[2019] UKFTT 275 (TC)

TC07114

Appeal number: TC/2017/04651

INCOME TAX – follower notice – penalty for failure to take corrective action – whether corrective action taken – whether reasonable in all the circumstances not to take corrective action – appeal allowed – costs of second hearing day to be paid by the Appellant

FIRST-TIER TRIBUNAL
TAX CHAMBER

GIULIO CORRADO **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at Taylor House, Rosebery Avenue, London on 10 July 2018 and 26 March 2019

Ms Emma Pearce of Counsel, instructed by Tish Leibovitch Limited, Accountants and Business Consultants, for the Appellant

Mr Paul Shea, of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

Summary

1. This was Mr Corrado's appeal against a penalty of £57,541.08 for failing to "take corrective action" on receipt of a Follower Notice ("FN") issued by HM Revenue & Customs ("HMRC") under Finance Act 2014 ("FA 2014"), s 208.

2. It was common ground that both the FN and the related Accelerated Payment Notice ("APN"), had wrongly stated that the "additional tax due and payable" was £191,803.60, when the amount due was only £16,580.29. The FN instructed Mr Corrado to send back the attached form confirming that he owed that much higher amount.

3. Mr Corrado instructed his accountant to "settle" his tax position; the accountant and HMRC agreed that only the lower amount was due; this was paid by Mr Corrado, but did not send back the form which was attached to the FN.

4. HMRC issued Mr Corrado with the penalty on the basis that he had not taken the required corrective action. Mr Corrado appealed, submitting that (a) he had taken corrective action; or in the alternative (b) that it was reasonable in all the circumstances for him not to have taken that action. He also appealed the quantum of the penalty.

5. For the reasons set out in this decision, I found that Mr Corrado did not take corrective action, but it was reasonable in all the circumstances for him not to do so. His appeal is allowed and the penalty cancelled.

6. The legislation relating to this judgment is set out in the Appendix.

The split hearing

7. The FN was issued because Mr Corrado had participated in a tax avoidance scheme known as "Working Wheels". The promoter was NT Advisers ("NT"); Mr Corrado was introduced to the scheme by his accountant at the time, Dominion Fiduciary Services Group ("Dominion"). Mr Corrado subsequently changed accountants to Tish Leibovitch ("TL"), but Dominion continued to deal with the Working Wheels scheme.

8. The appeal was listed for 10 July 2018. Mr Corrado gave evidence that he had realised, by 6 January 2015, that the scheme did not work. I asked the parties whether the hearing Bundle contained any communication from Dominion/NT about the scheme's chances of success (the Bundle had only been provided to the Tribunal that morning), and I was told it contained no related documentation.

9. Mr Corrado's evidence was that:

   (1) in the light of his realisation that the scheme did not work, on 6 January 2015 he instructed Mr Iqbal Shehzad, a TL employee, to "settle" the matter with HMRC;

   (2) he was thereby telling Mr Shezad to bring his involvement in the scheme to an end; and

(3) he had therefore either taken corrective action or had reasonably believed that corrective action had been taken.

10. The hearing concluded at the end of that first day. No further evidence or submissions were directed, and neither party applied for permission to provide any such further evidence or submissions. However, on 16 July 2018, TL wrote to the Tribunal ("the TL Letter"), saying that:

> "During last week's hearing, it became apparent that there might be insufficient evidence that advice had been given to Mr Corrado to 'give up' on the Working Wheels tax scheme in early 2015.
>
> Mr Corrado has carried out a fresh search of his email archives, and has found the document attached: a letter providing an update [the February Update] on the scheme from NT Advisers (with covering email dated 23 February 2015) sent to Mr Corrado by Dominion. Mr Corrado believes that this document provides evidence that he was told that the scheme would not work in early 2015 and avers that he accepted that advice.
>
> We would be grateful, provided that you think it appropriate, if you would consider this document before reaching our decision."

11. On 18 July 2018, Mr Shea, HMRC's representative at the hearing, emailed the Tribunal setting out a number of points arising from the TL Letter and its attachments, including the following:

(1) There appeared to be an inconsistency between Mr Corrado's evidence at the hearing, and what he "averred" in the TL Letter. At the hearing, Mr Corrado had said:

(a) he had decided the scheme did not work before 6 January 2015, and

(b) he had understood that his involvement in the scheme had been brought to an end as the result of the conversations which then took place between Mr Shezad and HMRC.

(2) However, the TL Letter said Mr Corrado only decided that the scheme did not work when he received the February Update on 23 February 2015. Thus, when he instructed Mr Shezad to "settle" the issue on 6 January 2015, it was likely that he was focused only on the APN, and had not instructed Mr Shezad to inform HMRC that he was withdrawing from the scheme or otherwise taking the corrective action required by the FN.

(3) In addition, the February Update contained a clear reminder that FNs must be acted upon. That Update had been copied to TL, so it was reasonable to infer it had been read by Mr Shezad, and that he had discussed it with Mr Corrado. Both Mr Shezad and Mr Corrado should therefore have been aware that they needed to take specific action to respond to the FN. The Update was therefore relevant evidence in the context of the "reasonable in all the circumstances" test and had not been provided for the hearing.

12. I directed the parties to provide submissions on whether the hearing should be listed for a further day, so as to allow:

(1) Mr Corrado to adduce the new documents;

(2) the provision of witness evidence on or related to those documents;

(3) Mr Shea to cross-examine the witness(es) on that evidence; and

(4) both parties the opportunity to make submissions as to whether, and if so how, their case was changed by the new documents.

13. I said that, if a further day was directed, its purpose would be limited to the issues set out above. I also explained my preliminary view that it would not be in the interests of justice to decide Mr Corrado's appeal without (a) taking the new documents into account, and (b) hearing further evidence and submissions on those documents. The parties responded by asking that case be listed for a further day, to deal only with the new documents and any related matters, and this was directed. For the reasons given at the end of this decision, I awarded HMRC their costs relating to that second day.

The evidence

14. On the first day of the hearing, HMRC provided a helpful bundle of documents, which included:

(1) written communications between the parties and the Tribunal;

(2) correspondence between HMRC and (a) Mr Corrado and/or (b) his representatives;

(3) file notes of telephone conversations between Mr Corrado's representatives and HMRC;

(4) HMRC's factsheet headed "Tax avoidance schemes – follower notices and accelerated payments (except partnerships)". This has the reference number CC/FS25a; the version provided to the Tribunal was dated 11/14;

(5) HMRC's factsheet headed "Tax avoidance schemes – penalties for follower notices", which has the reference number CC/FS30a. The version provided to the Tribunal was dated 04/16.

15. TL provided a supplementary Bundle for the second day of the hearing. This contained the TL Letter and various correspondence between (a) Mr Corrado and (b) Dominion and/or NT, including, but not limited to, the documents attached to the TL Letter. Mr Shea accepted that those additional documents were within the scope of the directions given for the second hearing day.

16. Mr Corrado provided two witness statements, one for each of the two hearing days. He also gave oral evidence and was cross-examined by Mr Shea. As indicated above, Mr Shea invited the Tribunal to find that his evidence was inconsistent, and I return to this issue at §90ff.

17. Mr Shehzad is a Chartered Tax Adviser, Chartered Certified Accountant and the TL employee responsible for Mr Corrado's SA returns and related matters. He provided a witness statement and attended the first day of the hearing, during which he gave oral evidence and was cross-examined by Mr Shea. For the reasons explained at §11, Mr Shea challenged some of his evidence as unreliable, and I make related findings at §62ff.

18. As noted at §11(3), Mr Shea had expressed concerns about the communications which may have taken place between Mr Corrado and Mr Shezad following receipt of the February Update. He therefore made the reasonable assumption that Mr Shezad would provide a witness statement and attend the second day of the hearing. However, Mr Shezad did not provide a witness statement, and neither did he attend. No explanation was provided. Mr Shea invited the Tribunal to make an adverse inference, and I consider his submission, and its context at §103ff.

19. On the basis of the evidence provided, I make the findings of fact set out in this decision. Most of these findings are contained in the next following section of this decision. I then consider and make findings about two contentious issues, namely when Mr Corrado decided to abandon the Working Wheels scheme, and whether Mr Shehzad genuinely believed that Mr Corrado had taken corrective action, see §89ff.

Findings of fact

20. Mr Corrado has worked in finance since 1988, and was employed by major banking organisations both overseas and in the UK. His self-assessment ("SA") returns for the years 1997-98 through to 2000-01 were prepared by TL. His SA returns for 2001-02 through to 2007-08 were prepared by Dominion. `

The Working Wheels scheme

21. In 2006-07, when Mr Corrado was UK resident, Dominion introduced him to NT, promoter of the Working Wheels scheme. Participants in the scheme became partners in a partnership which purported to be trading in used cars; losses generated by the partnership were offset against participants' other income.

22. Having participated in the scheme, Mr Corrado included a loss of £500,174 in his 2006-07 SA return. He offset £372,344 of that amount against income in that year, generating a tax overpayment of £128,986.63. He carried back the balance of £127,830 against his 2005-06 income, to generate an amount repayable of £51,139.48. The relevant entries and the related disclosure on his return were completed by Dominion.

23. HMRC did not repay either the £128,986.63 shown as overpaid for that year, or the £51,139.48 claimed as repayable for 2005-06. On 4 December 2008, they opened an enquiry into his 2006-07 return under Taxes Management Act 1970 ("TMA"), s 9A. HMRC had never previously opened an enquiry into any of Mr Corrado's SA returns. Dominion had responsibility under the terms of the engagement letter for dealing with any HMRC enquiry into the Working Wheels scheme, and Mr Corrado therefore informed Dominion that an enquiry had been opened.

24. In 2010, Mr Corrado instructed TL to prepare and submit his future SA returns, and to deal with a number of issues which had arisen in relation to earlier returns. He informed Mr Shehzad that he had participated in Working Wheels, but told him that Dominion remained responsible for dealing with HMRC's enquiry into that scheme. Mr Shehzad did not ordinarily advise on tax avoidance schemes and had not previously heard of Working Wheels. However, he had some experience of dealing with ordinary SA enquiries into income tax and capital gains tax, because HMRC opened SA enquiries into three or four of his clients each year, and he handled those enquiries personally.

25. The Working Wheels scheme was litigated, and on 10 February 2014 the First-tier Tribunal (Judge Bishopp) published *Flanagan and others v HMRC* [2014] UKFTT 175 (TC) ("*Flanagan*"). Judge Bishopp said at [86]:

> "none of the appellants was trading in the proper sense of that word, but they were instead engaged in an arrangement designed only to give the illusion of trading, and…the appeals must be dismissed on that ground alone."

26. On 13 February 2014, Dominion informed Mr Corrado that the FTT had found against the appellants in *Flanagan*, but that NT were considering an appeal, and would be discussing this with Counsel. On 17 September 2014, the Upper Tribunal ("UT") refused permission to appeal the FTT's judgment.

27. Although a matter of law rather than fact, it was not in dispute that the FTT's judgment had therefore become "final" for the purposes of the FN legislation in FA 2014.

The September and November Updates

28. On 24 September 2014, Dominion informed Mr Corrado by email that the UT had refused permission to appeal in *Flanagan*; they also sent him the latest NT Update ("the September Update"). The Update was copied to TL, as were the later Updates referred to below. Mr Shea asked the Tribunal to make the reasonable inference that the Updates were passed to, and read by, Mr Shehzad. Ms Pearce did not seek to resist those inferences, and I find them to be facts.

29. The September Update included the following text:

> "We believe that HMRC will now issue closure notices…for the year you made the Working Wheels loss…in addition to the issue of closure notices, HMRC will seek to collect the outstanding tax. We do not provide advice on the payment of tax and that should be checked with your normal tax adviser. However the following general comments may be of help:
>
> Any client who was taxed under PAYE for the relevant year and did not receive a refund after submitting their loss claim will not receive a new demand for tax.
>
> For other clients, HMRC will seek to collect outstanding tax and interest. They will do this either through the normal process when they issue a closure notice or alternatively by issuing an Accelerated Payment Notice (APN). They may also issue a follower notice. We will be able to advise you further when we know which route HMRC decide to take. However, if you receive any APN or follower notice, please email us immediately [address].
>
> In any event we strongly advise all clients not to withdraw their claims at this time. We will be contacting you shortly as to why no claims should be withdrawn until further comment is provided by us."

30. On 21 November 2014, Dominion sent Mr Corrado a further NT Update ("the November Update"). This informed him that NT, in conjunction with another firm, New Dawn Tax Partnership ("NDTP"), had been considering "options to secure the best outcome for participants" in Working Wheels and other schemes. It went on to

recommend NDTP's new "robust strategy" which would "assist in obtaining a full refund" in relation to some of the loss claims. NT said that NDTP was "very confident about the potential success of the strategy and is not charging any up-front fees or costs". Participants were advised to check with NDTP to see whether they met the criteria. Mr Corrado did not contact NDTP.

HMRC's November Letter

31. On 28 November 2014, HMRC's Accelerated Payments team sent a letter ("HMRC's November Letter"), together with a copy of Factsheet CC/FS25a, to Mr Corrado at his address in Hong Kong, where he had been living since 2010.

32. Mr Corrado did not receive HMRC's November Letter or Factsheet CC/FS25a, because they arrived after he had left Hong Kong: he moved back to the UK in early December 2014. A copy of HMRC's November Letter was sent to TL, together with information about how to download factsheet CC/FS25a from the HMRC website.

33. HMRC's November Letter is headed "About the tax avoidance scheme that you have used", and opens as follows:

> "We are writing to tell you that you will soon need to make a payment of the amount that relates to your use of the tax avoidance scheme shown in this letter. You will also need to decide whether to amend your return to counteract the tax advantage that you gained from using the tax avoidance scheme. This is called 'taking corrective action'."

34. The name of the Working Wheels scheme, the tax year and the scheme's Disclosure of Tax Avoidance Scheme number then followed. Under the heading "What happens next", the text said (emboldening in original):

> "In the next 2 to 6 weeks, we will send you a **follower notice**. This will ask you to take corrective action by amending your return to counteract the tax advantage from your use of the avoidance scheme.
>
> We will also send you an **accelerated payment notice**. This will show the amount that we believe relates to your use of the scheme. When we send you the notice, we will also tell you how we have worked out the amount.
>
> The enclosed factsheet CC/FS25a contains important information about the follower and accelerated payment notices, including information about the impact of not taking the corrective action."

35. Under the heading "What you will need to do when you receive the notices", HMRC's November Letter continued:

> "When you receive the follower notice, you will need to decide whether you want to amend your return as requested by the notice. If you decide not to amend your return, you will still need to pay the amount shown in the accelerated payment notice. The amount of the accelerated payment will be due within 90 days of the date that you receive the notice. That date may change if you make your representations objecting to the notice."

36. The next paragraph was headed "What if you now want to settle your tax affairs", and read:

> "If you now want to settle your tax affairs, you need to phone us straightaway on the number shown at the top of this letter. We will then tell you what you need to do next.
>
> It is entirely up to you whether you wish to settle your tax affairs. If you do not want to settle, then the current compliance check will remain open."

37. Factsheet CC/FS25a was included with HMRC's November Letter. Under the heading "Follower notices", the factsheet included the following paragraph:

> "The legislation means that, if a court of tribunal has made a final ruling that an avoidance scheme does not achieve the tax advantage, we may ask those who have used that scheme, or a similar scheme, to amend their return or claim or to settle their appeal. This is called 'taking corrective action'. We ask users of tax avoidance schemes to take corrective action by sending them a 'follower notice'…"

38. The next heading was "Accelerated payments", and the text began:

> "The legislation also means that those who have used a tax avoidance scheme may have to make a payment of the amount that relates to their use of that scheme, before the final amount has been agreed or determined by a tribunal or court. Such a payment is known as an accelerated payment."

39. On the next page, under the heading "What the follower notice asks you to do", the text began:

> "The follower notice will ask you to take the relevant corrective action to remove the tax advantage from your use of the avoidance scheme. This will mean either amending your return or claim, or settling your appeal…"

40. Under the heading "Penalty for not doing what a follower notice asks", the factsheet says "If you do not do what the follower notice asks, we may charge you a penalty". On page seven, under the heading "What [to do] if you want to settle your tax affairs"[1], the text reads:

> "If you want to settle your tax affairs once we tell you that we are going to send you an accelerated payment notice or follower notice, we will work with you to settle the compliance check or appeal.
>
> It is entirely up to you whether you settle your tax affairs. If you do not want to settle, then the compliance check will remain open."

41. Mr Shehzad had no previous experience of FNs or APNs. He read HMRC's November Letter and Factsheet CC/FS25; he also looked up the related guidance in HMRC's manuals. He then forwarded his copy of HMRC's November Letter to Mr Corrado, and advised him that he need do nothing at present; HMRC were simply telling him that they were going to take further action in the future.

[1] The words "to do" are omitted, but this is clearly an error.

HMRC's December Letter, the FN and the APN

42. On 17 December 2014, HMRC's Accelerated Payments team sent another letter ("HMRC's December Letter") to Mr Corrado, also to his Hong Kong address. Mr Corrado did not receive that letter either. On the same day, HMRC sent a copy to TL.

43. HMRC's December Letter began by saying that it enclosed the FN and APN referred to in HMRC's November Letter. The next paragraph is headed "What you need to do now", and included the following passage (emboldening in original):

> "The follower notice asks you to take 'corrective action' (which is explained in the [follower] notice) by the date shown in the notice. The accelerated payment notice requires you to pay the amounts due by the date shown in the notice."

44. Under the heading "Taking corrective action" HMRC's December Letter said (emboldening in original):

> "If you do what the follower notice asks, by amending your return, you must pay the amount due resulting from the amendment.
>
> If you consider the amount due from the amendment is **less** than the amount shown in the accelerated payment notice, you must **also** pay the difference between the two, so that the total amount paid is equal to the amount in the accelerated payment notice.
>
> However if you disagree with the amount shown in the accelerated payment notice, you can make representations to us. There is more information about this in the notice.
>
> If the amount in the accelerated payment notice is more than the amount that is due once your compliance check is complete we will repay any amount that you have overpaid. We will also pay you any interest that is due to you in respect of the amount overpaid.
>
> If the amount due after the return has been amended is **more** than the amount shown in the accelerated payment notice, this may be because we do not, at present, have all the information we need to establish the exact amount to include in the notice. You should pay the higher amount that will be due from the amendment of the return rather than the =amount shown in the accelerated payment notice.
>
> When we receive the amendment we will review the figures. If we find that you have not amended the return to show the correct amounts, this will mean that you have not done what the follower notice asks, and we may charge the penalty set out in the notice."

45. Under the heading "If you do not take corrective action", the text reads (again, emboldening in original):

> "If you **do not** do what the follower notice asks and take corrective action, you **must** still pay the amount shown in the accelerated payment notice. Please read that notice carefully as it explains what you must pay and when.
>
> …
>
> If you choose not to take corrective action and continue to dispute the tax effects of the scheme through to litigation, you may be charged the penalty set out in the notice.

> If you want now to settle your tax affairs, you need to phone us straight away on the number at the top of this letter. We will then tell you what to do next.
>
> It is entirely up to you whether you settle your tax affairs. If you do not want to settle, then the compliance check will remain open. However, now you have been sent a follower notice, there are serious consequences if you decide not to settle."

46. The FN enclosed with HMRC's December Letter first summarised statutory conditions for the issuance of an FN, set out in FA 2014, s 204, and then explained why, in HMRC's view those conditions have been met, and why *Flanagan* was a final judicial ruling for the purpose of that legislation. It then continued:

> "The principles set down by the FTT's decision in Flanagan would deny the entirety of the asserted advantage which you have claimed for 2006/7.
>
> Loss of £500,174 claimed in 2006/7 of which £372,444 was claimed in that year and the balance of £127,830 in 2005/6.
>
> 2005/6 Tax advantage £51,132.00
>
> 2006/7 Tax advantage £140,671.60
>
> Total amount payable £191,803.60"

47. The "total amount payable" shown in the FN was thus the full value of the loss claims made by Mr Corrado. However, HMRC had never repaid the losses claimed, see §23. It was common ground that the FN was wrong to say that the "total amount payable" by Mr Corrado was £191,803.60.

48. Under the heading "What you need to do in response to this notice – taking corrective action", the FN said (emboldening in original):

> "If you do not take the necessary 'corrective action' by the date shown below, you will be liable to pay a penalty under Section 208 of the Finance Act 2014. To take corrective action, you must:
>
> - Step 1: amend your Self Assessment Tax Return for the year ended 5 April 2007. Your amendment needs to counteract the denied advantage referred to above.
> - Step 2: notify us that you have taken Step 1. You must also tell us of the amount of the denied advantage and (where it is different) the amount of additional tax which has or will be come due and payable in respect of tax by reason of the first step being taken.
>
> Please **do not** try to amend your tax return online, you must complete the enclosed form and return it to us."

49. The "enclosed form" was headed "Tax avoidance schemes. Amending your return in response to a follower notice". The opening section referred to the FN enclosed with HMRC's December Letter, and informed Mr Corrado that if he wanted to amend his return, he must sign Part 1 of the form and complete Part 2. Part 1 read:

> "I, Mr G Corrado [Hong Kong address] want to amend my self-assessment tax return for the year ended 5 April 2007. I want my amendment to counteract the tax advantage asserted to result from my

> use of the avoidance scheme Working Wheels named in the follower notice dated 17 December 2014. I understand that by completing this form, I am amending my self-assessment tax return…"

50. Mr Corrado was instructed to complete Part 2 "to show the additional amount of tax that is due and payable or will be come due and payable, as the result of your amendment to the return [and] attach copies of your tax calculation showing how you worked out the amount you enter in Part 2." Part 2 reads "The amendment for the year ended 5 April 2007 results in additional tax due and payable as shown below, and as shown in the tax calculation, which is attached".

51. Thus, Mr Corrado was instructed to complete the form by using a figure for tax due and payable of £191,803.60, when he knew that the tax due and payable was significantly less than that.

52. An APN was also enclosed. The first page includes this text:

> "we have given (or are giving at the same time as this accelerated payment notice), a follower notice...in relation to the same return by reason of the same tax advantage and the chosen arrangements…"

53. The next page says that the "amount due" under the APN was £191,803.60" and Mr Corrado was warned that if he does not pay "in full and on time" he "will be liable to penalties". Again, it was common ground that the figure of £191,803.60 did not take into account the fact that HMRC had not made any repayments to Mr Corrado following his claims for Working Wheels losses.

54. Also in the same envelope were copies of HMRC's tax calculations for 2005-06 and 2006-07, showing the amounts due for each year after the Working Wheels loss claims, and the revised figures once those losses had been removed.

Mr Shehzad's and Mr Corrado's responses

55. On 5 January 2015, Mr Shehzad contacted HMRC, using the telephone number given in HMRC's December Letter. Having spoken to Simon Taylor, an officer in HMRC's Accelerated Payments team, Mr Shezad made a contemporaneous note, which reads:

> "I confirmed to Simon that we don't believe that HMRC tax demand of £191,803.60 is correct as although our client claimed those losses but they were never agreed and our client was never paid that tax credit. Therefore, if HMRC never made that refund, how our client is liable to pay back those funds."

56. Mr Taylor said he would check the position and call back. Mr Shehzad then scanned HMRC's December Letter, the FN and the APN to Mr Corrado. His covering email said:

> "Please note that according to HMRC letter, your losses in 2007 tax year were set off partly against your 2007 income and partly carried back to 2006 tax year and refunds were generated from both years.
>
> As these losses are now denied by HMRC, they expect the additional tax liability of £51,132.00 from 2005/06 tax year and £140,671.60 from 2006/07 tax year thus making the total to £191,803.60 to be paid to HMRC.

> Kindly forward this letter to your scheme issuer/scheme administrator to discuss it further.
>
> In the meantime, I have now contacted HMRC and confirmed that although losses in the original tax returns for 2005/06 and 2006/07 year created tax refund but this refund was never issued to you.
>
> Therefore, surely, you do not need to pay back any refund which has never been issued by HMRC."

57. Around three hours later, Mr Corrado emailed Dominion, saying:

> "Tish Leibovitch have just forwarded on to me a letter sent by HMRC, regarding a 'Follower Notice' issued by them in respect of Working Wheels.
>
> I have gone through their long letter, a lot of which are technical references to tax code so I can't comment.
>
> However one thing that stands out as incorrect, in that they are asking me to pay monies back to them as if they had paid me the stated 'Tax overpayment'.
>
> HMRC has not made any payments to me (they have all been withheld on account, pending enquiry) and what their calculations fail to show is that I have always been on PAYE and therefore all taxes were paid as if there was no benefit from the "Working Wheels" arrangement.
>
> In that case, at most, I should only owe HMRC £21,208, which is the sum of the right hand totals for "Total Income Tax Due" in 2005/06 and 2006/07.
>
> Could you kindly advise [how] I should proceed."

58. Dominion replied on 6 January 2015, agreeing with Mr Corrado's understanding that if he had not "used the credit/refund claimed" against any other tax liabilities, then "the credit should be provided against the APN". They also said that he or his tax adviser "should contact HMRC and explain to them that the tax refund had not been issued/used therefore APN is not for the correct amount".

59. Mr Corrado's witness statement said:

> "I explained to TL that I had never received any payment from HMRC in respect of the Scheme and that the FN and APN were therefore wrong. I did not send back the form, and nor did I instruct TL to do so, because as far as I was concerned, the documents were simply incorrect…
>
> I asked TL to work out what my outstanding tax liability would be, on the assumption that the Scheme did not work. I also authorised TL to contact HMRC to explain that they had made a mistake and then to settle the matter immediately: I wanted my outstanding tax liabilities in respect of the Scheme to be dealt with as soon as possible."

60. As noted earlier in this decision, Mr Shea challenged the credibility of this evidence, and I consider this further at §90ff.

61. Mr Shehzad checked HMRC's manuals and discussed the matter with Mr Tish, one of the partners at TL. He also entered the relevant data on TL's tax software, to

work out Mr Corrado's tax payment position, on the basis that the Working Wheels losses were not due. The software calculated that Mr Corrado owed HMRC £16,580.29, not £191,803.60.

Call between Mr Shehzad and HMRC on 6 January 2015

62. On 6 January 2015, Mr Taylor called Mr Shezad; he made a further contemporaneous note which reads:

> "Simon Taylor rang back and confirmed that he agreed with our arguments that our client although claimed losses, the tax refund was never issued to him. Therefore our client is only required to pay £16,580.29 instead of HMRC original claim of £191,803.60. I requested Simon to confirm this finding in writing so that I could forward that to our client to pay in due course. Simon agreed to do so."

63. Mr Shehzad's witness evidence for this hearing about that call is set out below. It is identical to the contemporaneous note, other than in relation to the final phrase, which I have underlined:

> "The next day (6 January 2015), the officer confirmed (during a telephone conversation) that our figure was correct. I recall that the officer agreed with the figure and the explanation and advised that Mr Corrado should pay that amount and not the amount stated in the FN and the APN. I asked the officer about what steps we should take. He told me that the £16,580 amount was the only amount that Mr Corrado would have to pay. He advised that Mr Corrado make this payment as soon as possible and <u>said that he would update Mr Corrado's self-assessment statement accordingly</u>."

64. Mr Shea challenged Mr Shehzad's evidence that Mr Taylor had told him he would update Mr Corrado's SA statement, pointing out that there is no reference to this in his contemporaneous file note. Mr Shehzad said that the file note "does not give the minute details just the broad picture". He then expanded the evidence in his witness statement, saying:

> "On 6 November I asked him 'is there anything else I need to do' and he said 'that is the end of it' and that he 'will update the statement of account accordingly'."

65. Mr Shea asked Mr Shehzad why his file note did not mention Mr Taylor having said 'that is the end of it', and Mr Shehzad said that his secretary "may have left out one line of my handwritten file note". No handwritten file notes were provided in evidence.

66. Mr Shea invited me to find that Mr Taylor had not said he would update Mr Corrado's SA statement, because that is not a "minute detail" but a very important fact: had Mr Taylor made that statement, Mr Shehzad would have recorded it in the contemporaneous note. Mr Shea also invited me to find that Mr Taylor had not said "that is the end of it", again on the basis that it would have been recorded in the file note. Mr Shea also relied on two other items of evidence, set out in the next following section of this decision, namely:

(1) the communications between Mr Shehzad record of his conversation with Mr Taylor the following day, see §68-69; and

(2) Mr Taylor's own near-contemporaneous note, which does not record that he either amended Mr Corrado's SA statement of account or that he had still to carry out that action, see §70.

67. I agree with Mr Shea. Mr Shehzad was punctilious in keeping detailed contemporaneous notes of his phone conversations. If Mr Taylor had made either of the statements which Mr Shehzad now attributes to him, it is inconceivable they would be omitted from his file note. I find Mr Shehzad's evidence on this issue to be unreliable.

Communication between Mr Shehzad and HMRC on 7 January 2015

68. On 7 January 2015, Mr Taylor emailed Mr Shehzad, saying:

> "As the AP notice and FN of 17-12-14 state, your client is being requested to make an accelerated payment for the years 2005-06 and 2006-07 in the sum of £191,803.60. Broken down between the two tax years as follows: 2005-06 £51,132; 2006-07 £140,671.60. However, I accept that your client did not get the full benefit of the above tax advantages, as repayments for these amounts were not issued. HMRC is holding a total of £175,223.31 in respect of these amounts, and your client is therefore only liable to pay the balance of £16,580.29 by 21 March 2015. I apologise for the fact that this was not made clear on the correspondence yourselves and your client received."

69. Mr Shehzad emailed back straight away, thanking Mr Taylor for "confirming the net tax position for the 2007 tax year". He told Mr Taylor that he had forwarded the email to Mr Corrado, and "as soon as I receive his reply, I will inform you accordingly".

70. Mr Taylor made a file note using a standard template document headed "Accelerated payments – record of telephone call". That note is undated, but both parties accepted made shortly after Mr Taylor's exchange of emails with Mr Shezad. The template has a list of eight possible "Actions", none of which refer to FNs. Mr Taylor checked the Action box which reads "Caller advised of payment methods". Underneath, he wrote:

> "Agent Mr Shehzad rang in, requesting clarification of the amount due on AP as stated customer had not had the full benefit of tax advantage, as repayments had not been made. Confirmed that HMRC holding large proportion of the amount in OAS [Overpayments and Accounting Summary] account[2], and customer only being asked to pay balance – acknowledged that this had not been made clear on AP and FN originally. Agent asked for confirmation email, which was sent on 7-1-2015 and said he would contact client and be in touch."

[2] HMRC's "government digital service" defines this as a place where HMRC hold "temporarily… payments that cannot be allocated to a specific taxpayer record" and "handle certain accounting tasks that cannot be performed within the…SA computer systems"

71. After the call, Mr Shehzad spoke to Mr Corrado and told him about his conversation with Mr Taylor. He advised Mr Corrado to make the payment to HMRC immediately.

The February Update

72. On 23 February 2015, Dominion sent Mr Corrado a further NT Update about APNs and FNs ("the February Update"), which included the following passages:

> "NT strongly recommend that any recipient of an APN and/or Follower Notice takes immediate advice from a professional tax adviser…if a recipient receives an APN or Follower Notice then they must deal with it (and pay the tax in the case of an APN) within the 90 days permitted by the notice or they will receive a penalty of up to 50% (for Follower Notices). However, if a recipient makes representations that are received by HMRC within the 90 days then the payment date (for APNs) / action date (for Follower Notices) on which penalties are based becomes 30 days after HMRC respond to the taxpayer's representations. In that case, a penalty cannot arise unless the taxpayer fails to subsequently make payment/action the follower notice within 30 days of HMRC responding."

73. NT also offered to supply sample "representations", pointing out that scheme participants would gain an extra 30 days of time simply by submitting those representations to HMRC. It added that NT regarded any further litigation about Working Wheels as being "fruitless", but that NDTP and Pinsent Masons LLP ("Pinsents") were both challenging the related APNs/FNs. Contact details and expected pricing structures for both NDTP and Pinsents were provided. Mr Corrado did not obtain copies of the draft representations from NT, and did not contact either NDTP or Pinsents.

The reminder and the payment

74. On 2 March 2015, TL received a copy of a further letter from HMRC's Accelerated Payments team. The original of the letter had been sent to Mr Corrado at his Hong Kong address on 20 February 2015. The letter stated that the deadline for making an accelerated payment was approaching; that the amount due was £16,580.29, and this was payable by 21 March 2015.

75. Mr Shehzad's contemporaneous file note says:

> "We received a confirmation letter from HMRC that our client must pay the revised agreed tax liability of £16,850.29 to clear his 2007 tax position by 21 March 2015. I immediately advised our client to pay this liability ASAP before 21 March 2015."

76. On 4 March 2015, Mr Corrado confirmed to Mr Shehzad that he had paid the £16,580.29; Mr Shehzad checked Mr Corrado's SA account online, and saw it had been updated to show the payment.

The Penalty

77. On 13 August 2015, HMRC sent a further letter to Mr Corrado, now at his UK address. The heading read, in bold:

> "You are now liable to a penalty of 50% - contact us now to help reduce the percentage rate of this penalty."

78. The text of the letter stated that the penalty was due because Mr Corrado had failed to take corrective action. It explained that the 50% penalty could be reduced for co-operating with HMRC, although not below 10%. A copy was sent to TL, and Mr Shehzad received it on 20 August 2015. He called HMRC the following day. His contemporaneous file note (which I accept as a correct record of that conversation) reads:

> "I immediately contacted HMRC and spoke to Mrs Vaughan and confirmed that we are extremely surprised to read contents of this letter as according to HMRC first letter of 28 November 2014, we were advised to take corrective action by amending our client's 2007 tax return and pay the additional tax liabilities. We duly took that action and removed those losses which were originally claimed by Giulio and it resulted in tax liability of £16,580.29. Therefore, we believed that we have taken corrective actions regarding this matter then why HMRC has issued a 50% penalty notice."

79. Mr Shehzad subsequently spoke to Mr Taylor, who advised him to appeal. On 27 August 2015, TL wrote to HMRC, asking that the letter be treated as an appeal against the penalty for failing to submit an FN. It set out the history, and then said:

> "in Simon [Taylor]'s email of 7 January 2015 and HMRC following letter of 20 February, there was not the slightest hint that although the tax liabilities were now agreed HMRC still required us to complete and return the Follower notice to HMRC. We were therefore confident that the matter had now been settled."

80. Almost two months later, on 16 October 2015, HMRC responded, saying that an appeal cannot be considered "unless and until a penalty has been issued". That crossed in the post with a follow-up letter from TL to HMRC asking for a response to their letter of 27 August 2015. On 28 October 2015, HMRC sent a further copy of their letter of 16 October 2015.

Closure Notice and appeal

81. A further three months passed. On 16 February 2016, HMRC issued Mr Corrado with a closure notice. This said that HMRC were closing the enquiry and amending Mr Corrado's 2006-07 tax return to remove the Working Wheels loss claim of £194,422.84. It continued:

> "Once the 30 day appeal period [in relation to the closure notice] has passed, I will arrange for the credit of £191,803.60 to be set against the Accelerated Payment Notice in respect of Working Wheels to be transferred to your self-assessment statement."

82. As soon as that letter was received, Mr Shehzad contacted HMRC and spoke to Mr Roger Taylor (not the Mr Simon Taylor with whom he had previously discussed Mr Corrado's case). Having set out the background, and explained why in his view there should be no penalty, Mr Shehzad queried the difference between the £191,803.60 in the APN and the £194,422.84 in the closure notice. He speculated that it might be related to Class 4 NICs, but said that if so, it was wrong because the whole basis of the *Flanagan* judgment was that the partners did not carry out a trade.

Mr Taylor said he would consider the position, and write to Mr Shehzad in due course. No letter was sent. Mr Corrado did not appeal the closure notice.

83. On 21 April 2016, HMRC issued Mr Corrado with an FN penalty of £58,326.85. This was 30% of the £194,422.84 in the closure notice. HMRC explained the basis for not reducing the penalty further:

> "you did not take corrective action before the deadline for doing so, and you have still not taken corrective action. We therefore consider that you have not given us any co-operation in counteracting the denied advantage."

84. On 28 April 2016, TL appealed the penalty for essentially the same reasons as set out in their letter of 27 August 2015. On 28 February 2017, HMRC refused the appeal on the basis that Mr Corrado had "not completed the corrective action form".

85. TL asked for a statutory review, and on 5 May 2017, the Review Officer upheld the penalty on the basis that Steps 1 and 2 in HMRC's December Letter had not been completed.

86. On 2 June 2017, Mr Shehzad wrote to HMRC, saying he now understood that they wanted the completed FN form which had been attached to HMRC's December Letter; this had now been signed by Mr Corrado, and was enclosed. At Step 2 of the form, the "amount of additional tax" is given as £16,580.29. TL then notified the appeal to the Tribunal.

The amount of the penalty

87. On 11 September 2017, Mr Shea filed and served HMRC's Statement of Case. Instead of defending the penalty of £58,326.85, which had been based on the figure included on the closure notice, he asked the Tribunal to uphold a reduced penalty of £57,541.08. This had been calculated as 30% of the £191,803.60 on the APN, instead of 30% of the higher figure on the closure notice.

88. At the hearing, Mr Shea confirmed that the difference between the two figures related to Class 4 NICs which had been incorrectly included in the closure notice. Mr Shezad had, of course, raised that point with HMRC over two years' earlier, but had never received a response.

Further findings of fact

89. This part of the decision makes findings about two key disputed factual issues: when Mr Corrado decided to abandon the Working Wheels scheme, and whether Mr Shehzad believed that Mr Corrado had taken corrective action.

When Mr Corrado decided to abandon the Working Wheels scheme

90. During the first day of the hearing, Mr Corrado's evidence was that he had decided the scheme "did not work" by 6 January 2015, and he instructed Mr Shehzad to "contact HMRC to explain that they had made a mistake [about the amount owed] and then to settle the matter immediately"; that he understood Mr Shehzad and HMRC to have settled the entire issue, and did not realise he needed to do anything further. His witness statement explained:

> "As far as I was concerned, the matter had been settled. HMRC did not accept that the Scheme worked and so had rejected losses claimed in the Return and had sent the FN and the APN. Those letters were incorrect. After discussion with TL, HMRC accepted that they had made a mistake and informed me that I needed to pay £16,580.29 in order to settle my outstanding liabilities. At no point did the officer explain that I would have to take any additional steps (other than paying them the correct amount of outstanding tax); nor did the officer send me a new FN or APN containing the correct amounts."

91. However, after that hearing, the TL Letter was sent to the Tribunal. It said that Mr Corrado was informed by the February Update that "the scheme would not work" and that Mr Corrado "avers that he accepted that advice".

92. In reliance on the TL Letter, Mr Shea submitted that Mr Corrado did not abandon the Working Wheels scheme until after 23 February 2015, the date on which he received the February Update. As a result:

(1) Mr Corrado's instruction to Mr Shehzad on 6 January 2015 related only to sorting out the incorrect APN amount, and did not extend to abandoning the loss claims;

(2) he therefore did not believe the loss claims had been resolved during Mr Shezad's discussions with HMRC in January 2015; and

(3) his evidence to the contrary should be rejected as not credible.

93. Mr Corrado provided a further witness statement for the second day of the hearing, essentially to deal with this issue. He said that by the time he received the November Update – not the February Update – he had decided to give up on the scheme, because:

(1) HMRC were taking an increasingly hard stance in relation to avoidance schemes;

(2) he had been made redundant in Hong Kong and was returning to the UK; he wanted to simplify his UK affairs, including his dealings with HMRC; and

(3) NT, despite their promises, had "failed at every step".

94. Mr Corrado drew attention to the fact that he did not ask NT for copies of their draft representations, and he did not contact NDTP or Pinsents.

95. In relation to the February Update, Mr Corrado said he agreed with NT's conclusion that any further defence of the scheme was "fruitless". The Update had simply confirmed he had been right to have instructed Mr Shehzad in January 2015 to settle his tax affairs with HMRC.

96. He agreed that he had reviewed a draft of the TL Letter, and approved its wording. When asked what he wished to convey by the statement that he had "accepted" the advice in the February Update, he said it meant he agreed with it; it did not mean the Update had changed his view.

97. I noted that, while Mr Corrado's command of English was excellent, it was not his mother tongue, and there were occasional small differences between his English

usage, and the words which might have been chosen by a native speaker to express the same point. Although he was not seeking to rely on his use of English, Ms Pearce submitted that it was nevertheless a relevant consideration.

98. Taking all relevant matters into account, I find that when Mr Corrado said he "accepted" the advice given in the February Update, he meant he agreed with it. That is consistent with his actions: although he was advised in the November Update to contact NTDP to find out about their new "robust strategy", he did not do so.

99. I therefore find as facts that:

(1) Mr Corrado decided to abandon the Working Wheels scheme by the time he received the November Update, and this was before 6 January 2015 when he instructed Mr Shezad to settle his dispute with HMRC;

(2) he came to this decision in part because he was returning to the UK and wanted to simplify his tax affairs, and in part because he believed the scheme did not work; and

(3) after he had (a) told Mr Shehzad to "settle" his affairs with HMRC, and (b) paid the balance due of £16,580.29, he believed he had done all that was required to resolve that dispute. At §129ff I consider whether that belief was reasonable.

What Mr Shehzad believed

100. The following facts are already established:

(1) Mr Shehzad is a Chartered Tax Adviser and a Chartered Certified Accountant.

(2) He does not ordinarily advise on tax avoidance schemes.

(3) He had some experience of dealing with ordinary SA enquiries into income tax and capital gains tax: HMRC opened SA enquiries into three or four of his clients a year, and he handled those enquiries personally.

(4) Before the events with which this appeal is concerned, he had no previous experience with FNs or APNs, and had not heard of the Working Wheels scheme.

(5) Dominion remained responsible for all matters to do with Mr Corrado's participation in Working Wheels. However, Mr Shehzad read the NT Updates; HMRC's correspondence with Mr Corrado; factsheet CC/FS25 and the related guidance in HMRC's manuals, and he discussed the case with Mr Tish.

(6) The day after the penalty warning letter, Mr Shehzad told HMRC he was "extremely surprised" at having receiving it, because he "believed that we have taken corrective actions" as "those losses which were originally claimed" had been "removed".

(7) In his letter to HMRC on 27 August 2015, he said that during his conversations with Mr Taylor "there was not the slightest hint" that anything further was required, and he had been "confident that the matter had now been settled".

101. Ms Pearce submitted that Mr Shehzad had thought corrective action had been taken, pointing out in particular that:

(1) although the FN was legally separate from the APN, they arrived together in the same envelope under the same covering letter;

(2) they both contained the same error; and

(3) the form which came with the FN also cross-referred to the same incorrect amount.

102. During his cross-examination of Mr Shehzad, Mr Shea suggested that his "focus had been on paying the tax, not on settling". Mr Shehzad denied this, saying that the emphasis had been on settling, and that he had advised Mr Corrado that "if you pay this [the outstanding amount] then your tax affairs would be up to date". At the end of the first day of the hearing, Mr Shea submitted that Mr Shehzad was "experienced with enquiry processes" and could not therefore have relied on his discussions with HMRC as amounting to corrective action. However, he did not submit that Mr Shehzad did not genuinely believe that corrective action had been taken. Instead, he criticised Mr Shehzad for "wrongly conflating the two notices", for "not turning his mind to the FN" but focusing on the payment, and for "not properly considering" the FN.

103. This remained Mr Shea's position after he had reviewed and considered the NT Updates provided for the second day of the hearing. Although he asked the Tribunal to draw an adverse inference from Mr Shehzad's unexplained failure to give evidence on that second day, when asked what inference he was asking the Tribunal to draw, he said that Mr Shehzad still did not "turn his mind" to the difference between APNs and FNs, despite having also read the NT Updates. This was no different from Mr Shea's submission at the end of the first day of the hearing, and no inference was therefore required.

104. However, I noted that the February Update had referred to there being a "payment date" for APNs and an "action date" for FNs, see §72. I considered for myself whether to infer, from Mr Shehzad's unexplained failure to provide witness evidence for the second day of the hearing, that he knew from reading the Updates that Mr Corrado had to take different and separate actions in order to deal with the APN and the FN, and thus that he did not genuinely believe Mr Corrado had taken corrective action.

105. In deciding whether to make that inference, I relied on the guidance given by Morgan J in *British Airways PLC v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch) at [146]:

> "…even if I eventually conclude that I have not been given a good reason or a credible explanation for the [party] not calling these three witnesses, it does not follow that I will automatically draw [an adverse] inference...In deciding what inferences to draw, I need to take into account not only the fact that [the individuals] were not called, when they could have been, but also other matters such as what I consider to be the most probable finding to make on the basis of all the evidence which I have received."

106. Taking into account all other relevant facts set out above, I decided that the most probable finding was that Mr Shehzad had not realised from reading the Updates that he needed to do anything further in order for Mr Corrado to have taken corrective action. I agree with Mr Shea that Mr Shezad had not "turned his mind" to the difference between the APN and the FN, and I find that he genuinely believed Mr Corrado had taken corrective action.

The issues in dispute

107. There were three substantive issues in dispute:

(1) whether Mr Corrado had taken corrective action ("the First Issue");

(2) if not, whether Mr Corrado's actions were "reasonable in all the circumstances" ("the Second Issue"); and

(3) if not, whether the penalty should be upheld in the reduced amount, increased, or further reduced ("the Third Issue").

108. Ms Pearce said that Mr Corrado was not seeking to argue that:

(1) the FN had not been served on him because it had been sent to his address in Hong Kong;

(2) Mr Corrado had made "representations" in relation to the FN or APN; or

(3) either the FN or APN was for any other reason invalid or unenforceable.

The First Issue: whether corrective action had been taken

109. Ms Pearce submitted that Mr Corrado had taken corrective action within the meaning of the statute. Mr Shea said he had only corrected the amount due under the APN.

The legislation

110. The relevant legislation is set out in the Appendix. FA 2014, s 208 applies where "a follower notice is given to P (and not withdrawn)". FA 208(2) reads:

> "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."

111. The "denied advantage" is, essentially, the benefit which has been claimed as due under the failed avoidance scheme, but which has now been "denied" by a final judicial ruling, such as that in ***Flanagan,*** see s 208(5). In a case such as this, where no representations were made to HMRC about the FN, the "specified time" is 90 days after the date on which the FN was given, see s 208(9).

112. FA 2014, s 208 also includes the following subsections:

> "(4) The necessary corrective action is taken in respect of the denied advantage if (and only if) P takes the steps set out in subsections (5) and (6).
>
> (5) The first step is that–
>
> (a) in the case of a follower notice given by virtue of section 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."

113. The normal position is that a taxpayer can only amend his return within the first twelve months after the filing date, see TMA, s 9ZA(2). But that provision is explicitly overridden by FA 2014, s 208(9), which provides:

> "No enactment limiting the time during which amendments may be made to returns or claims operates to prevent P taking the first step mentioned in subsection (5)(a) before the tax enquiry is closed (whether or not before the specified time)."

114. HMRC had opened an enquiry into Mr Corrado's SA 2006-07 SA return under TMA s 8. The interaction between an SA enquiry and the amending of the return so as to take corrective action under FA 2014, s 208 is dealt with by TMA s 9B, which provides that the amendment does not take effect while the enquiry is in progress", but instead "when the closure notice is issued", see TMA s 9B(3).

115. No statutory provision sets out how a taxpayer must "amend" his return so as to satisfy the first of the two steps which are "necessary" in order for the taxpayer to have taken the corrective action required by s 208.

Hutchinson

116. In *Hutchinson v HMRC* [2018] UKFTT 290, Judge Mosedale considered the position of Mr Hutchinson, who had also participated in the Working Wheels scheme. She rejected his submission that paying the APN was "corrective action", saying:

> "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 HMRC 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 (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."

117. Judge Mosedale went on to say that paying the amount demanded by the APN "simply deprives the taxpayer of the timing advantage of keeping the money pending resolution of the dispute", and added "[i]f 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". She contrasted this with the requirements of the FN, which was, she said "quite different" because:

> "…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."

118. Mr Shea represented HMRC in *Hutchinson*, and at [71] Judge Mosedale agreed with his submission 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."

119. Judge Mosedale also considered the status of the FN form attached to Mr Hutchison's FN, saying at [73] that it was "not prescribed by the legislation and there was no obligation on the taxpayer to use it". and continuing:

> "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."

Whether Mr Corrado had taken corrective action

120. Ms Pearce submitted that Mr Corrado had taken corrective action by:

(1) contacting HMRC (via Mr Shehzad) regarding HMRC's December Letter;

(2) reaching an agreement that the FN (and the APN) contained incorrect information; and

(3) reaching an agreement regarding the correct information that should have been included in the FN (and the APN), on the basis that Mr Corrado would not receive the benefit of the losses originally claimed in his Return, and thereby amending his SA return.

121. Mr Shea said that corrective action had not been taken, and the discussions between Mr Shehzad and Mr Taylor were limited to agreeing the amount of tax Mr Corrado had to pay. Referring to *Hutchinson,* he added that the APN and FN regimes were "distinct", so that "complying with one did not amount to compliance with the

other". In order in order to take corrective action, Mr Corrado had "irrevocably [to] give up his claim to the tax advantage". Had he done so, HMRC would have processed the amendment to his SA return and closed the enquiry by incorporating that amendment in the closure notice. Instead, the enquiry was not closed until 16 February 2016.

122. I agree with Judge Mosedale in *Hutchinson* that FNs and APNs are separate regimes, and that "corrective action" requires that a taxpayer irrevocably gives up his tax advantage. Although it is not necessary for a taxpayer to use the FN form in order to ask HMRC to amend an SA return, there must be some clear communication to HMRC that this is his intention.

123. No such communication took place between Mr Shehzad (on behalf of Mr Corrado) and HMRC. It is clear from Mr Shehzad's file notes that the discussions between Mr Shehzad and Mr Taylor were about "the figure" Mr Corrado had to pay; Mr Taylor's email of 7 January 2015 similarly only refers to the amount due from Mr Corrado as an accelerated payment, and the related file note records that Mr Shezad was "requesting clarification of the amount due on [accelerated payment] as stated customer had not had the full benefit of tax advantage".

Conclusion on the First Issue

124. For the reasons set out above, I find that Mr Corrado had not taken corrective action.

The Second Issue: whether reasonable in all the circumstances

The relevant legal test

125. FA 2014, s 214(3)(d) provides that an appeal may be made against an FN if "it was reasonable in all the circumstances for [the person] not to have taken the necessary corrective action".

126. In *Benton v HMRC* [2018] UKFTT 0593 (TC), I considered the meaning of the phrase "reasonable in all the circumstances". I decided that the test was similar, but not identical, to that for "reasonable excuse", as recently clarified in *Perrin v HMRC* [2018] UKUT 156 ("*Perrin*"). The difference arises because the FN test requires findings about "all" relevant circumstances, not just about those which relate to the particular "reasonable excuse" put forward by the taxpayer.

127. *Benton* was decided after the first day of this hearing. When the parties reconvened for the second day, I told them I had given permission to appeal in *Benton*. However, both parties were content to proceed on the basis that "all the circumstances" needed to be considered.

The facts which constitute "all the circumstances"

128. From my findings of fact earlier in this decision, the following circumstances were relevant to Mr Corrado's failure to take corrective action:

> (1) He works in financial services, from which I make the reasonable inference that he was financially literate. However, he engaged accountants to complete his tax returns.

(2) He participated in an artificial tax avoidance scheme, access to which was provided by his then accountants, Dominion.

(3) He knew HMRC had opened an enquiry into his 2006-07 tax return.

(4) He had never previously been subject to an HMRC enquiry, so had no familiarity with the enquiry process.

(5) He received the September Update, which included the following text:

> "We believe that HMRC will now issue closure notices…for the year you made the Working Wheels loss…in addition to the issue of closure notices, HMRC will seek to collect the outstanding tax.
>
> Any client who was taxed under PAYE for the relevant year and did not receive a refund after submitting their loss claim will not receive a new demand for tax.
>
> For other clients, HMRC will seek to collect outstanding tax and interest. They will do this either through the normal process when they issue a closure notice or alternatively by issuing an Accelerated Payment Notice (APN). They may also issue a follower notice."

(6) By November 2014, Mr Corrado had decided to abandon the Working Wheels scheme, in part because he was returning to the UK and wanted to simplify his tax affairs, and in part because he believed it did not work.

(7) He received and read HMRC's November and December Letters, the APN and the FN.

(8) The FN stated that Step 1 of taking corrective action required amending the return "to counteract the denied advantage referred to above"; and that "denied advantage" described the "total amount payable" as £191,803.60. Although this was the value of the denied advantage, the FN was wrong to say that £191,803.60 was "payable". The amount payable was only £16,850.29.

(9) The form attached to the FN required Mr Corrado to "show the additional amount of tax that is due and payable or will be come due and payable, as the result of [his] amendment to the return". That "additional tax" was again wrongly said to be £191,803.60.

(10) The November Update advised recipients to contact both their "normal tax adviser" about payments of tax, and to contact Dominion/NT if they received an APN and/or an FN. Mr Corrado did not need to contact Mr Shezad, because HMRC had sent TL a copy of the APN and FN. However, he did contact Dominion, and told them he did not understand "a lot" of HMRC's December Letter, but had identified "one thing that stands out as incorrect" as being the amount of the tax payment. Dominion told him that the "APN is not for the correct amount".

(11) Mr Corrado asked TL to work out what his outstanding tax liability would be, on the assumption that the Scheme did not work.

(12) HMRC's November Letter had said "If you now want to settle your tax affairs, you need to phone us straightaway on the number shown at the top of this letter. We will then tell you what you need to do next". Mr Corrado "authorised TL to contact HMRC to explain that they had made a mistake and

then to settle the matter immediately". Mr Shehzad called HMRC straightaway on the number shown on the top of the letter.

(13) Mr Corrado knew that Mr Shehzad had called HMRC straightaway on the number shown on the top of the letter, and that he (a) had obtained confirmation as to the correct amount of tax which had to be paid; and (b) Mr Taylor agreed that both the FN and the APN had been incorrect.

(14) After HMRC wrote again on 20 February 2015, Mr Shehzad advised Mr Corrado that he "must pay the revised agreed tax liability of £16,850.29 to clear his 2007 tax position by 21 March 2015".

(15) Mr Corrado and Mr Shezad both believed corrective action had been taken, see §99 and §106.

Whether Mr Corrado's belief was "reasonable in all the circumstances"

129. In *Perrin* the UT held that, for a person's belief to provide a reasonable excuse, it must not only be genuine, but objectively reasonable. The position has to be the same in the context of the "reasonable in all the circumstances" test which applies to FNs. It is therefore not enough for Mr Corrado genuinely to believe he had taken corrective action. His belief must also be objectively reasonable given the circumstances summarised above. I emphasise that it is Mr Corrado's belief which must be reasonable, not Mr Shehzad's belief.

130. In deciding whether that is the case, I respectfully adopt the approach set out in *Perrin* at [81(3)], namely:

> "[To] decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times."

131. The parties accepted this was the correct test, and put forward the following points, each of which I consider below:

(1) whether it was reasonable for Mr Corrado to rely on Mr Shehzad;

(2) whether Mr Corrado's level of engagement with the issue was reasonable;

(3) whether it was reasonable for Mr Corrado not to send back the form attached to the FN;

(4) whether Mr Corrado's overall understanding of the FN was reasonable; and

(5) the importance of the legislative context.

Reliance on Mr Shehzad

132. Ms Pearce submitted that it was entirely reasonable for Mr Corrado to rely on Mr Shehzad to resolve this matter. Although many other penalty provisions, such as FA 2008, Sch 36 and FA 2009, Sch 55 and 56, state "where [a person] relies on any other person to do anything, that is not a reasonable excuse unless [that person] took reasonable care to avoid the failure", this not been imported into the FN penalty

provisions. For his part, Mr Shea accepted that Mr Corrado was not an accountant, but said that as he was a financial specialist he should be held to a higher standard.

133. I place no weight on the absence of the statutory prohibition. In order for Mr Corrado's action to be "reasonable in all the circumstances", it cannot be sufficient for a person blindly to rely on an adviser: his reliance must be reasonable. I also agree with Mr Shea that the relevant circumstances include Mr Corrado's professional background: he is both intelligent and financially literate. I find that the reasonable person in the position of Mr Corrado would have taken into account the following:

(1) TL was an accountancy firm who had worked with Mr Corrado for many years;

(2) Mr Shehzad was a Chartered Tax Adviser and Certified Chartered Accountant;

(3) Mr Shehzad contacted Mr Corrado as soon as any HMRC correspondence arrived, and discussed it with him;

(4) immediately on receipt of HMRC's December Letter, Mr Shehzad had taken the initiative to contact HMRC via the specified phone line;

(5) after having spoken to Mr Taylor, Mr Shehzad communicated his analysis of the situation promptly and carefully to Mr Corrado; and

(6) Mr Corrado knew from HMRC's subsequent confirmation that Mr Corrado had correctly calculated the amount of payment which was actually due.

134. On the basis of those findings, I further find that it was reasonable for a person in Mr Corrado's position to rely on Mr Shehzad.

135. However, Mr Shea also submitted that Mr Corrado had not acted reasonably because he relied only on TL and "did not seek advice from HMRC or other professionals". I do not agree. Mr Corrado genuinely and reasonably believed he could rely on Mr Shehzad to settle his dispute with HMRC about the Working Wheels scheme. He also contacted Dominion, who told him to ask his regular accountant to call HMRC, or to do so himself. Mr Corrado already knew Mr Shehzad had spoken to HMRC using the number provided. The reasonable person in the position of Mr Corrado would not have thought it necessary to take further advice from another tax specialist, or to contact HMRC directly.

Mr Corrado's engagement with the issue

136. Ms Pearce submitted that Mr Corrado acted "immediately" when he was sent HMRC's December Letter, and I agree: he contacted Dominion around three hours after he had been emailed by Mr Shehzad, see §57.

137. Ms Pearce also pointed out that Mr Corrado had paid the liability before the due date, and this too is correct: on 2 March 2015, Mr Shehzad told Mr Corrado to pay "ASAP before 21 March 2015" and the payment was made by 4 March 2015, see §76.

138. Taking all relevant matters into account, I find that Mr Corrado's prompt engagement with the issue was that of a reasonable person in his position.

Response to the FN

139. Ms Pearce submitted that it was entirely reasonable for Mr Corrado not to send back the form attached to the FN, because:

(1) both the FN and the APN included the incorrect figure of £191,803.60, and the form attached to the FN referred back to the same figure;

(2) Mr Taylor's email, which was forwarded to Mr Corrado, agreed that both the APN and the FN were incorrect; and

(3) HMRC did not then send Mr Corrado a revised FN with a new figure, and a new form.

140. Mr Shea submitted that the FN had correctly identified the "denied advantage", which was the full amount of the loss claims, and there was no need for it to be reissued or clarified.

141. I agree with all Ms Pearce's submissions. It was objectively reasonable for Mr Corrrado to decide not send back the form. As he put it, "the documents were simply incorrect".

Overall understanding of the FN

142. Mr Shea made the following submissions:

(1) the reasonable reader of HMRC's November Letter; HMRC's December Letter; factsheet CC/FS25; and the FN/APN would have realised that it was not sufficient simply to pay the balance owing, but that more was required. In particular the FNs and APNs were clearly separate Notices, each with their own requirements;

(2) the reasonable taxpayer would have noticed that Mr Shehzad's conversations with HMRC, and Mr Taylor's confirmatory email, were concerned only with tax *payments*, and therefore could not have amounted to "taking corrective action";

(3) the HMRC letter dated 20 February 2015 was sent after Mr Corrado had paid the balance owing. It included a paragraph headed "if you now want to settle your tax affairs". That should have alerted the reasonable reader to the fact that he had not, in fact, taken corrective action; and

(4) HMRC's November and December Letters both include the sentence "if you do not want to settle, then the current compliance check will remain open". Mr Corrado knew his 2006-07 return was under enquiry, and he had received no correspondence from HMRC closing that enquiry. That should have alerted the reasonable taxpayer in his position to the fact that he had not taken the required corrective action, because had he done so, he would have received a closure notice.

143. Ms Pearce responded to the first three of these points as follows:

(1) although the FNs and APNs were separate Notices, HMRC's December Letter, the APN, the FN and the form all arrived together in the same envelope and were clearly linked;

(2) both the November and December Letters told taxpayers who wanted to take corrective action to "phone us straight away on the number at the top of this letter" and "we will then tell you what to do next". Mr Corrado knew that Mr Shehzad had done exactly that, and the reasonable person in his position would have thought that paying the lower amount of tax was what he had been instructed to do by Mr Taylor; and

(3) the letter of 20 February 2015 was a template letter, as could be seen from phrases such as "if you have recently paid the full amount due, please ignore this letter" and "if you have made representations about the accelerated payments notice, or intend to make them…the deadline for paying may change". The reasonable reader would have thought that the paragraph beginning "If you now want to settle your tax affairs" was another standard paragraph and would not alerted the reasonable reader in Mr Corrado's position to the fact that he had not taken the required corrective action.

144. I agree with Ms Pearce for the reasons she gives. In relation to Mr Shea's fourth point, I have found as a fact (see §23) that Mr Corrado had never previously had an SA enquiry; he told Mr Shea that he "had no experience so did not know what the process should be". The reasonable person who had never before experienced a TMA s 9A enquiry would not have known that it is ended by the issuance of a formal closure notice, as required by TMA s 28A.

145. Moreover, Mr Corrado did not blindly follow Mr Shehzad's advice. He read HMRC's correspondence and did his best to follow it: his email to Dominion said "I have gone through their long letter, a lot of which are technical references to tax code so I can't comment" other than that the payment amount "stands out as incorrect" because:

> "HMRC has not made any payments to me (they have all been withheld on account, pending enquiry) and what their calculations fail to show is that I have always been on PAYE and therefore all taxes were paid as if there was no benefit from the 'Working Wheels' arrangement."

146. These are the comments of a financially literate person who was aware of his tax position. Mr Corrado was able to identify that HMRC had made a mistake in relation to the amount now due. He was not, however, able to "work out what [his] outstanding tax liability would be, on the assumption that the Scheme did not work" and asked Mr Shehzad to carry out the calculation. He "authorised" Mr Shehzad to "contact HMRC to explain that they had made a mistake and then to settle the matter immediately". This is entirely reasonable behaviour for a person with his background.

The legislative context

147. Mr Shea submitted that the legislative context was a "circumstance" to be considered. He relied on *Onillon,* where the FTT had found at [172] that the purpose of the FN provisions was "to discourage taxpayers from pursuing their dispute in avoidance cases once their scheme has been shown to fail in another party's litigation", and continued at [173]:

> "A position which, viewed in context, frustrates the purpose of the legislation is unlikely to be viewed as reasonable in all the circumstances. For example, it is not enough for a taxpayer to simply

> decide to see how the litigation plays out and not take corrective action. Any decision not to take corrective action should be a properly informed choice".

148. Ms Pearce rightly did not take issue with this,. However, in relation to Mr Onillon, the FTT went on to say:

> "197. …the Appellant took no further steps to receive repayment of the refund sought from HMRC since taking part in the Working wheels scheme in 2007…
>
> 198. At no time after receiving the follower notice in December 2014 did the appellant seek to contest the denial of the tax advantage. Through his accountant, Mr Shah, he accepted confirmation that he would not receive a refund or repayment of tax in March 2015. Through his accountant, he accepted the closure notice issued by HMRC in March 2016.
>
> 199. The Appellant took no other active [steps] to contest or pursued the denied tax advantage. He pursued no litigation against HMRC nor pursued any appeals to the Tribunal or through the Courts. This was a world away from the taxpayer who, in the face of an adverse ruling, vigorously disputes the tax advantage denied in every conceivable forum until all avenues are exhausted. Therefore, the appellant did not seek to undermine the purpose of the Follower Notice legislation."

149. The facts of Mr Corrado's case are the same. He made no effort to obtain the blocked repayment; he accepted the closure notice; he did not take any steps to relitigate *Flanagan.* Instead, he did what he thought was necessary to settle the dispute with HMRC, and his actions were those of a reasonable person in his position.

Conclusion

150. For the reasons set out above, I find that it was reasonable in all the circumstances for Mr Corrado not to realise he had not taken the required corrective action.

The Third Issue: the amount of the penalty

151. Given my conclusion on the Second Issue, it is not necessary to consider the Third Issue.

The second day of the hearing: costs

152. Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 sets out the Tribunal's power to make costs awards. Mr Corrado's appeal was categorised as "standard", so the provisions which apply only to complex cases are not relevant. However, Rule 10(1)(b) allows the Tribunal to award costs if it considers that "a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings".

153. In *Market & Opinion Research International Ltd v HMRC* [2015] UKUT 12 (TCC), the UT (Judges Berner and Powell) said at [49]:

> "It would not, we think, be helpful for us to attempt to provide a compendious test of reasonableness for this purpose. The application

> of an objective test of that nature is familiar to tribunals, particularly in the Tax Chamber. It involves a value judgment which will depend upon the particular facts and circumstances of each case. It requires the tribunal to consider what a reasonable person in the position of the party concerned would reasonably have done, or not done."

154. Mr Shea said that Mr Corrado had acted unreasonably in (a) failing to provide all relevant documents for the original listed hearing, and (b) sending the TL letter, which contained a new statement as to the timing of Mr Corrado's decision. Ms Pearce submitted that it was not apparent from HMRC's Statement of Case that this further evidence would be relevant.

155. I agree with Mr Shea. The burden was on Mr Corrado to show that he had acted reasonably in all the circumstances. He gave evidence that he instructed Mr Shehzad to "settle" his appeal in January 2015, in part because he had decided "the scheme did not work". He could have relied only on that evidence, but if he wanted to put forward the Updates to support his position, he should have provided them for the listed hearing.

156. Moreover, the apparent contradiction between the wording of the TL letter and Mr Corrado's oral evidence led Mr Shea, entirely reasonably, to challenge his credibility. Further evidence was then necessary for that issue to be resolved.

157. The combination of the new documents and the TL Letter meant that a second hearing day was required. Responsibility for this lies at the door of Mr Corrado and/or TL, and I find they acted unreasonably in the way they conducted the proceedings.

158. Under Rule 10(1)(b) and 6(a), I order that Mr Corrado pay HMRC's costs of that second hearing day. I summarily assess those costs as being those set out at the end of Mr Shea's second skeleton argument.

Decision and appeal rights

159. I find that Mr Corrado did not take corrective action, but that his failure to do so was reasonable in all the circumstances. I allow his appeal and set aside the penalty.

160. Mr Corrado is to pay HMRC's costs of the second hearing.

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

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 25 APRIL 2019

APPENDIX

EXTRACTS FROM LEGISLATION

TAXES MANAGEMENT ACT 1970

9ZA Amendment of personal or trustee return by taxpayer

(1) A person may amend his return under section 8 or 8A of this Act by notice to an officer of the Board.

(2) An amendment may not be made more than twelve months after the filing date.

(3) In this section "the filing date", in respect of a return for a year of assessment (Year 1), means

(a) 31st January of Year 2, or

(b) if the notice under section 8 or 8A is given after 31st October of Year 2, the last day of the period of three months beginning with the date of the notice.

9B Amendment of return by taxpayer during enquiry

(1) This section applies if a return is amended under section 9ZA of this Act (amendment of personal or trustee return by taxpayer), or in accordance with Chapter 2 of Part 4 of the Finance Act 2014 (amendment of return after follower notice), at a time when an enquiry is in progress into the return.

(2) The amendment does not restrict the scope of the enquiry but may be taken into account (together with any matters arising) in the enquiry.

(3) So far as the amendment affects the amount stated in the self-assessment included in the return as the amount of tax payable, it does not take effect while the enquiry is in progress and--

(a) if the officer states in the closure notice that he has taken the amendment into account and that--

(i) the amendment has been taken into account in formulating the amendments contained in the notice, or

(ii) his conclusion is that the amendment is incorrect,

the amendment shall not take effect;

(b) otherwise, the amendment takes effect when the closure notice is issued.

(4) For the purposes of this section the period during which an enquiry is in progress is the whole of the period--

(a) beginning with the day on which notice of enquiry is given, and

(b) ending with the day on which the enquiry is completed.

FINANCE ACT 2014, PART 4

199 Overview of Part 4

In this Part--

(a) sections 200 to 203 set out the main defined terms used in the Part,

(b) Chapter 2 makes provision for follower notices and for penalties if account is not taken of judicial rulings which lay down principles or give reasoning relevant to tax cases,

(c) Chapter 3 makes--

(i) provision for accelerated payments to be made on account of tax…

Chapter 2

Follower Notices

Giving of follower notices

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…

(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 Corrado 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) …

205 "Judicial ruling" and circumstances in which a ruling is "relevant"

(1) This section applies for the purposes of this Chapter.

(2) "Judicial ruling" means a ruling of a court or tribunal on one or more issues.

(3) A judicial ruling is "relevant" to the chosen arrangements if--

(a) it relates to tax arrangements,

(b) the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage, and

(c) it is a final ruling.

(4) A judicial ruling is a "final ruling" if it is--

(a) a ruling of the Supreme Court, or

(b) a ruling of any other court or tribunal in circumstances where--

(i) no appeal may be made against the ruling,

(ii) if an appeal may be made against the ruling with permission, the time limit for applications has expired and either no application has been made or permission has been refused,

(iii) if such permission to appeal against the ruling has been granted or is not required, no appeal has been made within the time limit for appeals, or

(iv) if an appeal was made, it was abandoned or otherwise disposed of before it was determined by the court or tribunal to which it was addressed.

(5) Where a judicial ruling is final by virtue of sub-paragraph (ii), (iii) or (iv) of subsection (4)(b), the ruling is treated as made at the time when the sub-paragraph in question is first satisfied.

206 Content of a follower notice

A follower notice must--

(a) identify the judicial ruling in respect of which Condition Corrado in section 204 is met,

(b) explain why HMRC considers that the ruling meets the requirements of section 205(3), and

(c) explain the effects of sections 207 to 210.

207 [Representations about a follower notice]

Penalties

208 Penalty if corrective action not taken in response to follower notice

(1) This section applies where a follower notice is given to P (and not withdrawn).

(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.

(3) In this Chapter "the denied advantage" means so much of the asserted advantage (see section 204(3)) as is denied by the application of the principles laid down, or reasoning given, in the judicial ruling identified in the follower notice under section 206(a).

(4) The necessary corrective action is taken in respect of the denied advantage if (and only if) P takes the steps set out in subsections (5) and (6).

(5) The first step is that--

(a) in the case of a follower notice given by virtue of section 204(2)(a), P amends a return or claim to counteract 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.

(7) In determining the additional amount which has or will become due and payable in respect of tax for the purposes of subsection (6)(b), it is to be assumed that, where P takes the necessary action as mentioned in subsection (5)(b), the agreement is then entered into.

(8) In this Chapter--

"the specified time" means--

(a) if no representations objecting to the follower notice were made by P in accordance with subsection (1) of section 207, the end of the 90 day post-notice period;

(b) if such representations were made and the notice is confirmed under that section (with or without amendment), the later of--

(i) the end of the 90 day post-notice period, and

(ii) the end of the 30 day post-representations period;

"the 90 day post-notice period" means the period of 90 days beginning with the day on which the follower notice is given;

"the 30 day post-representations period" means the period of 30 days beginning with the day on which P is notified of HMRC's determination under section 207.

(9) No enactment limiting the time during which amendments may be made to returns or claims operates to prevent P taking the first step mentioned in subsection (5)(a) before the tax enquiry is closed (whether or not before the specified time).

209 Amount of a section 208 penalty

(1) The penalty under section 208 is 50% of the value of the denied advantage.

(2) Schedule 30 contains provision about how the denied advantage is valued for the purposes of calculating penalties under this section.

(3) Where P before the specified time--

(a) amends a return or claim to counteract part of the denied advantage only, or

(b) takes all necessary action to enter into an agreement with HMRC (in writing) for the purposes of relinquishing part of the denied advantage only,

in subsections (1) and (2) the references to the denied advantage are to be read as references to the remainder of the denied advantage.

210 Reduction of a section 208 penalty for co-operation

(1) Where--

(a) P is liable to pay a penalty under section 208 of the amount specified in section 209(1),

(b) the penalty has not yet been assessed, and

(c) P has co-operated with HMRC,

HMRC may reduce the amount of that penalty to reflect the quality of that co-operation.

(2) In relation to co-operation, "quality" includes timing, nature and extent.

(3) P has co-operated with HMRC only if P has done one or more 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 purpose of counteracting the denied advantage;

(e) allowed HMRC to access tax records for the purpose of ensuring that the denied advantage is fully counteracted.

(4) But nothing in this section permits HMRC to reduce a penalty to less than 10% of the value of the denied advantage.

211 Assessment of a section 208 penalty

(1) Where a person is liable for a penalty under section 208, HMRC may assess the penalty.

(2) Where HMRC assess the penalty, HMRC must--

(a) notify the person who is liable for the penalty, and

(b) state in the notice a tax period in respect of which the penalty is assessed.

(3) A penalty under section 208 must be paid before the end of the period of 30 days beginning with the day on which the person is notified of the penalty under subsection (2).

(4) An assessment--

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Chapter),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(5) No penalty under section 208 may be notified under subsection (2) later than--

(a) in the case of a follower notice given by virtue of section 204(2)(a) (tax enquiry in progress), the end of the period of 90 days beginning with the day the tax enquiry is completed, and

(b) in the case of a follower notice given by virtue of section 204(2)(b) (tax appeal pending), the end of the period of 90 days beginning with the earliest of--

(i) the day on which P takes the necessary corrective action (within the meaning of section 208(4)),

(ii) the day on which a ruling is made on the tax appeal by P, or any further appeal in that case, which is a final ruling (see section 205(4)), and

(iii) the day on which that appeal, or any further appeal, is abandoned or otherwise disposed of before it is determined by the court or tribunal to which it is addressed.

(6) In this section a reference to an assessment to tax, in relation to inheritance tax, is to a determination.

213 Alteration of assessment of a section 208 penalty

(1) After notification of an assessment has been given to a person under section 211(2), the assessment may not be altered except in accordance with this section or on appeal.

(2) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the value of the denied advantage.

(3) An assessment or supplementary assessment may be revised as necessary if it operated by reference to an overestimate of the denied advantage; and, where more than the resulting assessed penalty has already been paid by the person to HMRC, the excess must be repaid.

214 Appeal against a section 208 penalty

(1) P may appeal against a decision of HMRC that a penalty is payable by P under section 208.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P under section 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 section 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 section 208(4)) in respect of the denied advantage.

(4) An appeal under this section must be made within the period of 30 days beginning with the day on which notification of the penalty is given under section 211.

(5) An appeal under this section is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC's review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(6) Subsection (5) does not apply--

(a) so as to require a person to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Part.

(7) In this section a reference to an assessment to tax, in relation to inheritance tax, is to a determination.

(8) On an appeal under subsection (1), the tribunal may affirm or cancel HMRC's decision.

(9) On an appeal under subsection (2), the tribunal may--

(a) affirm HMRC's decision, or

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

(10) The cancellation under subsection (8) of HMRC's decision on the ground specified in subsection (3)(d) does not affect the validity of the follower notice, or of any accelerated payment notice or partner payment notice under Chapter 3 related to the follower notice.

(11) In this section "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of subsection (5)).