NCN: [2021] UKFTT 240 (TC)

# TC08189

*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 – Comtek considered and followed - penalties upheld – appeal dismissed*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2019/06432**

**BETWEEN**

**MR MICHAEL BENTLEY** **Appellant**

**-and-**

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

**TRIBUNAL: JUDGE NIGEL POPPLEWELL**

**Hearing conducted remotely by video on 14 and 15 December 2020**

**Mr Patrick Cannon Counsel for the Appellant**

**Ms Louise Gray of the Solicitors' Office and Legal Services of HM Revenue & Customs for the Respondents**

## DECISION

## PREAMBLE

1. This is a revised decision of the Tribunal following a review conducted pursuant to Rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

2. As can be seen from paragraph [8] below, the appellant has been assessed to three penalties for failing to take corrective action in response to HMRC issuing him with follower notices. I heard his appeal in December 2020 and a decision notice giving full findings of facts and reasons was released on 8 January 2021 (the "**Original Decision**").

3. The Original Decision upheld the penalties but reduced them to 24% of the denied advantage.

4. By notice dated 3 March 2021, HMRC applied for permission to appeal the Original Decision to the Upper Tribunal.

5. One of the grounds of that application was that the Tribunal had made an error of law when it gave a 6% reduction as credit for cooperation by the appellant when that cooperation took place after the assessment of the penalties. Although the application for permission to appeal did not include a request that I review the Original Decision, it seemed to me that I may have made an error of law and so it was incumbent on me to undertake such a review.

6. I therefore sought representations from the appellant on the merits of HMRC's position. The appellant provided his submissions on that issue on 19 April 2021. In the meantime, however the Upper Tribunal had released its decision in *HMRC v Comtek Network Systems (UK) Limited* [2021] UKUT 81 ("***Comtek***"). In *Comtek* the Upper Tribunal reviewed the approach which should be adopted when determining the level of penalties which should be imposed on taxpayers who are assessed to a penalty for failing to take corrective action following service of a follower notice. It seemed to me that, given that I was reviewing my Original Decision, I was obliged to take into account the sentiments expressed by the Upper Tribunal in *Comtek*, to the extent that they are binding on me, when conducting that review. I therefore sought further submissions from the parties on this point and am grateful for those submissions which I have taken into account when re-making the Original Decision.

7. I have decided, in accordance with section 9(4)(c) of the Tribunals, Courts and Enforcement Act 2007 to set aside those parts of the Original Decision which relate to the overall approach which should be taken when considering what level of penalties I should impose in the light of *Comtek* and to re-make the Original Decision accordingly, taking into account that I am not permitted, by statute, to give credit for cooperation to the appellant if that cooperation takes place after the date of assessment of the penalties. This Decision is that re-made decision.

## INTRODUCTION

8. This is an appeal against three penalties (the **"penalties**") issued under section 208 Finance Act 2014 ("**FA 2014**") in respect of Follower Notices ("**FNs**") issued to the appellant under Chapter 2 of Part 4 FA 2014. The FNs were issued following the appellant's participation, in the three tax years 2006-2007, 2007-2008 and 2008-2009, in a tax mitigation scheme named "IR35 Arrangement" in the FNs (the "**Scheme**") promoted by Montpelier tax

advisers ("**Montpelier**") which was designed to mitigate the appellant's liability to income tax and National Insurance Contributions ("**NICs**").

9. The first penalty was assessed in the amount of £15,005.24 for the tax year ended 5 April 2006 and notified to the appellant by a notice dated 29 March 2019.

10. The second penalty was assessed in the amount of £16,073.26 for the tax year ended 5 April 2007 and notified to the appellant by a notice dated 29 March 2019.

11. The third penalty was assessed in the amount of £12,515.98 for the tax year ended 5 April 2008 and notified to the appellant by a notice dated 29 March 2019.

12. HMRC raised the penalties as the appellant had failed to take corrective action by the date specified in the FNs as revised. They were calculated as 50% of the denied tax advantage which is basically the Income Tax and NIC's purportedly 'saved' by the Scheme.

13. On 14 July 2020 HMRC reduced the amount of the first penalty to £12,604.40, the amount of the second penalty to £13,501.53 and the amount of the third penalty to £10,513.42, which in each case is 42% of the denied tax advantage.

14. The appellant does not seriously challenge the issue of the FNs, but he says that it was reasonable in all the circumstances for him not to have taken the necessary corrective action on or before the due date for doing so which was originally 7 February 2017 as set out in the FNs but subsequently extended to 27 April 2017 following his representations in January 2017. He further says that if he should have taken corrective action by that date, the penalties should be reduced by the Tribunal for a number of reasons which I consider later in this Decision.

## EVIDENCE AND FINDINGS OF FACT

15. We were provided with a substantive bundle of documents**.** In addition the appellant gave oral evidence. From this documentary and oral evidence we make the following findings of fact:

*Background and documentary evidence*

(1) The appellant participated in the Scheme for each of the tax years under appeal. HMRC opened enquiries into the returns submitted by the appellant for those years. The enquiry into his 2005-2006 return was opened on 27 July 2007; into his 2006-2007 return, on 18 July 2008; and into his 2007-2008 return, on 6 January 2010.

(2) HMRC issued closure notices in 2009 and 2011 for each of these three years increasing the appellant's liability to both income tax and NICs. For 2005-2006, the liability was increased from £3,308.87 to £33,319.36, an increase of £30,010.49. For 2006-2007, the tax liability was increased from £2,287.99 to £34,434.51, an increase of £32,146.52. For 2007-2008, the liability was increased from £2,409.17 to £27,441. 13, an increase of £25,031.96.

(3) In time appeals were made on behalf of the appellant by Montpelier in relation to those closure notices. In each case the grounds of appeal was the same. The distributions were not partnership profits; they were not taxable under the relevant double tax agreement; retrospective legislation which sought to defeat the Scheme fell foul of the Human Rights Act 2008.

(4) The appeals were put on hold pending the outcome of the appeal in *Robert Huitson v HMRC* [2015] UKFTT 488 ("***Huitson***"). That appeal was finally determined on 23 January 2016 when time for making an application to appeal against the FTT's decision had expired without such an application having been made. In HMRC's view it therefore became a judicial ruling relevant to the arrangements and thus fulfilled Condition C set out in section 204 FA 2014.

(5) HMRC issued Accelerated Payment Notices ("**APNs**") to the appellant for each of the three tax years, on 16 April 2015. The appellant sent these to Montpelier. The amounts claimed by these APNs are different amounts from those set out at [(2)] above. These APNs were given on the basis that the Scheme was a notifiable scheme, which turned out not to be the case. And so HMRC withdrew these APNs on 30 December 2015 and 6 January 2016. Copies of the letters withdrawing the APNs were sent to Montpelier (Trust & Corporate) Services Ltd.

(6) The FNs 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 section 208 FA 2014.

(7) 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.'

(8) 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 cooperating with HMRC before a notice of penalty assessment was sent. The definition of cooperation in that context was also provided.

(9) The FNs also made it clear that the representations must be made by the date on which the corrective action must be taken and that corrective action must be taken on or before the later of the original date (namely 7 February 2017) or 30 days after the date on which HMRC tells the taxpayer of their decision in respect of his representations. Included with the FNs were forms which the appellant could complete to take corrective action.

(10) On the same date as they issued the FNs, HMRC also issued a second tranche of APNs to the appellant. The amounts payable under these was the same as in the original APNs.

(11) The FNs and these APNs were sent with a covering letter which indicates that HMRC had told the appellant on 24 October 2016 that they were proposing to send him the FNs and revised APNs; that he should read them carefully since they contain important information including details about penalties; that the FNs tell him that he will be liable to pay a penalty if he does not take corrective action, and the APNs require him to pay the amount due by the due date; that he could make representations in respect of both; that he should also read factsheet CC/FS25a, a

copy of which was sent to him on 24 October 2016; the consequences of failing to take corrective action; the penalty consequences of failing to take corrective action or paying the amount due under the APNs; and that if he wanted to settle his tax affairs he should telephone HMRC straight away who would then tell him what he needed to do next. The letter explained that it was "entirely up to you whether to settle, but if you do not, then the current appeal will remain open. However, as we have now given you a follower notice, you will be liable to pay a penalty if you do not take corrective action".

(12) The appellant did not send copies of these FNs or the APNs to Montpelier. He had however contacted Montpelier and told them that they had been served on him, and asked if he should send them on. But was told that Montpelier knew that a raft of these notices had been served on other clients of theirs who had used the Scheme, and they knew the content of those notices. There is no evidence that the appellant contacted HMRC either by telephone or by any other means in response to these notices.

(13) On 22 December 2016 HMRC issued a reminder letter relating to the FNs and APNs, reminding the appellant of the deadline for taking corrective action and for making payment, notifying the appellant of surcharges for not paying the APNs on time, and reminding him of the penalties which he might face if he did not take corrective action. HMRC followed this letter up with a call to the appellant on 12 January 2017 which was not answered by the appellant but HMRC left a voicemail message asking the appellant to contact HMRC regarding the notices. A similar call was made to the "appellant's accountants" on 18 January 2017. Again a voicemail message was left asking the accountants to contact HMRC which they failed to do. The identity of the accountants is not clear from the telephone records, and it does not appear to correspond to the telephone numbers on the Montpelier letter dated 20 September 2011 which accompanied their appeal against the closure notice for the tax year ended 5 April 2008.

(14) On 20 January 2017 the appellant made representations against the FNs under section 222 FA 2014. This seems to have been accepted by HMRC as being made under section 207 FA 2014, which is the correct section for representations in relation to FNs. Section 222 FA 2014 is relevant to representations in relation to APNs. That letter indicated that the FN was wrong in law for four reasons. On 29 January 2017 the appellant made further representations in respect of the FNs, this time under section 207 FA 2014. The appellant maintained his stance that the FNs are wrong in law, and as well as giving the previous four reasons, added a further three. On the same day the appellant submitted representations on the APNs. He contended that the APNs were wrong in law for five reasons. Interestingly, this letter is headed "DRAFT-IR35 APN response". The appellant says that these were pro forma letters sent to him by Montpelier which he simply signed and sent on to HMRC.

(15) HMRC issued FN and APN representation conclusion letters to the appellant on 23 March 2017. Both FNs and APNs were upheld. The FN letters informed the appellant that corrective action must now be taken by 27 April 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. Both conclusion letters also stated that HMRC would

not consider any representations sent after the statutory period for making representations has passed; that statutory period is 90 days after receipt of the original notice; and that the conclusions in the letters are final.

(16) On 5 April 2017 HMRC called the appellant who confirmed that he had received the conclusion letter, and when it was pointed out that corrective action needed to be dealt with by 27 April 2017 to avoid penalties, told HMRC that the matter would be dealt with before then.

(17) On 21 April 2017 the appellant wrote to HMRC, referring to the review conclusion letters, and making comments on certain aspects of those letters. The appellant's evidence is that this letter was drafted by Montpelier and sent to him and he simply copied and pasted it onto his own letterhead and sent it on to HMRC. The letter makes comments about the particulars of the Scheme, the role of the designated officer, the 90 day time limit, that the appeal does not include NICs, and that HMRC have not explained why Huitson applies to the appellant. It also notes the view of HMRC "that no further representations can be made by me." The letter goes on to say that for the reasons given in the letter he would not now be taking corrective action by 27 April 2017. The letter finishes with a paragraph on judicial review and the appellant indicating that "I will therefore be issuing such a Judicial Review challenge by 23 June 2017 within the statutory time limit".

(18) The date for taking corrective action was 27 April 2017. The appellant did not take corrective action until, at the earliest, 26 April 2019.

(19) On 8 May 2017 HMRC wrote to the appellant telling him that he was liable to a penalty for having failed to take corrective action and enclosed a factsheet explaining all aspects of the penalty regime, how the penalties are calculated, how the penalties can be mitigated by taking corrective action, and what corrective action meant. The letter also indicated that HMRC would, within 2 to 6 weeks from the date of the letter, send the appellant a penalty explanation letter telling him the amount of penalty that they thought was due, the amount of cooperation they consider that he had given, and how the penalty had been calculated. It also said that if the appellant thought that he had cooperated and should have been given credit for that, he should tell HMRC. And that he would be given credit for cooperation between the date of the penalty explanation letter and the date of the penalty assessment. The appellant then telephoned HMRC about what steps he should next take, and followed that up with an email asking HMRC not to charge penalties until he had received a reply from another HMRC officer. Some two months later, on 14 July 2017 the appellant wrote to HMRC saying that since he had no reply to his letter dated 21 April 2017 he was not intending to make any payment and asking HMRC to address further points regarding the APNs. He said that he was following tax advice from respected tax advisers that was legal at the time and that the law was unfairly changed retrospectively. He indicated he was going to take the matter up with his Member of Parliament.

(20) HMRC responded to that letter on 26 July 2017 indicating that the matter had been referred to a colleague for review and in the interim "I have arranged for the amounts shown as due on the Accelerated Payment Notices and on the late payment penalties to be stood over."

(21) In August 2017 the appellant had written to his MP, Dominic Raab, who in turn had written to HMRC enclosing a copy of the appellant's letter and asking for comments on the points that the appellant had raised. In response, HMRC, in a letter dated 3 October 2017, set out a detailed exposition of the FN and APN regimes. That letter concluded with the observation that if the appellant was concerned about his ability to pay the APNs or the penalties, he should contact HMRC and that "we have an excellent record of agreeing payment arrangements where people need time to pay."

(22) On 10 October 2017 HMRC replied to the appellant's letter of 21 April 2017. They dealt with all the points raised in that letter, but not in detail. They also pointed out that representations by a taxpayer must be made within a prescribed period.

(23) In a letter to HMRC dated 7 November 2017, the appellant refers to a letter of 11 October 2017 in which he was apparently offered a review by an HMRC officer who had not previously been involved in the case and indicated he would like to take up that offer. He also set out why he thought HMRC had been unreasonable in levying penalties. It is not clear whether these penalties related to the FNs or the APNs. It does however mention the fact that the deadline had been extended to 27 April 2017; that he did not receive any reminders for this deadline; that HMRC were using penalties as a revenue generation tool which was unfair and that HMRC had been deliberately misleading in giving confusing information. He hoped the independent reviewer would take a fair and pragmatic approach to his case.

(24) On 17 January 2018 HMRC sent the appellant a penalty explanation letter regarding the FNs together with penalty explanation schedules which explained the position in detail. They invited him to tell them if there was any information that they had not already taken into account and that that information should be with HMRC by 14 February 2018. The appellant then telephoned HMRC on 26 January 2018 saying that he was confused about the FNs and the related penalties as he thought the FNs related to NICs which he thought had been withdrawn. The call handler talked him through the letter which had been sent to him along with the FNs on 4 November 2016 and suggested that the appellant review his FN paperwork over the weekend before deciding what action to take next.

(25) On 27 January 2018 the appellant sent a further letter to Dominic Raab which set out his explanation as to why he was confused by the interaction between APNs and FNs and that he had assumed they were the same thing and that only one level of penalties would be levied. He explained that he was in financial difficulties and that just paying the outstanding amount was hard enough. He asked if Mr Raab could take this up with HMRC and see if HMRC might consider dropping the penalties as they resulted from misunderstanding on his part and he had now offered to settle all outstanding tax. He said that he had been a victim of an unscrupulous tax adviser who had promised that their scheme was legitimate and they had advised him extremely poorly in this matter. He realised with hindsight that he should have resolved this when he first received HMRC's letters.

(26) On 28 January 2018 the appellant sent a lengthy letter to HMRC in which he indicated that: he thought the FNs and APNs were linked as referred to the same amounts in the same tax years; he had honestly mistaken both FNS and APNs as the same items and had been discussing this with his tax adviser for the years in

question who had not advised him to treat these items as different; he thought in pursuing cancellation of the APN surcharge of £4,043.45, he thought he was dealing with the FNs; and that the comment that the late payment penalties could be stood over related to all the potential penalties that could be visited on him. He went on to say that he was waiting for replies and letters from HMRC; and had been advised by Montpelier that he should not pay any amount outstanding until he had received satisfactory answers to those letters; he had sent an email to the APN team and the response dealt with both APNs and FNs which further led him to mistakenly think that the two were linked; he told HMRC that he had taken out certificates of tax deposit in 2014 and asked HMRC to put in place the process for the amount of £80,869 to be "released" and used to settle the outstanding amounts mentioned in the APNs and the FNs. He told HMRC that he was very disappointed with the lack of guidance he had received from Montpelier and that he had trusted them for too long and that he now realised that "I was not equipped to understand the difference between APNs and FNs and potential penalties arising." He finished by saying that he would like to resolve the situation as soon as possible and did not intend to take any more guidance from Montpelier who had poorly advised him.

(27) A debt management letter chasing the APN payments was sent to the appellant on 29 January 2018. On 2 February 2018 HMRC responded to the appellant's letter of 28 January 2018 addressing all its points and setting out, once again, how FNs work, namely that in the absence of corrective action, the appellant would be liable to a penalty, and referred to previous correspondence and paperwork relating to both the FNs and the penalties which have been sent to the appellant. That letter also explained that the surcharges were a separate matter from taking corrective action and related to late payment of the APNs. It noted that the appellant had appealed against the surcharges and was awaiting the outcome of the appeal. It also explained how the appellant could initiate the process to release payment from his certificates of tax deposit and the allocation of the amount released by those certificates to his tax liabilities. The letter also said that "if you have now decided to take late corrective action, then please send your corrective action to us at the address given at the heading of this letter. We must point out that late corrective action is still subject to FN penalties."

(28) In letters dated 12 April 2018 HMRC acknowledged that the appellant's APN liabilities had been cleared by use of his certificates of tax deposit together with the surcharges thereon.

(29) HMRC then wrote to the appellant in a letter dated 24 May 2018 in which they indicated that the appellant, in their view, had no Limitation Act defence against enforcement action in relation to his NICs. It also went on to remind the appellant of what was said in the covering letter sent to the appellant on 4 November 2016 with the FNs, and what the FNs themselves said about taking corrective action and liability to penalties for failing to do so. And on 31 May 2018 they responded to letters sent by Dominic Raab on 8 February and 5 April 2018 about the appellant and the points that the appellant had raised in his letters to Mr Raab. It, once again, explained the distinction between FNs and APNs, that HMRC had sent the appellant a penalty explanation letter which had been copied to his agent Ashanta Solutions, that payment of the late payment surcharges on the APNs is a separate matter from taking corrective action, that the appellant had no Limitation Act

defence to his liability to Class 4 NICs for the years 2006 to 2008 and that HMRC would be taking action to enforce any amounts outstanding. And that if the appellant decides to "take late corrective action now", the address to whom he should write.

(30) There was then further correspondence between the appellant and Dominic Raab and Dominic Raab and HMRC, culminating in response to Mr Raab on 9 August 2018 in which HMRC set out in considerable detail the background to the APN and FN regimes, the justification for their introduction in the Finance Act 2014, the differences between APNs and FNs, and the obligation on a "taxpayer" to take corrective action failing which they will be liable to a penalty. They also stated that they were not in a position to finally resolve their review of the appellant's use of the avoidance scheme unless he withdrew his appeals, asked for the tribunal to hear them, or he agreed a binding settlement with HMRC.

(31) There was also further correspondence between the appellant and HMRC in which the appellant maintained his misunderstanding about the differences between the APNs and FNs, and HMRC indicated that the appellant needed to take corrective action in respect of the FNs if he was to avoid or mitigate a penalty.

(32) Dominic Raab became involved again on 6 November 2018 when he wrote to HMRC appending letters that he had received from the appellant, including one dated 6 November 2018 to HMRC, in which the appellant pointed out that he had been a PAYE employee for most of his working life; he had not been aware of the risky potential of the schemes until entering into them; HMRC should take a more understanding and less combative approach to unsuspecting scheme participators; he and his wife were finding life very stressful and he was going to end up paying somewhere between 20% and 70% more than he would have done for his fair share of tax; there is evidence of questionable business practices and HMRC's dealings with him and raising a number of other observations on HMRC's correspondence. He reiterated that he did not fully understand the workings of FNs and saw surcharges as further evidence that HMRC are determined to extract as much income out of law abiding citizens as is possible, and asked for a local meeting with a senior HMRC representative to discuss the situation.

(33) HMRC responded to this letter on 28 December 2018 dealing with the points raised in Mr Raab's letter, and on 5 January 2019, wrote directly to the appellant to respond to his letter of 6 November 2018. It dealt head on with all the points raised by the appellant, in many cases by reference to previous correspondence. It indicated that HMRC had fully explained FNs and their workings to the appellant in previous letters to him and to his MP and had nothing further to add. It noted that he had not taken corrective action and intended to proceed to issue the FN penalties for the three years under appeal for that failure. They also indicated that they could arrange for a senior member of the APN technical team to attend a meeting to discuss and clarify the FN and APN legislation but that that person would not be able to waive or abandon penalties/surcharges which HMRC were proposing to issue, as the appellant would be able to take these forward through the formal appeals process.

(34) Further correspondence between the appellant and HMRC (a complaint letter concerning HMRC's handling of his case); between the appellant and Dominic

Raab; and between Dominic Raab and HMRC took place in the Spring of 2019, but their relevance to the issue under appeal is limited to further comments made by the appellant concerning his misunderstanding regarding the interaction between APNs and FNs; and HMRC's response that they had previously explained that interaction on many occasions, and that the penalties relating to FNs were as a result of the appellant having failed to take corrective action before the due date of 27 April 2017.

(35) On 29 March 2019 HMRC issued notices of assessments for the FN penalties. These notices are all essentially the same for the three years under appeal, save that the amounts are different. Each notice of penalty assessment itself simply refers to the scheme name and reference and sets out details of the penalty, the date by which the penalty should be paid (2 May 2019), the payment reference number, the fact that interest will be payable if the penalty is not paid on time, details of how to pay and the appellant's appeal rights. Each notice is accompanied by a penalty explanation schedule which sets out in detail how the value of the denied advantage has been calculated (explained on a further form), how the penalty regime works, the reduction for the quality of cooperation to the maximum penalty (50% of the denied advantage), and an explanation of why, for this appellant, no reduction has been given. And so, in each case, the penalty is the maximum amount for each of the three years.

(36) On the same date HMRC sent notices to the appellant of surcharges for failure to pay the APNs on time for each of the three tax years.

(37) On 29 March 2019, HMRC also sent a letter to the appellant dealing with certain aspects of the complaints that he had raised in his letter of 30 January 2019.

(38) On 1 April 2019 the appellant wrote to HMRC, copied to Dominic Raab, in which he found it totally deplorable that HMRC had levied penalties at the full 50% rate when they had an option to levy penalties at only 10%, and provided reasons for that view. He indicated that he had been shocked by a number of things including HMRC's appalling handling of his case, the constant delays, and their unhelpful attitude. He had made an honest mistake, he had been sold a scheme which had been told was totally legal, and had been told that the scheme provider would stand with him and help him deal with HMRC (which did not happen). He asked that HMRC reconsider the size and nature of the penalties and that he would call to discuss this with one of HMRC's advisers later that week.

(39) On 24 April 2019 the appellant appealed against the APN surcharges which had been visited on him on 29 March 2019.

(40) In a letter dated 26 April 2019 from WTT Consulting ("**WTT**"), WTT explained that they were now advising the appellant who now wished to take corrective action and withdraw any appeals in respect of the three tax years under appeal and that he was relinquishing the denied tax advantages for those years. In a second letter of the same date, WTT also explained the reasons why the appellant had failed to take corrective action before 27 April 2017; the fact that another of their clients in the same position as the appellant had had their deadline for taking corrective action extended from 17 November 2017 until 22 March 2019; and asked why that option

had not been extended to the appellant; and asked too that the appellant should be offered a new corrective action deadline to avoid penalties.

(41) A meeting was held between the appellant and his wife, and members of HMRC, on 29 April 2019. The parties have conflicting views as to what was discussed, and the tone in which that discussion took place. HMRC's note, compiled by one of its attendees, suggests that the majority of the meeting was spent discussing areas that had previously been raised by the appellant in correspondence and confirmation that the appellant now understood what corrective action was; that the appellant would now like to settle his appeals and bring everything to a conclusion but was unhappy with a 50% penalty especially in light of the extension to corrective action which had been previously given to a client of WTT's; it also reflects the appellant's observation that correspondence which should have been sent to one Montpelier entity had been sent to the wrong entity. The appellant's recollection of the meeting is somewhat different, and is dealt with in my consideration of his oral evidence, below.

(42) HMRC's view of the matter letter dated 29 May 2019, written in response to WTT's appeal against the FN penalties, upheld the penalties and gave reasons for that decision. It set out the reasons why the FNs were given in the first place and why the four conditions in section 204 FA 2014 had been met; it reviewed the timing and nature of the representations made by the appellant on 20 January 2017, and considered that review and the extension of the date for taking corrective action to 27 April 2017; it summarised the grounds of appeal as being failure to take corrective action because he did not have a tax adviser at that time and that he had been informed by Montpelier that the APNs were subject to judicial review, and that he believed that given that an extension of the date for taking corrective action had been given to another client of WTT, the same extension should be given to him. HMRC's view of these grounds was that he had clearly been told on a number of occasions that failure to take corrective action resulted in penalties; he had told HMRC in his letter of 21 April 2017 that he was not going to take corrective action and would be commencing judicial review proceedings; it seemed that notwithstanding what WTT had said in their letter 26 April 2019, he did not wish HMRC to action the request to take corrective action for reasons given at the meeting on 29 April 2019; and that while HMRC cannot comment on the affairs of one taxpayer to another, the circumstances of the taxpayer mentioned by WTT consulting were materially different from his circumstances. The reviewing officer did not think that the appellant had demonstrated that it was reasonable in all the circumstances for him not to have taken corrective action, nor were there any other reasons why the penalties should be withdrawn or amended, and that the penalties in their full amounts remained chargeable. It went on to say that, as regards corrective action, HMRC were formally rejecting the appellant's request for an extension to the deadline for taking that and were, in consequence, not proceeding to process the appellant's corrective action request, but that if the appellant wanted HMRC to treat WTT's letter and attachments of 26 April 2019 as corrective action, HMRC would act accordingly.

(43) The view of the matter letter also offered the appellant the opportunity to have the decision in that letter, reviewed by an independent HMRC officer which offer the appellant accepted via WTT, who on 24 June 2019 wrote to HMRC indicating that

they wished to accept HMRC's offer of review and would also like to confirm that "our client is taking corrective action and therefore attach the letter dated 26 April 2019." A second letter to HMRC of even date therewith was also sent by the appellant to HMRC setting out further information which he thought should be taken into account in the review. There was further correspondence between WTT and HMRC, and between HMRC and the appellant, in June and July 2019, and HMRC issued their review conclusion letter on 6 September 2019 which included a full review of the foregoing background, and concluded that the penalty assessments should be upheld in the amounts originally assessed.

(44) The appellant notified his appeal to the Tribunal on 3 October 2019.

(45) In a letter to the appellant dated 14 July 2020, HMRC indicated that they had reviewed their policy with regard to reductions for cooperation for FN penalties where the substantive tax is under appeal and applied that provision to the appellant's penalties which would now be amended. This change in policy meant that the reduction for providing reasonable help with working out the amount of the denied advantage, for which the appellant had formally been given no credit, had now been allowed to the appellant in the amount of 20%. This is 20% of the 40% penalty range, so 8%, and the penalties were therefore recalculated on the basis of 42% of the denied advantage for each of the three tax years.

*The appellant's evidence*

(46) The appellant gave the following evidence in his witness statement: he had entered into the Scheme following a Montpelier representative's sales pitch in 2005; there appeared to be a number of tax advantages including tax efficiency and the appellant was told that the Scheme was accepted by HMRC; on entering into the Scheme he submitted forms to HMRC in 2005 and authorised Montpelier to be his agent; Montpelier sent him various documents concerning the Scheme in 2005 and submitted his tax returns for the years under appeal; when HMRC opened their enquiries into those returns he sent that correspondence on to Montpelier; he had been advised by Montpelier that HMRC were attempting to defeat the Scheme by retrospective legislation, and Montpelier further advised that such retrospective tax changes were invalid and would be defeated, principally on the basis of a human rights argument; Montpelier advised him to invest in certificates of tax deposit which he did in early 2014 in an amount of £85,000; Montpelier asked him to make representations against the first tranche of APNs, which were subsequently withdrawn; he received further APNs and FNs in November 2016; his initial reaction was that FNs related to NICs for which there were different procedures from tax with which the APNs were concerned; he expected Montpelier to advise on the FNs and was not unduly concerned about them; he thought the FNs may not apply to him since the APNs mentioned the Allenby partnership which he was never part of; Montpelier advised him that there was nothing to worry about as regards these APNs and FNs, and sent him letters of representation to which he added his name, and sent off to HMRC; these are the letters of 20 January 2017; he received slightly amended pro forma letters from Montpelier on 29 January 2017 which he also sent on to HMRC; he sent responses from HMRC on to Montpelier and was again told by Montpelier there was nothing to worry about, there were legal challenges ongoing and that HMRC had been premature in sending these documents out; he only briefly skimmed these documents as he was still working

abroad; he received a further draft response from Montpelier in April 2017 to which again he added his name and address and sent to HMRC on 21 April 2017; he phoned Montpelier following receipt of the letter stating he was liable to a penalty of 50% for failing to take corrective action and was once again told there was nothing to worry about and there would be another extended deadline; his understanding that the penalties will be stood over was that no action would be taken by HMRC until he received a response from HMRC to his letter of 21 April 2017; when HMRC responded to his letter, on 10 October 2017, he sent their letter to Montpelier; he was pleased that one aspect of that letter seemed to be that HMRC's claim for Class 4 NICs was out of time; at this time he was working abroad sometimes for two weeks at a time and was leaving matters to Montpelier; he thinks that HMRC should have extended the deadline in response to his second representations of 21 April 2017, something which they have done for other taxpayers; his complaint about HMRC's processes and review procedure, to the Adjudicator and the Parliamentary Ombudsman, was rejected, following which he appealed against the APNs surcharges; he thought that the application of his certificates of tax deposit against his income tax meant that he had no further liability and was not aware of the need to take corrective action as he had assumed he had done this by settling his outstanding tax; in his view HMRC have applied his certificates of tax deposit incorrectly and that matter is still in dispute with HMRC; the first round of penalty notices appear to deal only with income tax and not with NICs; it was only following a review of the paperwork following his telephone call with HMRC on 26 January 2018 that the whole horror of the FN business struck him; he had written and met with his MP Dominic Raab who appeared supportive and horrified by the FN regime; the appellant, in turn, was horrified when in May 2018 he felt that HMRC had changed their opinion regarding his liability to Class 4 NICs for which he was liable; he wrote to HMRC following this, and it was his view that this was clearly a vindictive act by HMRC motivated by a constant attack on IT Contractors; with hindsight he wished he had pushed for an extension to take corrective action for a further month after 27 April 2017; his work as an IT contractor takes him away from home for long periods at a time which meant he relied on Montpelier; HMRC's representatives at the meeting on 29 April 2019 showed no compassion or consideration; his understanding was that the meeting was to be a friendly discussion with hopefully a negotiated outcome but to him it was obvious from the start that HMRC were not going to move from their perceived right to penalise a hard-working individual; one point that emerged from the meeting was that HMRC had sent the second tranche of APNs and FNs to the wrong Montpelier entity; he engaged WTT in April 2019 to assist with reducing and overturning the FN penalties; the whole situation concerning the FNs and penalties has been very stressful for him and his wife; the FN regime and the penalties associated with failure to take corrective action is unfair; he has already paid his back tax and NICs together with interest; the financial and emotional cost to his family of having to find the money to pay the penalties is immense; he has found HMRC's conduct throughout his case deplorable, and they have demonstrated no understanding or compassion.

(47) In examination in chief, the appellant gave additional evidence: his understanding from Montpelier was that taking corrective action meant challenging the amount set out in the FNs, and he was not challenging the amount which he thought was correct; he had little understanding why HMRC withdrew the first tranche of

APNs; he relied on copies of the November 2016 APNs and the FNs being sent to Montpelier but it seems that HMRC sent them to the wrong Montpelier entity; he was 75% confident that the APNs and FNs would be withdrawn having seen the reasonableness of Montpelier's arguments but didn't understand much of what Montpelier had said in the pro forma letters which they had told him to send on to HMRC; he thought Montpelier would take judicial review action; if that action was successful, his FNs would be deemed not to be valid and he would have no liability to NICs; he had assumed that the deadline for taking corrective action would be extended following the submission of his second representation letter of 21 April 2017; towards the end of 2017 he was dedicating his time to fighting the surcharge on the APNs; during 2018 the advice and correspondence with Montpelier dwindled, he started trying to handle correspondence himself; he realised that given the unhelpful nature of the communications he was receiving from HMRC he needed help from a professional adviser; he turned to WTT in April 2019 who advised him to take corrective action; Montpelier never advised him to take corrective action; he is disgusted with the way in which Montpelier had handled his affairs; he relied on professional advice throughout; he had little time to focus on the documents since he was working extensively away from home; even at the meeting with HMRC in April 2019 he wasn't fully aware of what the FNs really meant and what they were following; on receipt of the first letter concerning penalties he telephoned Montpelier who advised him to speak to HMRC which he did; HMRC never said that he wasn't allowed to make further representations; at the time at which he made the representations on 21 April 2017 he was confused about surcharges on penalties and about APNs and FNs; he thought the former related to tax and the latter to NICs; he thought that any challenge to the FNs on the basis of human rights was likely to be a lengthy one which would ultimately defeat the deadline for him taking corrective action; he re-emphasised the financial and emotional stress that the whole process has caused; it has been a very upsetting time for himself and his wife and he has been shocked with the attitude displayed towards him by HMRC; whilst he did not feel particularly stressed in the Spring of 2017, that was largely because he still believed he was following the law as instructed by Montpelier, and furthermore he thought in dealing with HMRC, he was dealing with a reasonable organisation; as things turned out, he realised that HMRC were not being objective nor compassionate.

(48) In cross examination the appellant added; Montpelier never provided him with documents which dealt with the workings of the Scheme at or around the time that he decided to use it; there was no documentary corroboration of the oral statements made by Montpelier about the Scheme and that it had been approved by HMRC; when he got demands for payment under the APNs they did not come out of the blue since they had been anticipated by his taking out the certificates of tax deposit; he is not a tax expert and he did not understand the points that Montpelier, who are tax experts, were making in the pro forma letters that he was sent in January 2017 to send on to HMRC; nor did he understand the ramifications of failing to take corrective action as set out in the FNs; he thought the extension of the deadline for taking corrective action to 27 April 2017 also extended the deadline for making representations; his interpretation of the phrase that the penalties would be stood over was that they would be cancelled not merely postponed; his understanding of taking corrective action was that he needed to correct the amounts set out in the FNs but the amounts were not in dispute; a penalty of 50% of what he had already

paid is unacceptable for simply making a mistake about understanding the law; he was probably not prejudiced by HMRC's mistake of sending the November 2016 APNs and FNs to the wrong Montpelier entity, but it was certainly embarrassing.

## THE LAW

16. I 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 I set out below sections 210 and 214 FA 2014 which deal 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.

17. The subsections (3) (a) – (e) in s210 FA 2014 correlate with the sections set out in the penalty explanation schedules mentioned at [8(35)] above.

> **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)).

## CASE LAW

### Corrective action

18. The parties agree that Judge Redston's decision in *Giulio Corrado v HMRC* [2019] UKFTT 275 ("***Corrado***") correctly sets out the test that I should apply in this appeal. She describes that test as follows:

**"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."

19. Ms Gray also thought that paragraph 133 of her decision was also relevant to this appeal. In that paragraph Judge Redston says:

"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."

20. I also agree with the views set out in paragraphs 129-131:

*"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……."

## THE ISSUES IN THIS CASE

21. It was not disputed that:

(1) The FNs and penalty assessments were correctly issued and served on the appellant;

(2) The specified date for taking the necessary corrective action was 27 April 2017;

(3) No corrective action was taken, at the earliest, before 26 April 2019.

22. Under s208(2) FA 2014, the appellant is prima facie liable to pay the penalties. The issues that I 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 27 April 2017, since if so the penalties are not payable; but if they are payable

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

23. Although this was not disputed, and notwithstanding Montpelier's early contentions that the FNs were invalid, I find as a fact that the FNs were valid and that they and penalty assessments were correctly issued and served on the appellant.

## BURDEN OF PROOF

24. Given that I have found that the penalties were correctly imposed, it is for appellant to prove to me, on the balance of probabilities, that one of the grounds of appeal under s214(3) FA2014 is made out. The onus is on him too to show whether, and if so why, I should substitute my decision regarding the amount of the penalties for the decision made by HMRC.

## SUBMISSIONS

25. Both Mr Cannon and Ms Gray made clear and helpful submissions both written and oral for which I am most grateful and which I have carefully considered. However, in reaching my conclusions I have not found it necessary to refer to each and every argument advanced on behalf of the parties.

26. In his written submissions, Mr Cannon advanced the following points in relation to

corrective action: Mr Bentley had been advised by Montpelier not to pay the APNs nor to take corrective action; he had doubts about the procedural validity of the second round of APNs, and the FNs issued to him in November 2016 since the first tranche of APNs had been withdrawn; he thought the FNs had been issued in error since no FNs accompanied the first tranche of APNs; the appellant found the whole situation confusing as he was working out of the UK for some considerable periods of time, he did not read the documents in detail, and relied on Montpelier; he believed that paying off the tax due under the APNs by way of cashing in his certificates of tax deposit was taking corrective action; he had involved his MP, Dominic Raab, whose advice was to arrange a meeting with HMRC but this meeting took time to arrange; the appellant had made an honest mistake; the appellant did not understand that when HMRC said the penalties will be stood over, that meant they would be postponed rather than being waived; Montpelier had assured him that HMRC's stance as regards the Scheme, and the FNs would be defeated on the basis of a human rights challenge; the appellant's confusion about the position was exacerbated by his anxiety and stress caused by his situation.

27. In relation to an adjustment of the penalties, Mr Cannon cited the decision in *Glasby v HMRC* [2020] UKFTT 352 ("***Glasby***") which he suggested that I follow, since the appellant's circumstances in this case are similar to those in Glasby; in that in that case, the appellant relied on Montpelier, and was suffering from a medical condition; given that the penalties were reduced in that case, I should apply a similar reduction since the factors are similar in this case.

28. In his oral submissions, in addition to the above, Mr Cannon advanced the following further points concerning corrective action: it was not feasible for the appellant to take advice about corrective action from his advisers, Ashanta Solutions, as they were simply a husband and wife bookkeeping team: Ms Gray had mentioned the case of *HMRC v Benton* [2018] UKFTT 0953 ("***Benton***") in her closing submissions as authority for the proposition that a taxpayer cannot blindly follow advice; yet Benton differs markedly from this appeal in that in the former it had not been possible to establish all the circumstances and there were missing facts which were of fundamental importance; in this case the appellant has given full testimony in his witness statement and oral evidence; whilst the appellant now realises that the advice he was receiving at the time from Montpelier was bad advice, I must look at the situation without the benefit of hindsight, and as it appeared to the appellant at the time (i.e. prior to 27 April 2017); the difference between a procedural and substantive irregularity is not easy to discern; the appellant was told that the FNs would be cancelled by judicial review or a successful human rights challenge; advice that statutory provisions are unlawfully retrospective can be a procedural irregularity; the appellant doubted that the FNs were issued procedurally regularly given the APN history; he is not a tax expert, the provisions are extremely complex, and it was difficult for the appellant to work out the validity of what was being sent to him by HMRC where, on the one hand, HMRC said he had to pay and take corrective action, and on the other Montpelier was saying that the FNs were invalid and would be overturned; the involvement of Dominic Raab may have reinforced the appellant's belief that he did not need to take corrective action; the situation has caused immeasurable stress and anxiety to the appellant and to his family.

29. Mr Cannon also made further points in his oral submissions concerning a reduction to the penalties: he mentioned Glasby, and that the reduction given in that case reflected the fact that Mr Glasby, by taking corrective action, benefited HMRC by not putting them through the hoops of taking his appeal to the Tribunal; the same is true with this appellant; the penalty explanations were very difficult to understand; in Benton, and in an unreported, as yet, case mentioned by Ms Gray and included in the authorities bundle, *Barlow v HMRC* TC/2019/1595,

("***Barlow***") the Tribunal had not adopted the same approach to reducing penalties as had been applied by HMRC; instead they had simply reduced the penalties to a percentage of the tax, rather than applying a percentage to the difference between the upper and lower limit of the penalty range; I should adopt the same approach; so instead of taking the 20% reduction now allowed by HMRC and applying that to the range of 40% and so reducing the penalties by 8%, I should take the 20% reduction and apply it to the denied advantage;

30. In her written submissions concerning corrective action, Ms Gray made the following points: the appellant received repeated and consistent explanations from HMRC about the FNs, corrective action, and what was required of him and by when; he never brought judicial review proceedings notwithstanding his threat to do so; he took corrective action in May 2019; he provided no cooperation after closure of the tax enquiries into the three returns to merit any further reduction beyond that for which he was given credit in July 2020; briefly scanning the FNs was inadequate, they were not unduly technical and clearly set out why the appellant was receiving them and what he needed to do in response; the appellant was capable of reading and understanding the contents of the FNs, and a proper reading of them and the APNs would have made clear the distinction between the two; what was required of him was also made clear to his MP; evidence from correspondence in January 2018 and June 2018 clearly shows that by then the appellant understood the difference between FNs and APNs and what was required by him to take corrective action; the fact that the appellant received no FNs when he received the first tranche of APNs is irrelevant to his submission of confusion; HMRC's failure to send copies of the FNs and the second tranche of APNs to the correct Montpelier entity, whilst forming the basis for a complaint, has not affected the appellant's ability to take corrective action; there is no evidence that any delays caused by the respondent affected the ability of the appellant to take corrective action between 4 November 2016, the original date for corrective action on 7 February 2017 and the subsequently extended date to take corrective action, 27 April 2017; the appellant's representations of January 2017 were dealt with fully and within a reasonable period of time on 23 March 2017; there is no statutory deadline to provide representation conclusions; the effect of the FNs is suspended, anyway, whilst the representations are being considered; HMRC have not changed their position throughout this process as regards the appellant's obligation to take corrective action; any change in stance regarding the NICs took place after the date due for taking corrective action; the enforceability of HMRC's claim for NICs was not raised in the appellant's in time representation letters and therefore did not affect the extended deadline for taking corrective action; it is clear from the correspondence that the extension to the date for taking corrective action did not include an extension to the date on which HMRC would accept representations; HMRC cannot comment on the tax affairs of other taxpayers; the appellant overstates the impact of any HMRC delays, and in any event any such delays did not prevent the appellant from taking corrective action before 27 April 2017;

31. As to penalties, Ms Gray made the following written representations: in light of the fact that the appellant had provided no cooperation following the issue of the closure notices, he was given no credit for cooperation; this is consistent with HMRC's policy and standardise framework; the appellant was advised in writing on seven occasions how a penalty amount could be reduced and could have acted to so reduce it; he did not; he took no corrective action until May 2019, some two years after the time specified in the FNs (as extended); following the review of their policy, HMRC applied a 20% reduction since they did not require anything from the appellant to establish the value of the denied advantage which resulted in a reduction

in the penalty from 50% to 42% of the value of the denied advantage.

32. In her oral submissions, Ms Gray made the following additional points: if the appellant did not understand the distinction between the APN and FN regimes, he should have raised that with Montpelier; in any case it was clear from the papers sent to him that the two regimes were separate; in light of the complaints raised with HMRC, the appellant cannot claim ignorance of what was required of him to take corrective action; the case of *Comtek Network Systems Ltd v HMRC* [2020] UKFTT 0029("***Comtek***") is under appeal and is distinguishable from this appeal; in this appeal there is no ambiguity and it was clear what was required of this appellant to take corrective action and by when he should take it; the case of *Joseph Hutchinson v HMRC* [2018] FTT 290 ("***Hutchinson***") suggests that receiving APNs and FNs at the same time is not inherently confusing; there is no justification for suggesting that, having failed to receive FNs at the same time as the original tranche of APNs, the FNs were not valid; the appellant could and should have taken advice from advisers other than Montpelier, who were the Scheme promoter and so lacked independence; he could have taken advice from Ashanta Solutions; the appellant was aware that the second tranche of APNs and the FNs had been sent to the wrong Montpelier entity but did nothing to correct this; very little evidence has been submitted by the appellant concerning the substance of his communications with Montpelier either before the extended deadline to take corrective action, or thereafter; this is very different from Corrado where significant evidence was given about the advice sought and received; the appellant's situation is very similar to that in Barlow; however in Barlow, like Corrado, there was written evidence of the advice sought from Montpelier, whereas there is no such evidence in the case of this appellant; it is not apparent what the appellant asked Montpelier in light of the information provided in the FNs and in the covering letter from HMRC which set out what the appellant needed to do to take corrective action; the appellant has articulated no specific grounds concerning procedural invalidity; he had threatened to take judicial review but did not do so; HMRC has no discretion to extend the deadline to take corrective action beyond that which is stated in the legislation; HMRC does have a discretion regarding waiver of penalties, and although HMRC cannot comment on the tax affairs of other taxpayers, there may have been circumstances in relation to the taxpayer whose redacted correspondence had been sent to HMRC by WTT in April 2019, which were relevant to both the deadline for taking corrective action and the waiver of penalties;

## DISCUSSION

*Reasonable in all the circumstances for failing to take corrective action*

33. I remind myself of three principles which are relevant to my consideration of this issue. Firstly the test of whether it was reasonable in all the circumstances for Mr Bentley not to have taken corrective action is an objective one. In other words it has to be objectively reasonable, but I must take into account Mr Bentley's experience, personal and professional attributes, and circumstances.

34. Secondly, I must look at the position as it stood prior to the extended deadline for taking corrective action i.e. 27 April 2017. Events or omissions after that date might be relevant in shedding light on that earlier position, and might be relevant to the penalty position, but of themselves they cannot be directly relevant to failure to take corrective action before 27 April 2017.

35. Finally the burden of establishing that it was objectively reasonable for him not to take

corrective action rests with Mr Bentley.

36. From the evidence and submissions I consider that the following "circumstances" are relevant:

(1) The appellant is a literate man and I suspect numerate too given his expertise as an IT specialist. This is apparent from the way in which he gave his oral evidence and from the letters for which he was responsible for drafting, which he sent to HMRC and to Dominic Raab.

(2) He entered into the Scheme on the basis of assurances from Montpelier that it had been accepted by HMRC. There is no evidence of any written material or correspondence between the appellant and Montpelier relating to the workings of the Scheme.

(3) Montpelier dealt with the enquiries into the tax returns into the three years under appeal and with appeals against the closure notices.

(4) Although the appellant contacted Montpelier about the Scheme in relation to both those enquiries and the subsequent APNs and FNs, there is no evidence of any written correspondence between those parties.

(5) In 2014 the appellant was advised to invest in certificates of tax deposit to cover the tax saved by the Scheme.

(6) No FNs were issued at the same time as the issue of the first tranche of APNs which were issued in April 2015 and which were subsequently withdrawn

(7) The FNs were issued on 4 November 2016 along with a covering letter. In the same envelope were the second tranche of the APNs. Copies of these were sent to the wrong Montpelier entity, but Montpelier were aware of their contents since they had dealt with similar documents for other clients. And this knowledge enabled them to compile pro forma representation letters which they sent the appellant on 20 January 2017 and again on 29 January 2017.

(8) On receipt of the FNs, the appellant had contacted Montpelier who told him that he shouldn't worry about the FNs. The appellant's understanding was that they would be withdrawn following a successful human rights or judicial review challenge.

(9) He thought that the APNs dealt with income tax and the FNs dealt with NICs

(10) He didn't understand much of what was said in those pro forma letters and thought that if judicial review action was to be taken it would be taken by Montpelier.

(11) He had always relied on Montpelier to provide him with tax advice since he was not a tax expert.

(12) He had assumed that the deadline for taking corrective action would be extended following his second representation letter dated 21 April 2017.

(13) He did not fully understand what was required of him to take corrective action.

37. As can be seen from the foregoing, I have concluded that much of the evidence which

has been given by the appellant, and the submissions by Mr Cannon regarding the behaviour of the appellant, is not relevant to the circumstances in that much of that evidence and those submissions concerns events which took place after 27 April 2017. This includes all the correspondence with Dominic Raab; confusion about the Limitation Act position concerning NICs; the appellant's suggestion that the deadline for taking corrective action might be extended by a month; the stress and anxiety which the situation has caused to the appellant and his family; any ambiguity concerning the phrase "stood over" regarding the penalties; the alleged extension to the time permitted for taking corrective action to the unidentified client whose details were given to HMRC in WTT's letter of 26 April 2019; any delays by HMRC. To my mind none of these are circumstances which can be taken into account when considering whether it was objectively reasonable for the appellant to have taken corrective action before 27 April 2017. They simply did not exist prior to that date.

38. Furthermore I do not think it is objectively reasonable for the appellant to say that he took no corrective action by reason that; he was confused by the fact that the first tranche of APNs were not accompanied by FNs; he did not understand what was meant by taking corrective action; the documents were not sent to the correct Montpelier entity; the FNs related to NICs only and the APNs related to income tax; corrective action related to the amount of the tax at stake and about which there was no dispute; he assumed that the deadline for taking corrective action had been extended following his submissions on 21 April 2017.

39. The letter which was sent with the APNs and FNs on 4 November 2016 makes it absolutely clear that any reference to tax includes national insurance contributions; that HMRC had written to Mr Bentley on 24 October 2016 to tell him that they were going to send him FNs and APNs which were now enclosed with that letter; that he had to read the notices carefully as they contained important information including details about penalties; that if he did not take corrective action as explained in the Follower Notice on the date specified in the notice he might be liable to a penalty; that the APNs required him to pay the amount of tax due by the date shown in the notice; the consequences of taking or not taking corrective action, set out in bold, and making it clear that if he did not take corrective action he would still be liable to pay a penalty and must also pay the amount in the APNs. It also makes clear that he needs to both take corrective action and pay the amount due since he had been sent FNs and APNs; it explains what he should do if he wants to settle his tax affairs and also explains his right to make representations.

40. The FNs themselves are also clear on what is required of a recipient to take corrective action, and indeed was sent together with forms which could be completed by the appellant to take that action. The date for taking corrective action is clearly set out as being 7 February 2017 which is also identified as being the date by when the appellant should make any representations; the notice goes on to explain that if the appellant makes representations that the deadline for taking corrective action will be extended; and that if he does not take the necessary corrective action on time he will be liable to pay a penalty of 50% of the value of the denied advantage; the notice then goes on to explain that in the event that the appellant is charged a penalty, he will be sent a notice of penalty assessment; and furthermore that the penalty can be reduced for cooperation; it then goes on to explain in essence the five categories of cooperation set out in section 210 FA 2014.

41. Both the letter and the notices make it abundantly clear to the reasonable taxpayer that the FNs and APNs relate both to tax and National Insurance; having been served both notices, then the taxpayer must take action in respect of both notices (namely taking corrective action and paying the tax); the dates by when such action must be taken or representations made; what

corrective action comprises; the consequences of failing to take corrective action by the due date or the extended due date.

42. I do not think there is any objectively justifiable reason for the appellant's submissions set out at [31] above. The reasonable taxpayer endowed with all the appellant's characteristics and in his circumstances would not have been confused in the manner suggested by Mr Bentley.

43. The issue, to my mind, is the extent to which Mr Bentley can absolve himself of, to all intents and purposes, responsibility for dealing with the FNs and laying that responsibility exclusively onto the shoulders of Montpelier, and then say that it is reasonable for him to do so as Montpelier was his tax advisers; and given that he is no tax expert he relied entirely on their advice.

44. This situation is very similar to that which Judge Hellier considered in *Barlow.* That case also involved a scheme promoted by Montpelier, and the taxpayer in that scheme relied entirely on Montpelier to provide him with advice concerning taking corrective action following service of FNs on him. In that case Judge Hellier said the following:

> "70. I agree with Mr Taylor that a taxpayer who refuses to take corrective action is not necessarily unreasonable. But it depends on the circumstances. I also agree that those circumstances include the experience, knowledge and other attributes of the taxpayer.
>
> 71. In *Corrado* [2019] UKFTT 275 (TC) Judge Redston cited with approval the passage in *Onillon,* where the FTT had said 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".
>
> 72. It seems to me that if a taxpayer is not reasonably well informed and does not take steps to make himself such, his action or inaction may not be reasonable.
>
> 73. I accept that reliance on the advice of an adviser that a scheme works can mean that a taxpayer acts reasonably in not taking corrective action. Not everyone has the time or expertise to check for himself. If the taxpayer has done his homework and found that the qualification and reputation of the adviser are high and if he has carefully considered the opinion of his adviser in the light of his particular circumstances as they change from time to time, it is likely that he would be held to have acted reasonably in reliance on that advice. But if he has done no homework and does not carefully consider the advice given and in the light of any of HMRC's statements it seems to me that not taking corrective action may not be a reasonable response.
>
> 74. I had little evidence of Mr Barlow's experience and expertise, but the emails he sent seemed to me to be those of a literate thinking man who was capable of understanding the nature of the disputes with HMRC if he chose to do so."

45. Although not binding on me, I agree with these sentiments. Unlike Judge Hellier, however, I do have evidence of Mr Bentley's expertise and experience. That evidence is that he had little understanding of the basis of the workings of the Scheme; he had entered into it

on the basis that it had been accepted by HMRC; he had been given nothing in writing to support this; and Montpelier had been responsible for dealing with the enquiries in appealing against the closure notices. I accept that he is no tax expert. I also accept that there is no evidence to suggest that he should have been suspicious of Montpelier's integrity or expertise as an organisation between November 2016 and April 2017.

46. But I also have evidence that, like Mr Barlow, Mr Bentley is a literate thinking man and, also like Mr Barlow, was in my view capable of understanding the contents of the FNs and APNs, HMRCs covering letter, what was meant by taking corrective action, and the consequences of failing to do so.

47. It is one thing to rely entirely on a tax advisor when there is no indication that HMRC take a contrary view to the advice of that adviser. But here, Mr Bentley had been told in clear and categorical terms what was required of him following service of the FNs. Montpelier's assurances seem to have been there was nothing for Mr Bentley to worry about in these FNs. And his understanding was that if the human rights or judicial review challenges were successful, the FNs would fall away. But Mr Bentley did not fully understand what these challenges were, and indeed was under the misapprehension that if a judicial review challenge was mounted, that would be made by Montpelier and not by him. I would also observe that the threat of judicial review was made in the second representation letter of 21 April 2017, outside the time provided by statute making representations. Although, therefore, it was dealt with subsequently by HMRC, they were not required to take it into account when reviewing the validity of the FNs in the first place.

48. The appellant had also been advised to invest in certificates of tax deposit and so was on notice that the Scheme might not be wholly successful. As Ms Gray pointed out, it would have come as no surprise to him to find that in light of this, HMRC was seeking to recover from him, the tax saved by the use of the Scheme, via the APNs. He knew, therefore, that there was no guarantee that the Scheme would work.

49. He also knew, or should have done in my view since it was made abundantly clear in the FNs and the covering letter, that if he failed to take corrective action, he would be liable to a penalty of possibly 50% of the denied advantage or, in colloquial parlance, the tax saved. Had he read the documents fully and applied to their interpretation his undoubted intelligence, he would have realised that the penalties were an additional amount over and above the tax liability, and were not therefore covered by his certificates of tax deposit. This was real money over and above that for which he had made provision and was going to have to come out of his pocket. Although the FNs themselves did not calculate the penalty, the appellant was perfectly capable of calculating it for himself on the basis of the principles set out in the FNs.

50. By his own admission, the appellant did not understand the representations made by Montpelier in their pro forma letters which he sent on to HMRC on 20 January 2017 and 29 January 2017. He did not read the FNs and their covering letter as closely as he should have done, and indeed with the importance pointed out to him by HMRC. This was objectively unreasonable. Had he engaged properly with the process, he would have realised that what he was being told by Montpelier was wholly different from what he was being told by HMRC. To my mind this should have put him on notice that what he was being told by Montpelier, whilst convenient, might need some investigation or testing. But although the appellant's evidence was that he had spoken to Montpelier over the phone, there is no evidence of him testing Montpelier's position that he should not worry about the FNs. Given the significant financial (and as things have turned out emotional) consequences of having to pay penalties of up to

50% of the tax saved, the reasonable taxpayer in Mr Bentley's position would have investigated further (and a great deal of information is available online) and used that information to question Montpelier's advice.

51. It is one thing for the appellant to say that he is no tax expert. But even a non tax specialist faced with a significant financial penalty is doing himself a disservice if he is capable of undertaking research into the position and fails to do so. I would go so far as to say that in light of the rock of Montpelier's advice and the hard place of HMRC's reflection of the position in the FNs, the appellant should have sought independent advice.

52. I would also add that I do not see the interpretation of the FNs as being the exclusive province of a tax expert. They are couched in plain English; they set out precisely what is required of a taxpayer and the consequences of failure; although statutory provisions are referred to, the documents themselves set out, in a nutshell, a summary of those statutory provisions. And indeed a taxpayer with the appellant's personal qualities could readily have accessed the legislation himself had he chosen to do so. To my mind FNs fall more within the purview of debt collection documents, such as statutory demands, than comprising technical tax documents which require interpretation of technical tax concepts before they can be understood by a lay person.

53. I strongly suspect that the Scheme was mis-sold to the appellant. But having engaged with the tax system by entering into the Scheme, he should have continued to engage with it following service of the FNs. The evidence is that he did not so engage, he simply palmed responsibility off onto Montpelier. There was no engagement even of a minimal nature. I do not think this is the behaviour of a reasonable taxpayer in the appellant's circumstances given his personal qualities. There was a responsibility on him to read carefully through any documents that he was sent by HMRC and to challenge his advisers if those documents appeared to contradict the advice that he was getting. There is no evidence that the appellant did this, and I find therefore that it was not reasonable in all the circumstances for him to have relied entirely on Montpelier's advice that he should not take corrective action on or before the extended due deadline of 27 April 2017.

54. So my overall decision on this point is that it was not reasonable for the appellant not to have taken corrective action on or before 27 April 2017.

*The penalties*

55. I now turn to the question of penalties. Under section 214(9) FA 2014, I can affirm HMRC's decision regarding the penalties, or substitute for that decision another decision that HMRC had power to make. This means that I can consider reducing the penalties where, in accordance with section 210 FA 2014, Mr Bentley has cooperated, provided however that that cooperation has taken place before the penalties were assessed i.e. on 29 March 2019. I am not bound by HMRC's policy towards apportioning any discount between the five elements of cooperation set out in section 210(3) FA 2014, but I am of course bound by the statutory minimum. I cannot reduce any penalty to less than 10% of the value of the denied advantage. But subject to that, it seems to me that I have the ability to reduce the penalties to any percentage between 50% and 10%.

56. I am once again grateful to Judge Hellier for the views which he expressed in *Barlow*,

with which I agree which I set out below:

> "94. It seems to me that Miss Arnold is right when she says that an important part of cooperation is taking corrective action: to prompt such action is the purpose of the Follower Notice provisions. The timing, nature and extent of a person's cooperation should therefore be assessed inter alia by reference to whether or not he has taken such action, and if he has, when and how took it. And, on the basis that if such action is not taken and the taxpayer's appeal is eventually successful the penalty will be repaid, the potential penalty for not taking such action or taking it late should be a material part of the whole penalty.
>
> 95. But cooperation 'with HMRC' has other important elements. It is important that HMRC's job is made easier and progress faster if the taxpayer willingly, fully, promptly and helpfully provides information and access to records to HMRC. This serves the proper aim of ensuring that the right amount of tax is paid……
>
> 101. In setting the penalty reduction I do not consider that the reasons for a taxpayer's behaviour should generally play any part: the reduction is determined by the quality of the cooperation with HMRC –measuring its nature timing and extent – and generally that will consist of an enquiry into what could have been done and was or was not done rather than *why* something was, or was not, done……"

57. At paragraph [101] of the foregoing decision, Judge Hellier is of the view that the enquiry into the reduction in penalties must focus on whether the taxpayer did or could have done something rather than why he did or failed to do something. I accept that this is the correct reading of section 210(3) FA 2014. But it seems to me that an enquiry into the reasons why a taxpayer did or failed to do something is important since the application of the penalty regime to a particular taxpayer must be proportionate. Simply stated, one must ask whether the application of the regime to that taxpayer is not merely harsh but plainly unfair. And that requires an enquiry into why the taxpayer did or failed to do something which might not be required by section 210(3) FA 2014.

58. In *Comtek*, the Upper Tribunal had to determine how much credit to give the appellant for cooperation and it said as follows:

> "51. The final question, therefore, is how much credit to give the Company for the co-operation it gave. We have seen some decisions from the FTT that have approached this as a largely arithmetic exercise: for example allocating a notional 20% amount of maximum mitigation to each of the five categories of "co-operation" specified in s210(3) and then deciding how much mitigation to award in each of those five categories in order to reach an overall penalty total. We consider that such an approach risks losing sight of the holistic nature of the exercise and also the fact that, given the overall purpose of the follower notice legislation to which we have referred, "counteraction" of the tax advantage should in most cases tend to attract greater credit than the other categories. It also gives rise to conceptual difficulties. To take an example, in some cases the "tax advantage" at issue might be so straightforward to quantify that HMRC have no real need of assistance that could constitute co-operation falling within s210(3)(a). If a notional 20% of maximum mitigation was available for that category, the question would arise whether the taxpayer should obtain no credit at all (which might operate harshly since if it provided all necessary co-operation in other categories it could still not obtain maximum mitigation) or whether it should obtain the full 20% of maximum mitigation (which might appear generous when HMRC in fact needed no assistance).

52. We will, therefore, apply the following approach when deciding what level of penalty to impose:

> (1) We will approach the question holistically. Recognising that not all of the categories of "co-operation" set out in s210(3) are relevant in this case, we will not seek to allocate an overall level of discount to each of those categories, but rather will seek to give the Company credit for the overall level of "co-operation" afforded.
>
> (2) We will recognise that the overall purpose of the regime is to discourage taxpayers from pursuing, without good reason, disputes about tax advantages which HMRC reasonably consider to have been determined in their favour in other final decided cases. Co-operation that comes closest to addressing that purpose should, accordingly, attract the greatest credit and conversely, if the Company's actions, even if technically meeting the definition of "co-operation", have done relatively little to meet the statutory purpose, correspondingly lower credit should be given.
>
> (3) Where the Company took steps falling within s210(3), we will consider the overall effectiveness of those steps in meeting the purpose of the provisions, recognising that even if those steps were not fully effective, and more could reasonably have been done, some partial credit may still be appropriate.

53. Applying that approach, we see no reason to depart from HMRC's conclusion that the co-operation falling within s210(3)(a) would, on its own, justify a reduction in the penalty rate from 50% to 42%. Taking into account the Company's additional imperfect steps on the way to counteraction, we consider that an appropriate penalty rate would be 30% (which involves raising the level of mitigation from 20% offered by HMRC to 50%). That, in our judgment, recognises the Company's genuine attempt to effect some late counteraction, the most significant type of co-operation that could be offered in this case, whose effect was that no more HMRC resources in practice needed to be allocated to the appeal relating to the Scheme, while at the same time recognising that it fell a long way short of what was needed to achieve full counteraction and was based on an unreasonable belief as to the effect of the telephone call with HMRC on 22 January 2018. That puts the Company's penalty exactly half way between the minimum penalty of 10% and the maximum penalty of 50% which we consider appropriate."

59. In my Original Decision, I had adopted the arithmetical approach. Following a review of *Comtek* and a consideration of the submissions made by both parties, it is my view that the approach suggested in *Comtek* is binding on me and I have adopted it for the purposes of this Remade Decision.

60. I have already decided that the appellant should have taken corrective action on or before 27 April 2017, and in reaching that decision I have considered all of the circumstances, but only those which existed on or prior to that date. However, in my consideration of whether the penalties should be reduced, I can take into account the appellants actions and omissions after that date. And I need to do so to determine that the penalties are proportionate. This is however subject to an important caveat given that I may only substitute for HMRC's decision another decision that HMRC had power to make. HMRC may only reduce a penalty where a taxpayer has co-operated with them where that cooperation takes place before a penalty has been

assessed. So when considering the penalties and the circumstances of this taxpayer in relation to any such cooperation, I can only take into account cooperation which took place before the penalties were assessed i.e. on 29 March 2019, see *Comtek* at [8].

61. As regards timing, I have already said that I think the appellant should have taken additional steps such as taking independent advice concerning the verification of Montpelier's advice, and the fact that it seemed to directly contradict what he was being asked to do to take corrective action by HMRC. The appellant was notified that he might be liable to a penalty in the original FNs, and on 8 May 2017 HMRC wrote to him telling him that he was liable to a penalty and provided him with a further raft of information. The appellant was becoming gradually disenchanted with Montpelier and ceased to use them with effect from January 2018. Instead he seemed to be placing his faith in his MP, Dominic Raab. I agree with Ms Gray that it is clear from correspondence between the appellant and HMRC in January 2018 and again in June 2018 that he understood that he needed to take corrective action and the nature of that corrective action. And yet it was not until, at the earliest, April 2019 that the appellant consulted WTT whose letter dated 26 April 2019 was the first step in taking corrective action, and following some to-ing and fro-ing as a result of the meeting between the appellant and HMRC on 29 April 2019, that corrective action was finally confirmed on 24 June 2019 by a letter written to HMRC by WTT.

62. It is my view that at the latest, in June 2018, the appellant should have taken appropriate advice about the penalties and about taking corrective action from a competent adviser. Notwithstanding his letter to HMRC of 28 January 2018, the appellant asserts that he still did not understand what was needed to take corrective action, nor the differences between FNs and APNs up to and including his meeting with HMRC on 29 April 2019. I have to say that I am not wholly convinced of this given HMRC's constant explanations both over the telephone and in correspondence with the appellant explaining precisely what he needed to do, why he needed to do it (to avoid penalties) and that he needed to do it forthwith if he was to reduce the penalties. The appellant failed to take any such advice and by failing to do so has, in my view, contributed to the stress and anxiety which the matter has clearly caused him and his family. Given that the penalties are financially onerous, the appellant should have taken proper advice and thus taken corrective action well before April 2019. And in any event, this corrective action was taken after the date on which the penalties were assessed, and so since HMRC are not statutorily permitted to take any cooperation which takes place after the date of assessment into account when reducing a penalty, I cannot either.

63. As regards the extent of taking corrective action, when the appellant, through WTT, finally took corrective action in April 2019, he took it to its fullest extent even though there was this to-ing and fro-ing following the meeting on 29 April so that it was not until 24 June 2019 that corrective action was finally and conclusively taken. And I accept that by taking it the appellant did reduce the time and financial cost to HMRC which they would have incurred had no corrective action be taken and they had had to prosecute the appeal. HMRC have made no submissions about either financial or other prejudice which has arisen because of any inadequacies in the extent of the appellants action. However since this corrective action was not taken until after 29 March 2019 i.e. the date on which the assessments were issued, I cannot take it into account when reducing the penalties given that HMRC were not competent to take it into account.

64. As regards the nature of the corrective action, when he finally got round to doing it, it was not unequivocal. WTT's letter of 26 April, whilst it explained that they had advised the appellant that he should take corrective action, and that he was relinquishing his tax advantages

for the years under appeal, must be seen in the context of the second letter sent to HMRC on that date which sought an explanation as to why an option which had been given to another client of theirs, namely to extend the date for taking corrective action from 17 November 2017 until 22 March 2019 could not be offered to Mr Bentley. Furthermore, at the meeting on 29 April 2019 Mr Bentley appeared to resile from the sentiments expressed in WTT's letter of 26 April, and it was not clear to HMRC's officers following that meeting whether Mr Bentley had indeed taken corrective action; something which was only confirmed, following correspondence regarding the other client, to HMRC by WTT's letter of 24 June 2019. So the nature of taking corrective action was not wholly satisfactory. And in any event I cannot take any element of this aspect of cooperation into account given that the corrective action took place after the date on which the penalties were assessed.

65. When HMRC reviewed the penalties, they allocated the maximum reduction permitted by their revised policy, namely 20%, to providing reasonable help with working out the amount of the denied advantage (i.e the corporation envisaged in section 210 (3) (a) FA 2014). He had formerly been given no credit under this category. Whilst HMRC's methodology was then to apply this 20% to the difference between the maximum penalty of 50% and the minimum of 10%, so the percentage reduction was only 8% of the denied advantage, the 20% reduction reflects the principle that HMRC considered that the appellant had been wholly cooperative under this statutory head.

66. This is exactly the same position as the appellant in *Comtek.* In these circumstances the Upper Tribunal indicated that since HMRC had accepted that there was cooperation falling within this subsection, it would proceed on the same basis (*Comtek* at [41]) It then needed to consider whether the appellant gave any other type of cooperation. When adopting the holistic approach, the Upper Tribunal did not adopt the approach that I had adopted in the Original Decision. In that decision I had expressed the view that given that HMRC had given the maximum possible reduction under the head of providing reasonable help, then I could apply that 20% to the penalty level rather than to the difference between the maximum penalty of 50% and the minimum penalty of 10%. It is now my view that I must follow the same approach as the Upper Tribunal. The Upper Tribunal gave only an 8% reduction in the overall penalty for providing reasonable help and I shall do the same. In *Comtek* the Upper Tribunal then reduced the penalty rate to 30% on the basis that the company had made a genuine attempt to effect some late counteraction. Unfortunately for Mr Bentley, I can see nothing which enables me to provide a similar reduction to his penalties. The penalties were assessed on 29 March 2019 and before then Mr Bentley had maintained his position that, in essence, he did not understand the workings of FNs and did not consider that he needed to take corrective action. Any cooperation he gave was provided after the date on which the penalties were assessed. In his circumstances, therefore, he has done relatively little to meet the statutory purpose of the FN regime, namely to discourage taxpayers from pursuing, without good reason, disputes about tax advantages which HMRC reasonably consider to have been determined in their favour in other final decided cases. For this reason, it is my judgment that I cannot give Mr Bentley any further reduction to the penalty over and above the 8% which HMRC have already given him.

## DECISION

67. I dismiss the appeal and uphold the charging of the penalties in an amount, in each case of 42% of the denied advantage.

## HMRC's BEHAVIOUR

68. As is apparent from the evidence which I have set out above, Mr Bentley has made a number of criticisms of HMRCs behaviour extending to imputing improper motives to HMRC. He has also suggested that HMRC have been guilty of significant delays, and that he has been treated unfairly compared to the unidentified client of WTT's. Whilst I cannot comment on the manner of the discussion which took place at his meeting on 29 April 2019 with HMRC officers, I can comment on the validity, or otherwise, of Mr Bentley's criticisms where they are reflected in written communications with HMRC. And it is clear to me that not only is there nothing to justify the imputation of those improper motives by Mr Bentley, but also that HMRC have behaved in an exemplary fashion towards him. Notwithstanding that the covering letter of 4 November 2016 and the notices themselves made abundantly clear what he had to do to take corrective action, HMRC continued to explain what was required of Mr Bentley to take corrective action, to avoid penalties, and the distinction between the FNs and APNs. They did this lucidly and courteously and did so on many occasions. They did so, too, in their communications with Dominic Raab. I can see absolutely no justification from the written evidence for Mr Bentley's criticisms of HMRC's behaviour. Finally, I have no jurisdiction to consider whether Mr Bentley was treated unfairly compared with the unidentified client of WTT's, and Mr Cannon, knowing this, did not make any submissions of unfairness at the hearing. But it is absolutely right that HMRC cannot discuss one taxpayer's affairs with another. HMRC's behaviour on this issue, too, is beyond criticism.

## RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. 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: 30 June 2021**

## 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**

(1) Where a follower notice is given under section 204, P has 90 days beginning with the day that notice is given to send written representations to HMRC objecting to the notice on the grounds that—

(a) condition A, B or D in section 204 was not met,

(b) the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements, or

(c) the notice was not given within the period specified in subsection (6) of that section.

(2) HMRC must consider any representations made in accordance with subsection (1).

(3) Having considered the representations, HMRC must determine whether to—

(a) confirm the follower notice (with or without amendment), or

(b) withdraw the follower notice,

and notify P accordingly.

**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]**

(1) xxxx

**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)).