[2020] UKFTT 352 (TC)

TC07831

INCOME TAX – follower notices – necessary corrective action not taken – penalties for that failure - not reasonable in all the circumstances not to have taken corrective action - penalty regime proportionate – penalties reduced – reduced penalties proportionate – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/08359

BETWEEN

MR ADAM GLASBY **Appellant**

-and-

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

TRIBUNAL: JUDGE NIGEL POPPLEWELL
MRS RAYNA DEAN

Hearing conducted remotely by video on 14 August 2020

The Appellant in person

Miss Rebecca Arnold, Officer of HM Revenue & Customs, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against penalties (the **"penalties**") issued under s208 Finance Act 2014 ("**FA 2014**") in respect of Follower Notices ("**FNs**") issued to the appellant under Chapter 2 of Part 4 FA 2014.

2. The first penalty was assessed in the amount of £5,371.73 for the tax year ended 5 April 2006 and notified to the appellant by a notice dated 25 July 2018.

3. The second penalty was assessed in the amount of £11,640.66 for the tax year ended 5 April 2007 and notified to the appellant by a notice dated 25 July 2018.

4. HMRC raised the penalties as the appellant failed to take corrective action by the dates specified in the FNs as revised.

5. HMRC reduced the amount of the first penalty to £4,240.84 and the amount of the second penalty to £9,190.00 on 15 April 2020.

6. The appellant does not seriously challenge the issue of the FN's, nor the fact that he should have taken corrective action by the specified date. His contention is that the penalties are too large given the amount of tax at stake, the fact that he was paying off that tax pursuant to accelerated payment notices ("**APNs**"), and that HMRC's policy for giving credit for cooperation is opaque and applied inconsistently.

EVIDENCE AND FINDINGS OF FACT

7. We were provided with a substantive bundle of documents**.** In addition the appellant gave oral evidence. We found him to be honest, truthful and straightforward, and accepted what he said in evidence. From this documentary and oral evidence we make the following findings of fact:

Background

(1) On 6 January 2011 an appeal was made on behalf of the appellant by the appellant's then representatives, Montpelier Tax Consultants ("**Montpelier**") in relation to closure notices issued to him in respect of the tax years ending 5 April 2006 and 5 April 2007.

(2) An 'Advance Notification' letter was issued to the appellant on 18 October 2016, advising that FNs and APNs relating to the appellant's use of an IR35 arrangement scheme during tax years ended 5 April 2006 and 5 April 2007 would be issued within the next one to ten weeks.

(3) The letter included an explanation about required corrective action and was accompanied by Factsheet CC/FS25a, which explained that a penalty of 50% can be charged for failure to take corrective action by the specified date. It also explained that the penalty could be reduced by cooperation and explained what cooperation meant.

(4) The FNs and APNs were issued to the appellant on 4 November 2016. The FNs explained that if the appellant did not take the necessary corrective action by 7 February 2017, he would be liable to pay a penalty under s208 FA 2014.

(5) The FNs explained that taking corrective action is a two stage process which requires the appellant to 'take all necessary action to enter into a written agreement with us to relinquish the denied advantage' and 'tell us (HMRC) that you have taken the first step and tell us the amount of the denied advantage and (where different) the additional amount which has or will become due and payable in respect of the tax by reason of the first step being taken.'

(6) The FNs explained that if the appellant did not take the necessary corrective action on time and HMRC did not withdraw the notice, he would be liable to pay a penalty of 50% of "the value of the denied advantage" as determined by s209 FA 2014. The FNs also explained how the appellant could reduce the penalty percentage rate by co-operating with HMRC before a notice of penalty assessment was sent. The definition of co-operation in that context was also provided.

(7) HMRC telephoned the appellant on 21 November 2016. During that conversation the appellant confirmed that he was aware of the FN and APN requirements and the different penalty structures.

(8) The appellant made representations against the FNs and APNs on 5 February 2017. These representations were in letters signed by the appellant but based on templates supplied to the appellant by Montpelier.

(9) HMRC issued FN and APN representation conclusion letters to the appellant on 18 April 2017. Both FNs and APNs were upheld. The FN letters informed the appellant that corrective action must now be taken by 24 May 2017 and that penalties would be charged for failing to take corrective action on or before that date. The representation conclusion letters referred to the original FNs for further details of penalty charges.

(10) Accordingly, the requirement to take corrective action was deferred until 24 May 2017, being 30 days after HMRC notified the appellant of their representations conclusion.

(11) HMRC received a letter from the appellant on 24 May 2017 (dated 19 May 2017). At point 8 of the letter the appellant stated he would not be taking corrective action by 24 May 2017 for reasons outlined in his letter. This letter, too, is based on a template provided to the appellant by Montpelier. It is couched in robust terms, and tells HMRC that the appellant believes that "the views taken by HMRC in this matter are wrong and unfair and their stance unlawful" and that he "will therefore be issuing… a Judicial Review challenge by 18 July 2017…….".

(12) The appellant failed to take either corrective action or pay the APNs by the due date of 24 May 2017.

(13) On 26 May 2017 a 'Penalty Warning Letter' was issued to the appellant. The letter stated "you are now liable to a penalty of 50% - contact us now to help reduce your penalty". The letter explained that the appellant could reduce the penalty percentage rate through co-operation with HMRC and advised that the appellant should contact HMRC to discuss the matter.

(14) This was explained further in the enclosed factsheet CC/FS30a 'Tax avoidance schemes – penalties for follower notices'. It is clear from that fact sheet that in an

appeal case (which this is) that up to 90% of the reduction is apportioned to cooperation described as "Counteracting the denied advantage".

(15) In a letter dated 27 November 2017, HMRC provided the appellant with a response to the points raised in his letter dated 19 May 2017. The letter explained that it was the appellant's choice whether to take corrective action and advised that he had been made aware of the consequences of not doing so. The letter also advised that if the appellant failed to take corrective action before the due date, Class 4 NICs would not be included in the amount on which penalties are charged for that period.

(16) On 4 December 2017, the appellant called HMRC as he had received HMRC's letter. The appellant stated that he believed that by paying off the amounts due under the APNs he was taking corrective action. It was explained to the appellant that this wasn't the case, "the processes were entirely separate", and that to take corrective action he must withdraw his appeals for 2006 and 2007 and specify the amount of the denied tax advantage. The appellant stated he did not wish to do so and maintained that he had taken corrective action by paying the APNs. The appellant was advised that he would receive a call back regarding this matter.

(17) On 5 December 2017, HMRC called the appellant. A message was left for the appellant advising that HMRC's letter of 27 November 2017 set out HMRC's current position and that FN penalties were due for 2006 and 2007 as he had not taken corrective action by 24 May 2017.

(18) On 17 January 2018, the appellant called HMRC stating he wanted to take corrective action as he had heard he may be liable to penalties. It was explained to the appellant how to take corrective action and that penalties of up to 50% of the value of the denied advantage would be due as corrective action should have been taken by 24 May 2017.

(19) Further copies of the corrective action forms were sent to the appellant on 6 February 2018.

(20) The appellant telephoned HMRC on 23 April 2018 regarding taking corrective action. The appellant was advised that the corrective action date had passed. The appellant stated that he wished to resolve the matter and was advised 'that if he sends the corrective action forms in now they will be treated as late'.

(21) The appellant emailed HMRC on 25 April 2018 stating his intention to perform all required actions in line with the FNs.

(22) HMRC received the completed corrective action forms via email on 1 May 2018.

(23) On 25 July 2018, FN penalties and a penalty explanation letter were issued to the appellant alongside an explanation of how the penalty rate of 45.6% was calculated. The penalty payment due date was 28 August 2018. The letter informed the appellant that he could appeal the decision in writing no later than 30 days after the date he received the penalty assessment notice.

(24) HMRC received the appellant's appeal against the FN penalties on 30 August 2018 (dated 24 August 2018).

(25) HMRC received a letter from the appellant which further particularised the appellant's appeal by email on 10 September 2018.

(26) HMRC issued a 'view of the matter' letter on 25 September 2018. HMRC did not agree with any of the points raised in the appellant's appeal letters.

(27) On 28 September 2018, HMRC issued two letters to the appellant confirming that the appellant had now settled his appeals against the closure notices in relation to an IR35 arrangement in respect of income tax for the tax years ended 5 April 2006 and 5 April 2007.

(28) The appellant requested a statutory review of the FN penalty appeal decisions by email on 25 October 2018.

(29) On 8 November 2018, HMRC issued a statutory review acknowledgement letter to the appellant.

(30) On 29 November 2018, HMRC issued a review conclusion letter upholding the FN penalties issued to the appellant.

(31) On 29 December 2018, the appellant appealed to the Tribunal.

(32) HMRC revised the policy by which they give credit for certain matters when applying reductions for co-operation in FN penalty cases and reduced the amount of the first penalty to £4,240.84 and the amount of the second penalty to £9,190.00 on 15 April 2020.

The penalties

5 April 2006 Penalty Notice

(33) On 25 July 2018, HMRC issued a notice of penalty assessment regarding the appellant's failure to take corrective action specified in the FN for the tax year ended 5 April 2006.

(34) The penalty charged was £5,371.73 representing 45.6% of the denied advantage of £11,780.12.

(35) HMRC calculated the reduction in the range of the penalty as follows:

(a) Maximum penalty 50%, minimum penalty 10%;

(b) penalty range – 40%;

(c) reductions allocated for s210(3)(a) to (e);

Section		Available	Given
a	Assisting quantifying tax	0%	0%
b	Counteracted denied advantage	90%	1%
c	Provide information to enable corrective action	0%	0%
d	Provide information to make settlement	10%	10%
e	Access to records	0%	0%
		100%	11%

(36) Reduction in penalty range 40 x 11% = 4.4. Net penalty 50 – 4.4 = 45.6% (£5,371.73).

(37) On 15 April 2020, HMRC reduced the amount of the penalty assessment regarding the appellant's failure to take corrective action specified in the FN for the tax year ended 5 April 2006.

(38) The penalty charged was reduced to £4,240.84 representing 36% of the denied advantage of £11,780.12.

(39) HMRC calculated the reduction in the range of the penalty as follows:

(a) maximum penalty 50%, minimum penalty 10%;

(b) penalty range – 40%;

(c) reductions allocated for s210(3)(a) to (e);

Section		Available	Given
a	Assisting quantifying tax	20%	20%
b	Counteracted denied advantage	70%	5%
c	Provide information to enable corrective action	0%	0%
d	Provide information to make settlement	10%	10%
e	Access to records	0%	0%
		100%	35%

(40) Reduction in penalty range 40 x 35% = 14. Net penalty 50 – 14 = 36% (£4,240.84).

5 April 2007 Penalty Notice

(41) On 25 July 2018, HMRC issued a notice of penalty assessment regarding the appellant's failure to take corrective action specified in the FN for the tax year ended 5 April 2007.

(42) The penalty charged was £11,640.66 representing 45.6% of the denied advantage of £25,527.78.

(43) HMRC calculated the reduction in the range of the penalty as follows:

(a) Maximum penalty 50%, minimum penalty 10%;

(b) penalty range – 40%;

(c) reductions allocated for s210(3)(a) to (e);

Section		Available	Given
a	Assisting quantifying tax	0%	0%
b	Counteracted denied advantage	90%	1%
c	Provide information to enable corrective action	0%	0%
d	Provide information to make settlement	10%	10%
e	Access to records	0%	0%
		100%	11%

(44) Reduction in penalty range 40 x 11% = 4.4. Net penalty 50 – 4.4 = 45.6% (£11,640.66)

(45) On 15 April 2020, HMRC reduced the amount of the penalty assessment regarding the appellant's failure to take corrective action specified in the FN for the tax year ended 5 April 2007.

(46) The penalty charged was reduced to £9,190.00 representing 36% of the denied advantage of £25,527.78.

(47) HMRC calculated the reduction in the range of the penalty as follows:

(a) Maximum penalty 50%, minimum penalty 10%;

(b) penalty range – 40%;

(c) reductions allocated for s210(3)(a) to (e) ;

Section		Available	Given
a	Assisting quantifying tax	20%	20%
b	Counteracted denied advantage	70%	5%
c	Provide information to enable corrective action	0%	0%
d	Provide information to make settlement	10%	10%
e	Access to records	0%	0%
		100%	35%

(48) Reduction in penalty range 40 x 35% = 14. Net penalty 50 – 14 = 36% (£9,190.00).

The appellant's oral evidence

(49) Since 1995 the appellant has been suffering from a medical condition for which he is currently receiving medication. This condition worsened in 2007. It causes the appellant occasional but severe bouts of depression which last for between four and six months, the most recent of which started in December 2016. The appellant did not make much of this in his appeal against the penalties since it is only recently that he has felt confident to disclose this condition to some of his closest family let alone external agencies such as HMRC. However given that the stigma surrounding his sort of condition has started to lift as a result of members of the Royal family, sports and other celebrities openly discussing such conditions, he has felt able to disclose this condition to HMRC and to the tribunal.

(50) Whilst he is in a depressive episode, the appellant is barely able to continue to work and his focus is on that, and earning money to look after his family.

(51) It is the appellant's view that the thought of dealing with issues such as the APN's and the FN's is difficult and has contributed to his slow responses to HMRC's letters during the relevant periods.

(52) The appellant no longer deals with Montpelier who had assured him that the FN's were likely to be illegal and that the appellant should not worry about them. However the appellant accepts that responsibility for failing to take corrective action is his.

(53) Had he realised that by delaying he was only going to get credit of 1% for taking corrective action when he did, he would have taken it much earlier.

(54) He used the Montpellier scheme for about 18 months but ceased to use it, voluntarily, in 2008. He had paid off all of the tax outstanding and which was claimed under the APNs, by August 2018.He had started paying this in July 2017.

THE LAW

8. We have set out the relevant legislation in an appendix to this Decision. However, given that the focus of the appeal concerns the reduction in the amount of the penalties we set out below s210 FA 2014 which deals with this:

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 cooperation.

(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.

9. The subsections (3) (a) – (e) in s210 FA 2014 correlate with the sections set out in the penalty tables which are set out at[7](35)ff above.

10. Under s214 FA 2014,

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

(2) 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.

CASE LAW ON PROPORTIONALITY

11. The appellant's main submission regarding the penalties is that they are excessive and disproportionate to the amount of tax for which he is liable. HMRC addressed this submission in their skeleton argument, and in so doing appeared to accept that this tribunal has jurisdiction to consider whether the penalties are proportionate.

12. We set out below an extract from the case of *Joseph Hutchinson* [2018] UKFTT 290, ("*Hutchinson*") a First-tier Tribunal decision given by Judge Mosedale. This decision is not binding on us but we agree with the principles expressed in it and adopt them, with gratitude, for the purposes of this decision:

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

109. The Tribunal has jurisdiction to consider the proportionality of a penalty because the European Convention of Human Rights confers a right to property, and a person cannot be deprived of his property (such as by the imposition of a penalty) unless in exercise of the right of the government to levy tax and enforce laws. In doing so, the Government must act proportionately. What that means was explained in *International Transport*

Roth [2002] EWCA Civ 158 where it was said that to lack proportionality a penalty must be 'not merely harsh but plainly unfair'

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

The scheme as a whole

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

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

113. I accept that 50% of the tax is a harsh penalty where the offending does not involve dishonest behaviour. The offending is to persist (without good reason) in the position that the taxpayer's tax liability is lower than a final judicial ruling in a similar 35 case has indicated that it is. The prejudice to HMRC that it is put to the trouble and expense of defending the appeal which, because there is no good reason for the persistence, HMRC considers that it should not have been.

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

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

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

115. I also note that the legislation has no sliding scale: the full 50% is due whether the appellant is one day late complying or never complies. However, as I have just said, the penalty can be mitigated for cooperation which takes place after the date of compliance. The regime therefore does make a

distinction between compliance which 15 is late and a complete failure to comply. I do not think that it is plainly unfair.

The penalties in this particular case

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

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

THE ISSUES IN THIS CASE

13. It was not disputed that:

(1) The FNs were correctly issued;

(2) The specified date for taking the necessary corrective action was 24 May 2017;

(3) No corrective action was taken on or before that date, and HMRC received the completed corrective action forms on 1 May 2018.

14. Under s208(2) FA 2014, the appellant is therefore, prima facie, liable to pay the penalties. The issues that we therefore have to consider are:

(1) Whether it was reasonable in all the circumstances for the appellant not to have taken the necessary corrective action on or before 24 May 2017, so that the penalties are not payable; but if they are payable

(2) whether we should affirm the amount of the penalties or whether we should substitute for HMRC's decision regarding the amount of the penalties, another decision regarding that amount that HMRC had power to make.

BURDEN OF PROOF

15. This is a penalty case and therefore to the extent that it is in dispute, HMRC must prove that the penalties were correctly imposed on the appellant. They must prove this on the balance of probabilities. If they can establish the penalties were correctly imposed then the burden shifts to the appellant to prove to us, again on the balance of probabilities, that one of the grounds of appeal under s214(3) are made out. The onus is on him too to show

whether, and if so why, we should substitute our decision regarding the amount of the penalties for the decision made by HMRC.

SUBMISSIONS

16. The appellant's main submission was that the penalties were excessive and disproportionate. He was (as originally assessed) being fined £17,012.40 on a tax debt of £37,307.90. He was only about one year late in taking corrective action. The maximum penalty is 50% and his penalty was 45.6% (now reduced to 36%). He was only allocated 1% for condition b (counteracting the tax advantage) (now increased to 5%). Had he known that he would only receive a very modest reduction in the penalty, his oral evidence was that he would have taken corrective action earlier (his written submissions were that he might not have taken corrective action at all given that it would have meant he could have kept his legal powder dry and he didn't gain anything by taking corrective action as far as the penalties were concerned). The penalties should be reduced given that he paid all of the tax under the APNs, and in the period when he was not taking corrective action, HMRC had the financial security of those payments. He was confused about the interaction between the APNs and the FNs which had been withdrawn and reissued. Colleagues of his had used similar schemes and not been sanctioned by HMRC. The House of Lords has recommended the penalties associated with FNs and APNs should be abolished. HMRC have changed their policy regarding his penalties. What happens if he pays and HMRC subsequently change their policy again. Might he get a rebate? There is no information transparently available to a taxpayer to see how HMRC will apply discounts for co-operation. Certain of HMRC's letters telling him that he was liable to the penalties contained incorrect dates. His medical condition meant that he found it very difficult to engage with the FNs and to concentrate on taking corrective action. He had been advised by Montpelier not to worry and it was Montpellier who provided the template letters which he sent to HMRC. He wishes he had raised his medical condition with HMRC before he did.

17. HMRC submit that the appellant accepts the validity of the FNs and that he should have taken corrective action. He also accepts that he is liable to the penalties and his only challenge in this appeal is to the amount of those penalties. HMRC do not negotiate penalties as they are applied objectively to all taxpayers. Since this was an appeal case, HMRC can only give discounts for cooperation under conditions a b and d. The appellant has not established that it was reasonable for him in all the circumstances not to have taken corrective action on or before 24 May 2017. The information he received in correspondence and formal documents on or before that date clearly explained the penalty regime and what he had to do to take corrective action in order to avoid falling into that penalty regime. Certain of those documents also explained how discounts are available if he was liable under the penalty regime. Further explanations of how discounts will be applied for cooperation (although not the precise amounts which are directed by HMRC policy) were given to the appellant along with documents relating to the penalties. He took no corrective action until 1 May 2018 some 342 days after the due date. He had been told, during a telephone conversation with HMRC on 4 December 2017, that paying off the APNs was not taking corrective action. The two processes were entirely separate. In any event, the appellant did not start to pay the APN's until July 2017 and did not pay them off entirely until August 2018. It is not conceivable therefore that he believed that paying them meant that he was not liable to take corrective action. He had confirmed during a telephone conversation on 21 November 2016 that he was aware of the different penalty structures for FNs and APNs. The appellant was fully aware of the obligation to take corrective action and made a deliberate decision not to do so which was reflected in

the letters which he had sent HMRC telling HMRC that he would not be taking corrective action. Incorrect dates were contained only on customer service letters which HMRC are under no statutory obligation to provide. The statutory notices were correctly dated and in any event the appellant was under no illusion of the years in respect of which the FNs ends were issued nor what he should do if he wished to avoid penalties. HMRC recognise the difficulty that the appellant has faced in acknowledging his medical condition and is grateful for his honest evidence. HMRC are sympathetic to the appellant's situation. However the appellant has not explained why his medical condition prevented him from taking corrective action on 24 May 2017, nor until 1 May 2018. They note that he was able to carry on his activities as an IT consultant during that period. During the six month period starting in December 2016 (the period of his last depressive episode) he was able to prepare and submit letters of representation in respect of both the FNs and the APNs; he was able to provide a sophisticated and reasoned letter to HMRC on 19 May 2017, some five days before the due date for taking corrective action, in which he confirmed that he would not be taking that action and will also be issuing a judicial review challenge. Furthermore he has not explained why that depressive episode which lasted six months prevented him from taking corrective action until 1 May 2018.

DISCUSSION

18. As we have said above, the appellant does not challenge the validity of the FNs, nor that he failed to take corrective action until 1 May 2018 when that action should have been taken on or before 24 May 2017. Nor does he make any submissions that the penalty notices are not valid, or that he did not receive them. We find as a fact that the penalty notices were valid and that he did receive them (and that his submissions regarding the dates on the customer service letters do not affect the validity of either the FNs themselves, nor the penalty assessments and notification thereof to the appellant).

19. The appellant's main submission is that the penalties are too high. He is therefore tacitly accepting that they are due and that there are no reasonable circumstances which justify his failure to take corrective action on or before 24 May 2017.

20. However, we have considered this point given that the appellant is a litigant in person, and that some of his submissions could be construed as comprising circumstances which might justify his failure to take corrective action on or before 24 May 2017. HMRC have addressed this point in some detail in their submissions.

Reasonable circumstances for failing to take corrective action

21. It was apparent from the evidence and submissions which the appellant presented at the hearing that notwithstanding his medical condition, he is a bright, intelligent and articulate individual. He entered into the Montpelier scheme with his eyes open and voluntarily gave it up some 18 months later. He clearly has a mind of his own. Having been sent a raft of correspondence and fact sheets between October 2016 and May 2017, relating to FNs, what a taxpayer needs to do to take corrective action, the penalty regime which would apply to a taxpayer who failed to take corrective action, and the differences between the FN and APN regimes, the appellant in our view took the conscious decision not to take corrective action on or before 24 May 2017.

22. However, it is our view too, that this was, to a large extent due to the advice given to him by Montpelier who had told him not to worry and provided him with template letters to send to HMRC some of which were couched in aggressive terms. The appellant could never have written those letters without external help. We think it is inconceivable that

he had any real intention of bringing Judicial Review proceedings against HMRC notwithstanding that he told HMRC that he would do so in his letter to them of 19 May 2017.

23. We would note in passing that notwithstanding this, the appellant very fairly said that he does not blame Montpelier, and the responsibility for taking corrective action, and not taking it until 1 May 2018 is his alone.

24. But given the volume and quality of information provided by HMRC regarding FNs and the consequences of not taking corrective action by the due date, we do not think it is reasonable for the appellant to claim that he was unaware of the need for him to take corrective action by that date if that claim is based on any ignorance of what the consequences might be of a failure to do so.

25. Nor do we think that the appellant has any grounds for complaint that the information provided to him before 24 May 2017 did not set out clearly the penalty regime which would apply if he failed to take corrective action, even if it did not specifically set out the precise discount policy of HMRC.

26. As far as the appellant's submission that he considered payment of the APN's comprised taking corrective action, we are unsympathetic. It is HMRC submission that the information provided to the appellant on or before 24 May 2017 make it expressly clear that the FN and APN regimes are different and separate regimes. The appellant recognised this in a call with HMRC on 21 November 2016. In another call on 4 December 2017 it was further explained to the appellant that paying off amounts due under an APN was not corrective action for the purposes of FNs. HMRC make the further point that in any event the appellant did not start paying off amounts under the APNs until July 2017 (even if he might have been discussing the amounts he needed to pay before then). But in any event, those payments did not start until after the due date for taking corrective action under the FNs. We can see how the appellant might consider that these payments justified ongoing failure to take corrective action after 24 May 2017, but cannot see any justification for his belief that there was no need to take corrective action on or before 24 May 2017. The test for reasonable in all the circumstances is an objective test. We do not think it was reasonable, on this objective test, for the appellant consider that payment under the APNs comprised corrective action for the purposes of the FNs.

27. The appellant's medical condition, and the depressive episode which took place in or around December 2016 and which lasted, on the appellant's evidence, between four and six months, could potentially be an objectively reasonable circumstance. But the appellant, very honestly has not submitted that it was a direct cause of his failure to take corrective action on or before the due date. He has explained that it made dealing with the FNs difficult and we can see that just getting to grips with them, whilst he was in that episode would not have been easy. But equally the FNs had been issued to the appellant on 4 November 2016. Whilst this might have tipped the appellant into his depressive episode, it was in our view open to him to have asked others to help him to deal with them either before or during the currency of that episode. Although we have no evidence on this, we suspect that whilst the appellant is in a depressive episode, he will be assisted by his family to help him cope with the vagaries of day-to-day life. The appellant mentioned in evidence that the whole issue with the FNs has caused him a great deal of stress and resolving the position was clearly therefore important to him. It was open to him to seek help from his family or externally, from HMRC or a tax specialist. It seems he did not do so. He thinks he might have telephoned HMRC but HMRC have no records

of any such call. So we do not think that the depressive episode, per se, is an objectively reasonable circumstance for failing to take corrective action. We are also sympathetic to HMRC's observations that during the currency of that episode, the appellant was able to submit his representations on the FNs and the APNs and send them the letter of 19 May 2017 telling HMRC in no uncertain terms that he was not intending to take corrective action.

28. That sympathy is, however, tempered by the fact that those representations and that 19 May 2017 letter were both originally authored by Montpelier, and the appellant acted almost as a postbox for that letter; and little of the appellant's real sentiments concerning the issues surrounding the FNs were reflected in those communications.

29. Our conclusion therefore is that it was not reasonable in all the circumstances for the appellant to have failed to take corrective action on or before 24 May 2017, and therefore HMRC were entitled to visit the penalties on the appellant for that failure.

Proportionality

30. The appellant's main submission concerning the penalties is that they are excessive and disproportionate. As originally assessed they amounted to 45.6% of the tax due, and as reassessed, they amount to 36% of the tax due. We will take the two submissions, namely excessive and disproportionate, in reverse order and consider proportionality first.

31. We have set out above an extract from the case of *Hutchinson* and indicated that we agree with the sentiments expressed therein. Whilst the appellant can argue that the penalty regime which applies to FNs is disproportionate, we do not believe that it is for the reasons given in *Hutchinson*. In truth, the appellant does not argue that the regime is disproportionate, more that its application to his situation is disproportionate. But for the avoidance of doubt it is our view, too, that the FN penalty regime is a proportionate one (notwithstanding comments by the House of Lords that the penalty regime should be abolished).

32. As can be seen from paragraph [43] below and for the reasons set out in the paragraphs immediately preceding it, we have reduced the penalties to £2,356 and £5,105.56 which means that they are 20% of the tax at stake in each of the relevant tax years. We do not consider that this percentage is disproportionate to this appellant in his particular circumstances. Whilst it might be harsh, it is not plainly unfair when considered against the appellant's failure to take corrective action in circumstances when it was made so expressly clear what he needed to do and what the consequences would be of failing to do it.

The amount of the penalties

33. The provisions of s214 (9) FA 2014 direct us that on an appeal against a decision of HMRC as to the amount of a penalty payable by a taxpayer, the tribunal may affirm HMRC's decision or substitute for that decision another decision that HMRC had power to make.

34. In considering whether we should make another decision that HMRC had power to make, we are not fettered by HMRC's policy regarding attributing a certain percentage discount to each of the statutory conditions in s210 FA 2014. However we must consider the penalties in light of those conditions and cannot step outside them.

35. Furthermore our jurisdiction is not a supervisory one. In other words we cannot review the reasonableness of HMRC's original decision regarding the level of penalties.

36. Instead we may consider the matter afresh in light of the evidence that has been provided to us at the hearing and, if we consider it appropriate, substitute a different amount of the penalties from the amount assessed by HMRC.

37. HMRC's original assessment allowed a 1% discount for condition b co-operation out of a maximum of 90% which their policy allocated to that condition. Condition b co-operation arises if a taxpayer has "counteracted the denied advantage." The level of discount which HMRC can apply depends on the "quality" of any co-operation given by a taxpayer and "quality" "includes timing, nature and extent". It is this expression which HMRC used to justify discounting a penalty by a modest amount if corrective action is taken, in their view, late. Their original policy seems to have been that taking corrective action after 90 days allowed them to apply merely a 1% discount to the 90%. Their revised policy allows them to discount a penalty by up to 70% (rather than 90%) for condition b co-operation and to allow a 5% discount where the delay in taking corrective action is between 26 and 52 weeks.

38. As we have said above it is not for us to review the reasonableness of either HMRC's policy nor its application to this appellant's particular circumstances. But it does seem to us that a discount based on timing is a somewhat blunt instrument when the circumstances surrounding taking corrective action and its implications are considered. This is an appeal case, in other words the appellant has brought an appeal. The FN regime, in essence, puts a gun to an appellant's head. Once an FN has been served, the appellant has a somewhat invidious choice to make. It can either take corrective action and give up its rights under the appeal. Alternatively it can take no corrective action, maintain its rights under the appeal and indeed proceed with that appeal to the First-tier tribunal and, perhaps, beyond. If the taxpayer subsequently loses the litigation, then it is liable to penalties since it had failed to take corrective action on the date specified for so doing in the notice. But by prosecuting his appeal the taxpayer will have put HMRC to a great deal of cost and additional effort, which is not the case if an appellant takes corrective action before his appeal gets to be heard by the tribunal. It is not clear to us from the evidence what steps have or have not been taken regarding the prosecution of the appeal between 24 May 2017 and 1 May 2018, and therefore what practical cost and effort had been unnecessarily expended by HMRC because of the delay in the appellant taking corrective action. HMRC did not make any submissions about financial or other prejudice which arose because of the delay.

39. This appellant has been allowed a 5% discount for taking a corrective action. We suspect that an appellant who continued with an appeal, failed to take corrective action, and who subsequently lost when the appeal was finally determined, would receive a 0% discount. It seems to us that allowing the appellant only a 5% discount for the saving in cost and effort that taking corrective action brought for HMRC is very modest when that cost and effort are taken into account.

40. Furthermore, it is our view that when considering whether we should substitute a different amount of the penalties, we can take into account the reasons why an appellant has failed to take corrective action until the date on which it is actually done so. In other words why he did not co-operate with HMRC until he did.

41. It seems to us that there are two reasons why the appellant took no corrective action until some 342 days after the date on which he should have done. The first concerns the

"advice" which he received from Montpelier. The second concerns his medical condition. We have set out above our views regarding both of these issues in connection with reasonable circumstances for failing to take corrective action by 24 May 2017. It is clear that Montpelier's advice and the provision of template letters for the FN and APN representations as well as the letter of 19 May 2017 suggested to the appellant that there were reasons why there was no need to take corrective action either at all or in a timely way. Furthermore his medical condition, in our view, affected his ability to positively engage with the FNs in 2017. Whilst, as we have said above, neither of these matters are objectively reasonable circumstances to justify the appellant's failure to take corrective action by 24 May 2017, they are matters which, in our view, have affected the appellant's behaviour towards taking timely corrective action thereafter.

42. Taking these three factors into consideration we have concluded that we should substitute a discount of 45% for condition b co-operation, in place of the 5% given by HMRC.

43. This gives a total discount of 75% for each of the two years, which, according to our arithmetic, reduces the penalty to 20% of the tax due for each of the years assessed. So revised amounts of penalties of £2,356.02 for the tax year ended 5 April 2006 and £5,105.56 for the tax year ended 5 April 2007.

DECISION

44. For the foregoing reasons it is our decision that this appeal be allowed in part, and the penalties revised to the amounts set out at paragraph [43] above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

NIGEL POPPLEWELL
TRIBUNAL JUDGE

RELEASE DATE: 03 SEPTEMBER 2020

APPENDIX

EXTRACTS FROM LEGISLATION

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]

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 cooperation.

(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.

212 [Aggregate penalties]

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)).