received the second APN.

42. It was this ground of appeal which led the review officer to cancel the second penalty for 2013 on 21 November 2017 (§12). The first penalty, which is the subject of this appeal, had had a separate, earlier review and had not been cancelled. However, Mr Birkin's position was that the appellant had never attempted to agree a time to pay arrangement for either or both of the APNs and the review officer's decision on the second penalty was unduly favourable to the appellant, although Mr Birkin did not seek to reverse it.

43. Mr Vasudeva appears to accept that he did not try to arrange a time to pay agreement for the amount of both APNs: his point was that the debt management team clearly regarded him as owing both APNs and would not have permitted him a time to pay arrangement for just one of the APNs.

Does the 2nd APN amount to a reasonable excuse for not paying the 1st APN?

44. Putting aside the issue of whether HMRC's debt management unit would have permitted a time to pay arrangement which applied just to the 12/13 APN, at root the reason Mr Vasudeva gave for his failure to pay was lack of funds. I do not consider
5 lack of funds is a reasonable excuse for the reasons given at §§48 below.

45. In any event, even if I am wrong to regard this excuse as fundamentally being one of shortage of funds rather than error by HMRC, his excuse that HMRC expected him to pay both APNs ceased when HMRC withdrew the 13/14 APN. At that point he could have, but did not, approach HMRC for a time to pay arrangement solely for
10 the 12/13, which sum was due. I note that the review officer's letter of 21 November 2017, allowing the appeal against the second penalty, specifically told the appellant that he ought to pay the APN and would be receiving further penalties if he did not.

46. I do not know why he did not pay the APN at this point or at least ask for a time to pay arrangement. It may be that he considered he did not have to pay the APN
15 while he was receiving what he considers to be unjustified penalties for non-payment of it. If he thought that, he was wrong, and ignorance of the law is no excuse. In any event, penalties are not payable while they are under appeal. The first APN was payable while the penalties were under appeal and the appellant had been told this.

47. So I do not accept that the fact HMRC expected payment of both APNs to be a
20 reasonable excuse for the non-payment of the 12/13 APN at any time; even if I am wrong, and I should accept it as an excuse, it would only last until the 13/14 APN was withdrawn on 21 November 2017 yet the APN had still not been paid at the time of the hearing. §16 of Sch 56 FA 2009 (the provision on reasonable excuse) provides an excuse is to be regarded as continuing to exist 'if the failure is remedied without
25 unreasonable delay after the excuse ceased'. But a delay of over 3 months is, in my view, an unreasonable delay and so the I find that (if this was a reasonable excuse) it has ceased and it is therefore not a reasonable excuse for the continuing failure.

Insufficiency of funds

48. Mr Vasudeva's last ground of appeal (§15(d)) was that he was unemployed for
30 3 years after 12/13 which led to his incurring a large amount of unsecured debt which he is still struggling to repay, and was the reason he did not want to take a day off to attend this hearing.

49. §16 of Sch 56 FA 2009 (the provision on reasonable excuse) provides:

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

50. While I accept that being made unemployed may well be beyond the taxpayer's control, Mr Vasudeva's case is that he became long-term unemployed and incurred large debts. I know no more than this. I cannot therefore be satisfied that the length of time he was unemployed and the amount of debt he incurred were either the reason
40 for the insufficiency nor that they were 'events outside [his] control'; I cannot be satisfied that the shortage of funds was and remained a reasonable excuse.

Special circumstances

51. On review, HMRC considered whether there were any special circumstances but concluded that there were none. I can only interfere with this decision if it was flawed; as I am not aware of any matters which would constitute special circumstances, I do not consider HMRC's decision flawed.

Conclusion

52. For the above reasons, the appeal against the penalty of £684.71 for non-payment of the 12/13 APN is dismissed.

Penalty of 1 March 2018

53. In his last letter to the tribunal, dated 10 March 2018, Mr Vasudeva mentioned he had received another penalty from HMRC for non-payment of the 12/13 APN. He wanted that to be included as part of this appeal.

54. It was too late for that to happen, and this appeal therefore determines nothing in respect of a penalty imposed on 1 March 2018. If Mr Vasudeva wishes to appeal it, he should lodge an appeal with HMRC, as HMRC explained in their letter to him of 19 March 2018, and as Mr Vasudeva accepted in his letter of 24 March.

55. 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: 6 JULY 2018