Neutral Citation: [2024] UKFTT 00518 (TC)

Case Number: TC09206

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: TC/2023/00875

INCOME TAX – Follower Notice – penalty – sections 204-214 Finance Act 2014 – necessary corrective action not taken – whether reasonable in all the circumstances

Heard on: 11 January 2024
Judgment date: 13 June 2024

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER CELINE CORRIGAN

Between

NIGEL ALEXANDER MOORE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant in person

For the Respondents: Ms Rebecca Arnold, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. The appellant appeals against the respondents' ("HMRC's") decision that penalties are payable by him under section 208 Finance Act 2014 ("FA 2014") in respect of Follower Notices ("FNs") issued under Chapter 2 of Part 4 FA 2014.

2. The appellant contends that either the penalties, totalling £19,516.10 should be vacated as the circumstances are either identical, or similar, to those in the First-tier Tribunal ("FTT") appeal *David Andreae v HMRC* [2022] UKFTT 142 ("Andreae") or the penalties should be further reduced as they are disproportionate. HMRC do not agree.

3. With the consent of the parties, the hearing was conducted by video link using the Tribunal's video hearing system. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

4. The documents to which we were referred comprised three Bundles including the hearing Bundle produced by HMRC extending to 992 pages. HMRC's Statement of Reasons had not been included and that was subsequently produced. That extended to 15 pages. The appellant had produced his own Bundle extending to 514 pages and a Supplementary Bundle extending to 15 pages.

5. By Directions issued on 16 January 2024, and of consent, the parties were directed to lodge Written Submissions relating to the Supplementary Bundle. Those were received on 26 January and 10 February 2024.

Background

6. The appellant is currently retired but previously worked as a contractor in the IT industry. Prior to that he had been an employee of a limited company.

7. In approximately 2005, there was widespread concern in the appellant's industry about the impact of IR35. He and a number of colleagues researched alternatives to the use of a limited company and, in particular, the services of what he described as a tax consultancy called Montpelier. He was aware that there was a Montpelier group but he did not distinguish between the various entities in that group. As far as he was concerned they were all Montpelier and he was only interested in the content of what they could provide. He was aware that he was primarily dealing with entities based in the Isle of Man.

8. Amongst the companies with which he had dealings were MTM (Consultants) Limited, Montpelier Tax Planning (Isle of Man) Limited trading as Montpelier Tax Consultants, Rathowen Limited and Hazelmere Limited and we will refer to all of them as "Montpelier" regardless of the entity which was involved.

9. A colleague gave him a contact telephone number and he had a discussion with them and decided to engage them. The appellant had made checks about Montpelier on the internet and they appeared to him to be a big worldwide organisation with offices not only in the UK but worldwide. They employed qualified accountants and retained both an English and Irish barrister. He believed that they had a good reputation and track record.

10. Montpelier also offered free tax and accounting advice which he found attractive and they confirmed that they would "look after all of his tax obligations". He understood that he could utilise their tax planning services and they undertook to answer his queries in a timely manner. He was aware that Montpelier promoted a tax scheme involving an Isle of Man Trust and an Isle of Man Partnership ("the Scheme").

11. The Scheme sought to exploit the double taxation arrangements between the UK and the Isle of Man by routing the earnings of the contractors through two Isle of Man Partnerships and an Isle of Man Trust. In the self-assessment tax returns ("SATRs") for the years in question, the contractors returned income from the offshore trust and claimed an equivalent amount of double taxation relief.

12. The appellant was not aware of the extent of Montpelier's vested interest in the Scheme but was aware that it had been disclosed to HMRC. He knew that the tax law could change.

13. On 30 March 2007, Montpelier wrote to the appellant confirming that "our Tax Company invented this tax planning arrangement many years ago and have been running it ever since … and they will defend you from any Revenue attack up to and including the House of Lords at their cost. That is a measure of their commitment to you and the arrangement".

14. Montpelier offered to prepare and submit his annual SATRs and he instructed them to do so for 2006/07 and 2007/08. He was in regular correspondence with Montpelier. An example is an email to Montpelier on 2 August 2007 from the appellant enclosing what he described as a "rather worrying email". That email implied that the Scheme would not work and suggested that the appellant should ask Montpelier (a) what arguments would be advanced to the Revenue, (b) what would happen if the Revenue won any litigation, and (c) in that event, who would be responsible for any tax bills. The appellant was reassured by Montpelier and took the view that that was simply a competitor trying to sell their own services.

15. Montpelier provided regular updates on HMRC's attitude to the Scheme. In particular, on 1 August 2008 they provided a Note of Advice intimating that their clients would be receiving letters from HMRC following the passing of the Finance Act and that those letters would in due course be followed by Closure Notices and they gave a summary of their advice which included:-

(a) Clients should reply to the Notices of Enquiry stating that professional advice was being taken.

(b) Montpelier would advise HMRC that there was an application for judicial review.

(c) Clients should refer Closure Notices to Montpelier for appeal.

(d) "Clients may, if they wish, settle the tax and NIC demanded or purchase tax certificates and await the outcome of the judicial review challenge".

(e) Correspondence should be copied to Montpelier.

16. On 12 December 2008, the appellant's SATR for the tax year ending 5 April 2007 having been filed on 30 January 2008, HMRC opened an enquiry under section 9 Taxes Management Act 1970 ("TMA") into that return. (It was added to what was described as an "overall enquiry" into previous SATRs.) That letter suggested that a payment on account would reduce the interest charge and that the return should be amended. It also recommended that the SATR for 2008 should not make any claim to exemption under the double taxation agreement.

17. On 30 January 2009, the SATR for the tax year ending 5 April 2008 was lodged with HMRC and it did include such a claim.

18. In the interim, on 5 January 2009, the appellant had contacted Montpelier in relation to the letter of 12 December 2008 and Montpelier confirmed that they would reply on his behalf

after tax returns were lodged which would be after 5 January 2009. The appellant had had difficulty in getting in contact with Montpelier.

19. On 30 January 2009, Montpelier advised that the High Court had refused the application for judicial review but that tax appeals would proceed before the Special Commissioners and that would probably be at the end of 2009. (In fact the Special Commissioners ceased to exist with effect from 1 April 2009 when the Tribunals became operational.)

20. On 19 March 2009, HMRC wrote to the appellant with a Closure Notice under section 28A(1) and (2) TMA. They confirmed that they had completed their enquiry into the SATR for the year ended 5 April 2007 and had concluded that he had received income from the Scheme of £63,100. HMRC amended the tax return resulting in an increase in tax and Class 4 National Insurance Contributions ("NICs") due of £23,915.93. The appellant forwarded that to Montpelier. Again he had difficulty in being able to make contact and finally on 2 April 2009, having telephoned Montpelier, they confirmed that they would appeal it on his behalf.

21. At some stage in 2008/09, the appellant decided that, not least because of the difficulties in making contact, he would no longer use the Scheme. He continued to retain Montpelier only for what he described as accountancy, ie tax advice. With the exception of issues arising out of the SATRs for 2006/07 and 2007/08, from approximately 2012, he used an online accountancy adviser called JSA Services Limited ("JSA"); they were not connected with Montpelier.

22. In the course of 2009, Montpelier wrote to the appellant on at least three occasions with updates on the position in relation to the proposed judicial review.

23. On 3 December 2009, HMRC wrote to the appellant opening an enquiry into the tax return for the year ended 5 April 2008 in which the appellant had again claimed relief for 2007/08. The appellant was invited to make payment of the tax that was likely to be due.

24. In the course of 2010 and 2011, Montpelier wrote to the appellant on at least eight occasions, the last of which was on 16 September 2011 with updates on the position in relation to the proposed judicial review.

25. On 28 November 2011, HMRC wrote a generic letter to the appellant headed "Tax avoidance schemes using Isle of Man & Guernsey Double Taxation arrangements". It was described as a newsletter which was being sent to the users of certain tax avoidance schemes. It referenced the various decisions by the Court of Appeal. It then stated that following the Court of Appeal decisions, the appellant was invited to make a payment on account of tax, NICs and interest. It also invited settlement either by withdrawing appeals where there were Closure Notices or contacting HMRC if no Closure Notice had been issued. In summary it was, as the appellant agreed in oral evidence, a very clear warning.

26. On 15 December 2011, Montpelier wrote to the appellant commenting on the newsletter and, in particular, referred to the invitation to make a payment on account. Montpelier stated "In our view this is a matter for each individual client. We still believe that Section 58 is objectionable in any democratic society and unfair, therefore we continue to support the appeals". The appellant chose not to make a payment on account because Montpelier had not made a positive recommendation to do so.

27. On 16 February 2012, HMRC wrote a further generic letter referring to the newsletter confirming that:

(a) the Supreme Court had not granted permission to appeal and that therefore the Court of Appeal decisions (in favour of HMRC) were final,

(b) the validity of the application of the retrospective legislation had been confirmed,

(a) HMRC intended to make arrangements to finalise all open enquiries and returns, and

(b) the appellant was "strongly" urged to make a full payment on account.

28. The appellant sent that to Montpelier who responded on 24 February 2012, stating that they were disappointed but that HMRC would still have to deal with appeals in the Tribunal.

29. On 4 April 2012, Montpelier wrote stating that their tax company had advised that they intended taking one test case to the Tribunal. They stated "You may of course wish to settle with HMRC and that is your choice". For the same reasons as previously, he chose not to settle or to make a payment on account. The appellant received at least a further two updates from Montpelier in the course of 2012.

30. On 18 October 2013, HMRC wrote a further generic letter to the appellant referencing the previous newsletter, confirming that:

(a) an amendment to the Finance Bill 2013 to withdraw the retrospective effect of section 58 had been withdrawn,

(b) Lady Justice Arden had clearly indicated that the Treaty (and this legislation) should be interpreted to ensure that "double relief" could not occur and in HMRC's view the Scheme was an attempt to abuse the UK/Isle of Man double taxation arrangements (DTA) in order to obtain "double relief", and

(c) the courts had described the Scheme as being wholly artificial with no commercial purpose.

31. It was argued that it was very unlikely that the Tribunal would prefer Montpelier's interpretation of the legislation to that of the Court of Appeal. It concluded by stating that "If you have not already done so, it is extremely important that you consider purchasing a Certificate of Tax Deposit or making a payment on account of the liabilities that will arise should the FTT find against you …".

32. On 22 November 2013, Montpelier wrote to the appellant referencing the letter of 18 October 2013, stating in particular that in relation to the alleged attempt to obtain "double relief" "That is not strictly correct". As far as the payment on account or a Certificate of Tax Deposit ("CTD") was concerned, Montpelier simply stated "We cannot comment on this decision which is entirely up to each taxpayer". The appellant took no action.

33. On 17 July 2014, Montpelier wrote to the appellant quoting "Our Tax Company" and warned that it is likely that HMRC would issue Accelerated Payment Notices ("APNs"). That was followed by a "Memorandum Note" issued on 20 October 2014 which asked that any client receiving an FN or APN should submit it to them immediately or to other advisers "for detailed scrutiny".

34. On 5 February 2015, HMRC wrote to Montpelier intimating that they intended to issue APNs stating that when they did so they would suggest to the taxpayers that "… they contact you if they have any questions about the Scheme or their use of it …".

35. Montpelier sent a copy of HMRC's letter to the appellant on 11 February 2015 stating that "Our tax company" had just received the letter. They confirmed that, as Montpelier had advised in a letter sent to the appellant and others the previous day, they had briefed counsel

in relation to a judicial review and they would be checking the validity of the APNs. That was followed by further advice on 17 April 2015.

36. On 18 February 2015, HMRC wrote to the appellant intimating that APNs would be issued within the next month and, once received, the appellant would be legally required to pay the amount shown in it within 90 days. They stated that they had sent a copy of that letter to his tax adviser, JSA and suggested that he discuss the matter with them.

37. On 23 February 2015, the appellant emailed Montpelier enclosing a copy of the letter and asking for advice.

38. On 17 April 2015, Montpelier wrote to the appellant stating that any APN should be forwarded to them immediately and advised that he should not seek to engage with HMRC himself and they would draft a letter which should be sent to HMRC.

39. On 23 April 2015, HMRC wrote to the appellant referring to the letter(s) of 18 February 2015 and enclosing the APNs. The APN for the year ended 5 April 2007 was in the sum of £22,018.91 with payment due on or before 28 July 2015. The APN for the year ended 5 April 2008 was in the sum of £24,448.07 with payment due by the same date.

40. The APNs pointed out that if payment was not made in full and on time, surcharges might apply. It was pointed out that there was no right of appeal against the APNs but that representations could be made in terms of section 222 FA 2014.

41. On 2 July 2015, Montpelier emailed the appellant stating "We can confirm that all checks have now been carried out on your APNs and can advise that all details are correct in accordance with the Finance Act of 2014." They enclosed a draft letter which should be used to respond. The appellant issued that letter.

42. On 29 July 2015, Montpelier confirmed to the appellant that HMRC had refused to withdraw the APNs and suggested the terms of a letter that he should send to HMRC. HMRC then issued a further APN Overdue Notice and on 18 August 2015 the appellant sent a copy to Montpelier who confirmed, again, that the figures were correct and stated "… until HMRC can see your name linked to the JR submission they will continue to chase you for funds."

43. On 3 September 2015, Montpelier wrote to the appellant about the proposed judicial review and asked him to confirm in that regard that he had not paid the APNs.

44. On 24 November 2015, HMRC issued a Closure Notice in relation to the SATR for 2007/08.

45. On 13 January 2016, Montpelier wrote to the appellant confirming that HMRC had now conceded that the APNs issued to date were unlawful and that HMRC would formally withdraw the APNs. They enclosed a copy of the letter from HMRC dated 29 December 2015. That letter accepted that condition C of section 219(4)(b) FA 2014 had not been met and therefore the APNs would be withdrawn.

46. However, it went on to say that although the APNs were to be withdrawn, HMRC's view was that the Scheme did not achieve the intended tax advantage and that that view was supported by the recent Tribunal decision in *Huitson v HMRC* [2015] UKFTT 448 ("Huitson").

47. Montpelier stated that an appeal had been made to the Upper Tribunal. We are aware that *Huitson* had found that what the Tribunal found to be a tax avoidance arrangement marketed by Montpelier did not work. It was basically the same as the Scheme. The

decision had been released on 3 September 2015. The time limit to submit an appeal to the Upper Tribunal would expire on 23 January 2016.

48. On 19 February 2016, HMRC wrote to the appellant formally withdrawing the APNs. They referred to *Huitson* and to Mr Huitson's failure in his appeal to the European Court of Human Rights and an Upper Tribunal decision in regard to another taxpayer. HMRC argued that in light of the case law, which had gone in favour of HMRC, the appellant should settle the appeal and/or pay what was due. That letter was again copied to JSA.

49. On 26 October 2016, HMRC wrote to the appellant stating that the decision in *Huitson* had become final on 23 January 2016. The time limit for an application for leave to appeal *Huitson* had expired with no application. A subsequent late appeal had been rejected by the Upper Tribunal on 5 July 2016. That being the case, HMRC intended to issue FNs and new APNs.

50. That letter made it explicit in plain English that FNs and APNs were separate and distinct. It included a section headed "What you will need to do when you receive the notices" with sub-headings "Follower Notice" and "Accelerated payment notice". Those headings were all in bold print. The instructions under the FN heading ended with a sentence reading "Even if you decide not to take the necessary corrective action, you must still pay the amount shown in the accelerated payment notice." The steps relating to corrective action were clearly set out as also the 90 day time limit and the risk of a penalty if no action was taken. The instructions for the APNs were equally clear.

51. The appellant duly sought advice from Montpelier who told him on 5 November 2016 that they did not believe that the FNs and APNs were lawful. They asked for copies.

52. On 11 November 2016, HMRC issued the FNs, under section 204 FA 2014, to the appellant for both the tax years in question. They again relied on *Huitson*. The FNs stated that if the appellant did not take necessary corrective action by 14 February 2017 he would be liable to pay a penalty under section 208 FA 2014. It made it explicit that corrective action meant:-

(1) Taking all necessary action to enter into a written agreement with HMRC to relinquish the denied advantage.

(2) Telling HMRC that the appellant had taken that first step and intimating to HMRC the amount 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).

(3) The enclosed form CADAcc38 required to be completed and returned to HMRC.

53. The FN stated that there was no appeal against the FN but under section 207 FA 2014, representations could be made to HMRC. Those had to be received by no later than 14 February 2017.

54. On the same date, new APNs were issued. As far as tax was concerned they were in the same sums as previously (but rounded down), namely £22,018 and £24,448. APNs for the NICs were also issued in the sums of £1,897 and £2,112.

55. The covering letter made it very clear under a heading in bold stating "Important information…" about the FN and APN that the appellant would have to both pay the amount due under the APN and take the necessary corrective action if he wanted to avoid penalties and that paying the amount due does not mean that corrective action has been taken; even if payment is made, if there is no corrective action then there will be penalties.

56. The appellant forwarded those to Montpelier on 14 November 2016 simply stating that Montpelier should let him know if they required any assistance from him. They replied the following day stating that they would revert with a response to be sent to HMRC once they had reviewed the letters.

57. On 7 December 2016, the appellant contacted Montpelier stating that HMRC had telephoned him the previous day asking whether he had received the letters. In that telephone call, the officer had reminded him that unless the corrective action forms were returned within the 90 days, penalties would be imposed. He asked Montpelier whether they had a response for HMRC since more than a month had elapsed.

58. On 28 December 2016, HMRC issued a reminder letter for each of the relevant tax years to the appellant, with copies to JSA, pointing out that if corrective action was not taken he would be liable to pay a penalty and he was still required to pay the amount specified in the APN and that by 14 February 2017. HMRC suggested that the appellant should discuss the letters with JSA or Montpelier.

59. On 27 January 2017, HMRC called the appellant and on receiving no answer left a message requesting that he call back. He did not. The appellant acknowledges that he received "several phone calls from HMRC" but does not remember them all.

60. On 2 February 2017, in a generic email, Montpelier furnished the appellant with representations which should be sent to HMRC. It told him how to tailor that for his circumstances and said that HMRC's response was awaited with interest "…given that it is important to avoid a 50% penalty".

61. On 10 February 2017, the appellant sent HMRC one letter of representations for the FNs and one for the APNs. In respect of the FNs, one of the arguments advanced was that *Huitson* was not final because there was an application for leave to appeal to the Upper Tribunal that was due to be heard on 9 February 2017.

62. On 2 October 2017, HMRC issued their conclusions following consideration of the representations. HMRC pointed out that, as he would no doubt be aware, leave to appeal in *Huitson* had not been granted and the decision was final. The FNs were upheld and the appellant was advised to take corrective action by a new date of 7 November 2017 in order to avoid a penalty. HMRC explicitly pointed out that that conclusion was final and "We will not consider any representations…" sent more than 90 days after receipt of the original FNs. The letter concluded with two sentences in bold stating that if no corrective action was taken by 7 November 2017, penalties would be charged.

63. On the same day a letter was sent to the appellant upholding the four APNs and stating that payment was due by no later than 7 November 2017.

64. In the interim on 30 August 2017, Montpelier had written to the appellant commenting on a number of cases about tax points and arguing that at that point "our advice is to take no action" in that regard.

65. On 24 October 2017, using a template provided by Montpelier, the appellant wrote to HMRC appealing the letters dated 2 October 2017, albeit noting that HMRC had indicated that no further representations could be made, and confirming that, for the reasons stated, he would not take corrective action. He argued that permission to appeal to the Court of Appeal had been lodged in *Huitson* but that in any event, *Huitson* did not apply to him. He said that he would be raising judicial review proceedings and requested a stay of proceedings..

66. On 14 November 2017, HMRC wrote to the appellant confirming that he was now liable to a 50% penalty for failing to take the corrective action by 7 November 2017. That

letter pointed out that the appellant could reduce the percentage rate of the penalties if he co-operated with HMRC before the penalties were issued.

67. On 20 November 2017, the appellant emailed Montpelier stating that he had just received the penalty notice. He asked:

> "Could you please confirm what our response & strategy should now be, especially as now the HMRC are charging penalties. Reading the letter, it looks like we have less than 30 days, but there are so main (sic) deadlines in the letters its not that clear.
>
> Can you please also confirm whether I should, start discussions with the HMRC, as it looks that this may reduce the penalty – or will this weaken our position (as Montpelier prescribed beforehand).
>
> What's strange is that the HMRC haven't responded or referenced our letter, I sent (via special post) on the 24th Oct".

68. The appellant tried and failed to contact Montpelier by telephone on 20, 21 and 22 November 2017. Eventually on 23 November 2017, contact was made and on 24 November 2017, Montpelier wrote to the appellant asking if he wished to join the judicial review proceedings in respect of the FNs and APNs.

69. On 19 December 2017, Montpelier confirmed that the application in regard to the judicial review had been dismissed and that counsel had suggested instead a "multiple joint claim against HMRC". The appellant confirmed that he would wish to join that and said "Thanks Dawn and good work".

70. On 8 January 2018, a Debt Management Officer from HMRC wrote to the appellant pointing out that he owed £49,903.30 (being the total due in terms of the APNs) and threatened enforcement proceedings.

71. On 11 January 2018, the appellant sent a copy of that letter to Montpelier describing it as being "rather alarming". He asked whether he had been added to the multiple joint claim and, if so, whether this should have put a stop on the enforcement proceedings. He asked for advice. He stated that he was sure that the sum sought was "massively out" as it was simply a guess by HMRC. He asked if the figures should be corrected.

72. Montpelier replied on the same day stating that they were not sure about the position in regard to the multiple joint claim. What they did say was:

> "Should you want to make payment or come to an (sic) time to pay agreement with HMRC, this is not deemed as settling with HMRC, it is purely a payment on account. It is only if you complete the corrective action forms and submit to HMRC that is when they deem you are settling".

They confirmed that the figures had been fully reviewed by them and that the figures were correct. The appellant understood from that that Montpelier were implying that he should make a payment on account.

73. On 13 January 2018, the appellant again contacted Montpelier because he had received an automated reminder about the payment being overdue.

74. On 16 January 2018, HMRC responded to the letter of 24 October 2017 stating that they were not pursuing any issues relating to NICs and would not impose penalties in that regard. They rejected the appellant's arguments and stated that he needed to take corrective action but pointed out:

(a) That the appellant could appeal the penalties under section 208 FA 2014.

(b) That if he did not take corrective action and there were penalties, HMRC would enforce payment of the APNs and any associated surcharges and the FN penalties.

(c) Any application for judicial review would not affect the validity of the APNs and FNs so there would be no stay.

75. On 18 January 2018, the appellant sent a copy of that letter to Montpelier and asked whether there was news on the multiple joint claim.

76. On 19 January 2018, the appellant contacted HMRC by telephone pointing out that nothing had been received from Montpelier about the multiple joint claim. He discussed a payment on account without acceptance of the APNs and various other matters. He also spoke with two other members of HMRC.

77. On 21 January 2018, he wrote to HMRC referring to those telephone conversations. He argued that various payments should be treated as being made without prejudice because Montpelier were preparing the multiple joint claim. He asked a number of questions about self-assessment tax.

78. On 25 January 2018, he again emailed Montpelier asking what was happening with the multiple joint claim.

79. On 26 January 2018, the appellant emailed HMRC following another three telephone conversations he had had with HMRC that day, referring to the conversations on 19 January 2018 and questioning the amounts sought from him. He again raised questions about self-assessment tax calculations generally.

80. On 29 January 2018, Montpelier stated that they would be providing an update "over the next few days".

81. On 1 February 2018, the appellant forwarded two letters dated 26 January 2018 that he had received from HMRC applying surcharges in relation to the APNs. He asked if the surcharges would be waived after the multiple joint claim or if there was "something else Montpelier can do (such as appeal on my behalf)".

82. He said that the letters had referred to *Huitson* again but he thought that a letter had been sent to HMRC on 11 November 2016 to which he could not trace a reply. He said that that letter, which had presumably been drafted by Montpelier, had argued that the ruling in *Huitson* was not final as there was an application for permission to appeal which was due to be heard by the Upper Tribunal on 9 February 2017. He asked for a reply by 9 February 2018 so he could reply to HMRC in a timely manner. There would appear to have been no reply from Montpelier. There is no letter dated 11 November 2016 in any of the Bundles.

83. On 7 February 2018, the appellant twice wrote to HMRC referring to his previous letters to HMRC and the two Notices of Surcharge. He said that he found the correspondence confusing.

84. On 18 February 2018, he sent a further letter to HMRC referring to the correspondence and appealing the Surcharges on the basis that:

(1) The effect of the Scheme was still in dispute.

(2) The validity of the APNs and FNs was subject to judicial review and a multiple joint claim.

(3) Because he had only received the response to his letter of 24 October 2017 on 16 January 2018, any failure to settle the APNs within the deadline was the result of HMRC's failure to respond to him.

85. On 21 February 2018, HMRC wrote to the appellant responding to his various communications confirming that (a) payment of the APNs did not settle the appeals and was in effect a payment on account, and (b) the APNs issued to him on 11 November 2016 had "clearly stated surcharges would be issued" if the APNs were not paid on time. They pointed out that as he had not taken corrective action, the appeals remained open. At that stage he had made payments totalling £44,168.50.

86. On 25 February 2018, the appellant forwarded that response to Montpelier asking what he should do in reply and pointing out that HMRC had said that no multiple joint claim had been lodged. He asked why not. On the same day he also emailed HMRC raising a number of queries about both self-assessment and the amount of one of the APNs.

87. On 27 February 2018, Montpelier wrote to the appellant apologising for the delay in responding but pointing out that there was no need to reply to HMRC. They explained that they had withdrawn their application for judicial review and stated that they would be writing "shortly" to advise on the matter of ongoing litigation.

88. On 17 and 24 March and 13 April 2018, the appellant chased Montpelier again asking what was happening in the litigations. Meanwhile the appellant and HMRC continued to correspond about the size of the APNs and the surcharges and other issues. (HMRC confirmed that the size of the APNs had not changed.)

89. On 21 May 2018, Montpelier wrote to the appellant, in what was obviously a generic letter, saying that litigation was ongoing. They said that:

(a) *Huitson* had been decided on very narrow facts and that they were pursuing a new case, but, as he knew, the First-tier Tribunal could not create a legal precedent.

(b) There was a new judicial review in the High Court challenging some aspects of APNs and FNs.

(c) There were separate Tribunal proceedings, not being taken by them, suggesting that the Scheme had PAYE implications.

(d) They were "…aware that you have received at least one APN and perhaps an FN. We have drafted letters of representation for you and the ball is in HMRC's court to reply". The cumulative effect of the previous three points was that HMRC might take those into account.

(e) As the appellant knew, payment of an APN was not an admission of liability and he could still raise the three first points as challenges. However, if he had taken corrective action with regard to the FN then "your appeal is over in which case please let us know as no further challenge is open to you and we can close your file".

They concluded by stating that they were still "optimistic that we can defeat the unfair and wrong retrospective provisions".

90. On 15 February 2019, HMRC wrote to the appellant explaining that their view regarding NICs and the Limitation Act 1980 had changed. The letter explained again that failure to take corrective action would result in penalties for up to 50% of the tax in dispute.

91. On 18 February 2019, HMRC wrote letters to the appellant confirming the amounts of the surcharges. They pointed out that:

(a) He was not a claimant in a judicial review and the fact that someone else was involved in such proceedings could not affect his APNs.

(b) HMRC's letter dated 2 October 2017 had made it explicit that HMRC would not, and could not, in terms of the legislation, consider any further representations.

(c) His letter of 24 October 2017 had been issued after the statutory time limit for making representations had expired, so their delay in responding to that letter was not relevant.

92. On 21 and 24 February 2019, the appellant wrote to Montpelier, referring to a conversation the previous week saying that it had been good to catch-up. He asked for advice on the letters received from HMRC and enquired what had happened with the judicial review.

93. On 27 February 2019, HMRC issued revised corrective action forms to the appellant and asked that their letter of 15 February 2019 be disregarded. They explained that if the appellant took corrective action by a new deadline of 29 March 2019 they would not charge FN penalties.

94. On the same day, Montpelier wrote to the appellant advising that appeals of the surcharges had no prospect of success. They said that the judicial review case (by someone else) had been partially successful for that appellant and also for HMRC and that there was a *Huitson* type case due to be heard by the Tribunal in May 2019. No details were provided.

95. They stated that:

> "There are no disadvantages of (sic) making payment on account to HMRC, so long as the corrective action forms are not completed and returned to HMRC, effectively agreeing to settle, any monies paid on account will be returned if/when either of the above cases are successful against HMRC."

96. On 27 February 2019, the appellant emailed HMRC offering payment of the surcharges on a without prejudice basis (implementing Montpelier's advice).

97. On 15 March 2019, the appellant sent HMRC's letter of 27 February 2019 to Montpelier. He thanked them for their help "as always".

98. On 20 March 2019, he wrote to HMRC offering payment of the surcharges on a without prejudice basis.

99. Late at night on 22 March 2019 and thus not received until the next day, referring to HMRC's letters dated 18 and 27 February 2019, he wrote to HMRC, using a template that was provided by Montpelier, arguing that the FNs were fundamentally flawed as there was no enforceable debt against him for NICs and therefore logically there could be no penalty. He said that he had paid the APNs for the NICs under sufferance and advanced arguments on due dates for payment.

100. On 22 March 2019, HMRC wrote to the appellant stating that they intended to charge penalties for both tax years and they enclosed penalty explanation schedules. They asked if there was any other information that he could provide which would affect their view of his level of co-operation. That was required by 12 April 2019.

101. The appellant sent that to Montpelier on 23 March 2019 stating that it was "rather worrying" and he had thought that by paying to account of the APNs that would "…keep the HMRC quiet". He noted that a response was required by 12 April 2019 but he was not sure what kind of response was required.

102. On 25 March 2019, Montpelier advised that since the APNs had been paid no further action was required but that:

> "The follower notices wanted you to take corrective action, thereby withdrawing your appeals and basically agreeing to settle for these tax years with HMRC. Unless you are adamant that you want to settle and draw a line under this, we recommend not completing the corrective action forms. If ongoing litigation is successful, then you

> would be in a position to reclaim the monies you have paid to HMRC. Should you complete the corrective action forms, you would not be able to reclaim any monies and HMRC would also issue you with interest calculations."

The ongoing litigation to which they referred was the litigation, not involving the appellant, described at paragraph 94 above. They said that the judicial review was the subject of permission to appeal to the Tribunal.

103. They pointed out that HMRC had said when they issued the FNs that they could issue penalties for non-completion of the corrective action forms.

104. On 27 March 2019, Montpelier wrote to the appellant stating that FN penalties were HMRC's method of pushing taxpayers into returning the corrective action forms before the hearings in the litigations took place.

105. On 5 April 2019, HMRC wrote to the appellant about the NICs rejecting his arguments about due dates and confirming the total amount of the APNs for both tax and NICs. They also wrote a separate letter confirming that they had previously upheld the surcharges.

106. On 7 April 2019, the appellant wrote to HMRC, at length, "appealing" the APN surcharges but confirming that he would pay the surcharges on a without prejudice basis "whilst the Tribunals are ongoing" but he emphasised that he was not settling with HMRC. He went on to say that the judicial review was the subject of permission to appeal to the Tribunal and that there was a *Huitson* challenge in the Tribunal later that year.

107. He referred to HMRC's letter of 22 March 2019 (see paragraph 100 above) about the FN penalties and said that the further information that he wished to have considered was:

(a) All previous correspondence.

(b) He believed that HMRC had not complied with statutory timescales.

(c) The figures in the APNs and FNs were overestimated by £11,000 (and HMRC had not replied to his arguments on that).

(d) The ongoing judicial review and the *Huitson* type litigation in the Tribunal.

108. On 17 April 2019, Montpelier emailed the appellant with a draft letter to send to HMRC about the NICs. He responded the same day and referred to an EU challenge stating "Thanks for all work (sic) and happy to challenge this with Montpelier". He wrote to HMRC the following day.

109. On 17 July 2019, HMRC issued FN penalties for the two tax years in question. Those were calculated at the maximum amount of 50% of the denied advantage for the years in question, namely £11,957.96 and £13,280.48.

110. On 24 July 2019, the appellant appealed the penalty assessments on the basis of a template provided by Montpelier. He argued that there was no lawful NIC liability. He also argued that the FNs were based on *Huitson* but he had relied on a Tribunal hearing in May 2019 where the decision was awaited. He said that that hearing had been concerned with "agency and PAYE". That was the first time that argument had been advanced. He also argued that there was no penalty reduction for co-operation.

111. HMRC state that that was only received by them via email on 29 September 2019. Latterly, it seems that HMRC accepted that the appeals were dated 24 July and 18 August 2019.

112. On 18 August 2019, the appellant had written to HMRC referring to the letter of 24 July 2019 reiterating his grounds of appeal attempting to rely on his letter of

24 October 2017 stating that the deadlines between 24 October 2017 and 16 January 2018 were "totally unjust & not lawful". He argued, again, that he had paid "'on account' well within an acceptable timeframe by 29 January 2018".

113. In approximately September 2019, the appellant became aware that Montpelier was facing liquidation and that there were allegations of diversion of funds. The last two communications received from Montpelier were dated 24 September and 1 October 2019 and were updates on litigations.

114. On 13 September 2019, HMRC demanded payment of the FN penalties and on 18 September 2020, the appellant replied stating that they had been appealed. That was acknowledged by HMRC on 31 October 2019.

115. On 18 September 2020, the appellant emailed HMRC saying that he had not heard from them since July 2019. He asked if they could "explain the path/process to settlement". He again raised the question of the £11,000 by which he thought the APNs had been inflated (see paragraph 107 above). Various "holding" replies were issued by HMRC and reference was made to Covid-19.

116. On 9 February 2022, HMRC wrote to the appellant apologising for the delay, indicating that they hoped to write to him by 30 June 2022 to give him their view of the matter. In fact they wrote to him on 10 August 2022 and their view of the matter was that the conditions for a penalty were met in both of the relevant years. However, they would revise the penalties downward with a reduction of 42% on the basis that they would apply a 20% reduction to the 40% penalty range for category (a) because he had "provided reasonable assistance to HMRC in quantifying the tax advantage". The revised penalties charged were £9,247.94 and £10,268.16.

117. On 3 September 2022, the appellant asked for a statutory review. One of the arguments advanced was that:

> "Once the rules [section 58 Finance Act 2008] changed I obtained secondary advice from my accountant, who advised me to leave the scheme immediately, which I did. Exactly the same circumstances as David Andreae …".

118. The appellant took independent advice from WTT Group, Tax Consultants in September 2022 and on 16 October 2022 he again wrote to HMRC, copied to WTT Group, drawing detailed comparisons with *Andreae*.

119. On 13 January 2023, HMRC issued their Review Conclusion Letter upholding the penalties. That letter made the point, more than once, that it was concerned with FN penalties only and not with the APNs and whether or not they were correct. Specifically, the officer stated that the £11,000 of expenses was not relevant to the issue of FN penalties.

120. On 30 January 2023, the appellant, having spoken that day with an HMRC officer, emailed her asking that the £11,000 be removed from the APNs. She responded on the following day pointing out that the APNs had been paid after the extended due date. The date had been extended because HMRC had considered the representations in February 2017. She stated that "We would not take this amount from the APN values. Any expenses that may be due would be considered if and when you were to settle your appeals with HMRC."

121. On 8 February 2023, the appellant wrote to that officer again stating that he had received the Review Conclusion Letter and thought that he had two options which were to "Relinquish/Settle" or go to the Tribunal. He said that he assumed that if he did the former the penalties would be reduced and the £11,000 would be taken into account. He asked how

much the reduction might be and what timescale would be involved for taking corrective action.

122. On 20 May 2023, the officer replied stating that there would be no reduction in the penalties because he had not taken corrective action to relinquish the tax advantage. Another officer would contact him about the statutory appeals (ie the Closure Notices). Having had no reply, the appellant sent a reminder to HMRC on 23 May 2023 asking if they were "open to negotiation". That lead to an exchange of emails to which we refer under the heading "Written Submissions" at paragraphs 142 onwards below.

123. On 10 February 2023, the appellant appealed to the Tribunal. In summary he argued that:

(1) His case was "almost identical" to *Andreae.*

(2) It was reasonable that he had not taken corrective action because he had relied upon Montpelier.

(3) He had acted promptly as soon as he realised that he needed a second opinion and he sought further advice "from other professional parties".

(4) He had intended to settle and tried to engage with HMRC on numerous occasions but settlement was always "blocked by a JR, Tribunal, Appeal or similar activity".

(5) The penalties are excessive and disproportionate.

Approach to the evidence

124. As can be seen, the events with which we are concerned happened a long time ago.

125. We were not referred to it but we agree with Judge Amanda Brown, KC and Member Duncan McBride in *Cry Me A River Limited v HMRC* [2022] UKFTT 182 (TC) where they state at paragraphs 11 to 14 as follows:-

> **"Approach to evidence**
>
> 11. There are a number of cases which, over the last decade, have considered the approach to be taken in respect of oral evidence received, particularly concerning facts and matters which occurred sometime before the giving of the evidence. These cases have been comprehensively reviewed in the judgment of Judge Brooks in *Hargreaves v HMRC* [2019] UKFTT 244.
>
> 12. So far as material in the present appeal the Tribunal notes, from that judgment, that a certain degree of caution is to be taken because:
>
> "26 …
>
> - memories are fluid and malleable, being constantly rewritten whenever they are retrieved …
> - the process of … litigation … subjects the memories of witnesses to powerful bias …
> - witnesses, especially those who are emotional, who think they are morally right, tend very easily and unconsciously to conjure up a legal right that did not exist …".
>
> 13. The judgments summarised by Judge Brooks conclude that:
>
> 'The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose … But its value lies largely … in the

opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."'

14. This approach is particularly relevant in the present appeal."

1. It is also very relevant here.

The Law

2. Section 208(2) FA 2014 imposes a liability to a penalty if "…the necessary corrective action is not taken in respect of the denied advantage (if any) before the specified time".

3. Sections 208(4) to (7) specify that the necessary corrective action is <u>only</u> taken if the taxpayer takes the steps in subsections (5) and (6) and that is, amending the return or taking all necessary action to enter into an agreement with HMRC in writing, for the purpose of relinquishing the denied advantage. The taxpayer must notify HMRC (a) that that has been done, and (b) of the denied advantage being the tax that will become due and payable on relinquishing the denied advantage.

4. The term "denied advantage" is defined in section 208(3) FA 2014 and 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)."

5. Section 204(3), which is headed "Circumstances in which a follower notice may be given", reads:

> "204(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')".

6. Section 209(2) FA 2014, which is headed "Amount of a section 208 or 208A penalty", states that "Schedule 30 contains provisions about how the denied advantage is valued for the purposes of calculating penalties…".

7. Paragraph 2 of Schedule 30 states that "The value of the denied advantage is the additional amount due or payable in respect of tax as a result of counteracting the denied advantage".

8. Section 210(1) allows HMRC to reduce the amount of the penalty if the person upon whom the penalty is imposed has co-operated and HMRC may reduce it to reflect the "quality" of co-operation.

9. Section 210(3) specifies what must be done for there to have been co-operation as follows:

> "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."

10. Section 210(4) provides that the penalty cannot be reduced below 10% of the value of the denied advantage.

11. The grounds of appeal and powers of the Tribunal are set out in section 214 of FA 2014 and read as follows:-

"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.

…

(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….".

12. The onus is on HMRC to demonstrate that the conditions for issuing a penalty for failing to comply with the FNs are satisfied. The onus is also on HMRC to demonstrate that the penalty amount has been correctly calculated.

13. The onus is on the appellant to demonstrate that it was reasonable in all the circumstances not to take corrective action.

14. The standard of proof is the civil standard being the balance of probabilities.

Discussion

15. There is no doubt that the appellant has not complied with the FNs and that therefore the statutory penalty provisions are engaged. Accordingly, we find that HMRC have discharged their burden of proof in that regard. The issue for HMRC then is whether the penalties have been correctly calculated.

16. We observe that at page 32 of his Bundle the appellant confirmed at point 7 that the quantum of the maximum penalty is not disputed. However, he argues that if a penalty is due, which he denies, even the reduced penalties are excessive in his circumstances.

The Written Submissions

17. The Supplementary Bundle lodged by the appellant contained emails covering the period 23 May 2023 to 4 January 2024.

18. On 10 August 2023, HMRC confirmed that the appellant still had live appeals against the Closure Notices for 2006/07 and 2007/08 and the additional tax and NICs (being the amounts in the APNs) were postponed and collection suspended. The appellant replied on 16 August 2023 stating that he was prepared to settle provided the FN penalties were cancelled and the APNs reduced by the £11,000 of expenses to which he had repeatedly referred in correspondence.

19. HMRC's response on 17 October 2023 was to the effect that:

(a) The FN penalties could not be cancelled since they had been levied on the basis that the appellant had not taken corrective action to relinquish the tax advantage.

(b) The economic effect of the Scheme was described in *R (Huitson) v HMRC* [2010] EWHC 97 (Admin) and the taxpayer does not supply his services to the end user. The Isle of Man Partnership did so and received payment. The taxpayer was then paid an annual fee by the Partnership. Thus the appellant's expenses should have been forwarded to the Partnership for reimbursement; they were not deductible from payments made to him by the Partnership. They had not been incurred for the purpose of his trade and therefore could not be allowed.

20. The appellant responded on 16 November 2023 stating that he was challenging the FN penalties and the expenses in his appeal to the Tribunal. On 19 November 2023, the appellant expanded upon that confirming that in the relevant tax years he also had self-employment income against which the expenses could be offset.

21. On 12 December 2023, HMRC responded and asked if the appellant would confirm that the expenses should be offset against his self-employment income. The appellant replied on 29 December 2023 agreeing but advancing arguments that the FN penalties and the APN surcharges should be reduced.

22. In HMRC's email of 4 January 2024, HMRC stated:

> "These proposals do not adjust the Isle of Man Partnership Income so have no impact on the Follower Notice ("FN") Penalties that have been issued. I require you to confirm you understand that the FN Penalties (sic) is separate from the agreement we have reached to settle the statutory SA appeals. Once I have your confirmation that you understand the agreement to settle your SA appeals is separate from the FN Penalty appeals you have listed for hearing at Tribunal I will arrange for the adjustments to be made to the Revenue Amendments for 2006/07 and 2007/08."

The officer had indicated that the FN penalties had been reduced, with the NICs being removed and a reduction for co-operation granted. He reiterated that the penalties had been imposed because no timeous corrective action had been taken. He also indicated that once the

appeals against the Closure Notices were settled, payments towards the APNs could be off-set against the revised self-assessment liability.

23. In response on the same day Mr Moore argued, as he still does, that the APN denied advantage is all of his income including the Isle of Man Partnership income minus the original self-assessment and payments on account. He stated:

> "I will then separately liaise with Tribunal (sic) to discuss this new APN advantage figures and hence FN Penalties."

24. It was agreed in the course of the hearing that Directions in relation to written submissions on these emails would be required; hence the Directions and the Written Submissions.

25. The issue is the basis upon which the penalties are calculated. As can be seen, HMRC argue that the FN penalties are based on the Isle of Man Partnership income only (ie the Scheme income). It is common ground that the income derived from the Scheme was £63,100 in 2006/07 and £70,450 in 2007/08. Those were the figures reported by Montpelier and used in the calculation of the APNs and Closure Notices. As can be seen, Montpelier had confirmed to the appellant on more than one occasion that those figures were correct.

26. The appellant believes that it should be based on his total taxable income and he has produced what he describes as "Missing Expenses" that were not included in the SATRs submitted by Montpelier. That is the £11,000 to which he repeatedly referred in correspondence. The "Missing Expenses" relate to expenditure that he avers was incurred wholly and exclusively for the purposes of his work. They do not relate to the Scheme. He argues that the penalties should be recalculated (and thereby reduced). He has produced calculations showing what he describes as a "corrected Denied Advantage/APN figure" of £19,038.60 for 2006/07 and £21,404.87 for 2007/08.

27. As can be seen from the section of this decision outlining the law, denied advantage is the term used in section 208 FA 2014 which relates to FNs and not to APNs so the appellant is not correct to describe the denied advantage in the context of APNs. We do understand that to a non-tax specialist this legislation is very complex. The computation of the accelerated payment in the APNs is the amount charged (rounded down to the nearest pound) reflecting the amount that was under appeal in the Closure Notices, ie the increase in tax and NICs as a result of including the income from the Scheme in the tax computations for those years.

28. In his Submissions the appellant argues that on "numerous" occasions HMRC had used his self-assessment figures in order to calculate the denied advantage. We do not propose to cross-reference those or to comment thereon since, regardless of what HMRC may or may not have been perceived to have done, the Tribunal was created by statute and has only the powers given to it by statute. In this case that means ensuring that the penalties have been correctly calculated in accordance with the relevant legislation.

29. We therefore start with the value of the denied advantage. HMRC correctly argue that what the legislation means is that the value of the denied advantage equates to the additional tax due or payable in respect of the Scheme, ie the appellant's share of the income from the Isle of Man Partnership. HMRC have used the figures provided by Montpelier and received by the appellant. As can be seen from paragraph 20 above, in 2006/07 the income from the Scheme was £63,100 leading to an increase in tax and NICs of £23,915.93. The combined total of the tax and NIC APNs for that year is precisely that figure. The NICs have now been excluded and the tax in dispute is the quantum of the tax APNs in each year.

30. At a technical level, looking at section 204(3) FA 2014, the APN calculations are predicated on the basis that the Scheme is the "chosen arrangements" and the "asserted advantage" is the amount of tax, which has not been paid, that is derived from that.

31. For the purposes of the FN penalties, the denied advantage is £22,018.91 for 2006/07 and £24,448 for 2007/08 (ie excluding the NICs). The penalties have been charged at the rate of 42% in each of those years and therefore amount to £9,247.94 in the earlier year and £10,269.16 in the later year.

32. The appellant has conflated self-assessment, denied advantage, APNs and FNs and therefore the FN penalties. Whilst we understand why he considers that they are inextricably linked, and therefore the "Missing Expenses" must be taken into account, that is simply not the case.

33. The self-assessment tax regime certainly applies to the appellant but it is what it says it is, namely a means of assessing, or calculating the total tax due. Within that, different rules apply to different categories of income or indeed capital gains. Different rules apply to different reliefs and claims.

34. APNs and FNs both relate to tax avoidance schemes and, in this case, arise from the Scheme. However, different legislative provisions apply to both and, as can be seen, there are different provisions for the FN penalties.

35. HMRC are correct to say that APNs are not the amount of the further tax that is <u>due</u> in terms of the denied advantage. What they are is a requirement to pay an amount that a designated officer deems necessary to be paid <u>on account</u> of tax or NICs in order to counteract the denied advantage. The amount in an APN may very well not be the final liability which may be larger or smaller. That is why the officer said that amounts paid toward the APNs might be offset (see paragraph 147 above).

36. The FNs simply tell the taxpayer that they will be liable to a penalty if they do not take corrective action, by a given date, to remove a tax advantage that is said to flow from the use of a tax arrangement. Before any reductions, the quantification of the penalty is a mechanical exercise being 50% of the denied advantage. In this case, that is the amount of additional tax payable on the income received from the Scheme in each year. Nothing falls to be deducted from it since it is described in the Scheme as being an annual fee. That is the inevitable consequence of having chosen to use the Scheme.

37. The self-assessment regime is simply the "wrapper" into which all of these issues fall, together with the appellant's other income from any source.

38. HMRC have pointed out that if the appellant can persuade HMRC that the expenses were wholly and exclusively incurred for the purpose of his trade (which is the correct test) that may reduce his overall tax liability in each of the relevant tax years. Indeed they quote from their email dated 12 December 2023 which is in the Supplementary Bundle and reads:-

> "Additional expenses claim: This issue is unconnected to the FN Penalties and will be considered against the open appeals you have made against the 2006/07 and 2007/08 Closure Notices and Revenue Amendments. Now you have confirmed these additional expenses do not relate to your partnership income from the Isle of Man Double Tax Arrangement Scheme but are to be set against your separate UK based self-employment income I can consider whether they are allowable for income tax purposes."

39. The appellant's appeal against the Closure Notices is not before the Tribunal and we therefore have no jurisdiction to consider those expenses. That is a matter for the appellant to take up separately with HMRC.

40. In that regard we also have no jurisdiction in relation to HMRC's general conduct of the appellant's tax affairs. We can only decide whether or not the appealable decisions, in this case the penalty notices, should be upheld or not.

41. In summary, of the four bullet points included under the heading "Ideal outcome" at paragraph 5 of the appellant's Bundle only the first, being "Tribunal to cancel the FN Penalty (£19,516.10)", is a live issue for decision before this Tribunal. The other three matters which include the "Missing Expenses" are for resolution, or not, between the appellant and HMRC. It may be that if, for example, the Missing Expenses cannot be resolved then there would be a further appealable decision to the Tribunal.

Was it reasonable in all the circumstances for the appellant not to have taken the necessary corrective action within the amended time limits?

42. Obviously, the appellant is relying upon section 214(1)(d) FA 2014.

43. In their Statement of Reasons, HMRC referenced the Upper Tribunal decision in *HMRC v Comtek Network Systems (UK) Limited)* ("Comtek") [2021] UKUT 81 (TC) under the heading "Reasonable in all the circumstances" but then only referred to what was said about "co-operation" and "counteracting".

44. *Comtek* is not only relevant but it is also binding upon us. At paragraph 32 the Upper Tribunal stated that "We would however, observe that the phrase 'reasonable in all the circumstances' involves the application of a straightforward test" and at paragraph 33, having pointed out that there was no need to look at the wording of other tests in different contexts (as many Tribunals had done) that:

> "33. It follows, in our judgment, that the FTT simply had to consider whether it was 'reasonable in all the circumstances' for the Company not to take corrective action, giving that phrase its ordinary and natural meaning. That required the FTT to do the following in this case (which should not be taken as setting out an exhaustive list of the examination required in all cases):
>
> > (1) The FTT needed to consider why the Company chose not to take corrective action as its thought process formed part of the relevant 'circumstances'.
> >
> > (2) The FTT also needed to take into account the fact that the question of whether it was 'reasonable in all the circumstances' not to take corrective action operates as a defence to a penalty that applies if corrective action is not taken by a deadline. Accordingly, the fact that the deadline was missed, and the Company's reasons for missing it were highly relevant.
> >
> > (3) The FTT needed to take into account the structure and purpose of the relevant provisions of FA 2014. Those provisions are designed to ensure that taxpayers who fail to take corrective action by the deadline in response to a follower notice are to suffer a penalty unless, among other defences, they can establish that it was reasonable in all the circumstances not to take the corrective action. Once a taxpayer fails to meet the deadline, even if that failure was not reasonable in all the circumstances, it is not pre-ordained that the maximum penalty of 50% will be charged, since s210 provides for the penalty to be mitigated if there has been 'co-operation' as statutorily defined. But it would be quite contrary to the purpose of the legislation for a taxpayer who misses the deadline for no good reason to enjoy complete exemption from a penalty simply because of actions taken after the deadline has been missed."

45. At paragraphs 52(2) and (3) the Upper Tribunal made it clear that:

"(2)…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

46. It is for that reason that we have set out at such length the factual background. To that we should add that in his Bundle the appellant also made the following assertions:

(a) In Annex A to the email of 16 October 2022, at paragraph 31, having referred to the issue of the FNs in October 2016, the appellant stated that because the paperwork for the FNs looked very like the paperwork for the APNs he had thought that it was "tax terminology for the same thing that the (sic) HMRC introduced to baffle and persuade. So the implications of FNs was never fully realised by the appellant".

(b) At paragraph 62 in that Annex he went on to say that "On 22 March 2019 HMRC started asking about further penalties which confused the appellant as he is clearly not a tax expert. However, this is when the penny dropped that FNs (sic) penalties are different to APNs."

(c) Lastly, in the context of that Annex, at paragraph 52 he stated that, having received HMRC's letter of 16 January 2018, "The appellant felt that things were beginning to unravel, quicker than Montpelier could deal with them and their response timings slipped and the Judicial reviews were failing to materialise to address the APNs and the Nov deadline." At paragraph 58 he recorded that by April 2018, he was concerned because he was unable to get a response from Montpelier or promised updates about litigation.

(d) In his "Brief History of Events" in his Bundle at paragraphs 13 and 14 he states that when Montpelier allowed the 7 November 2017 deadline to lapse without warning him it was a "watershed" moment. From 2018, because of that "watershed" he took a proactive approach, crosschecked everything and started to look for another "reliable and cost effective Tax Adviser".

47. As can be seen from paragraphs 2, 117, 118 and 120 above, the appellant has consistently argued that the penalties should be vacated as his circumstances are either identical, or very similar, to those in *Andreae* where the taxpayer's appeal was allowed.

48. In his own Bundle there was a table extending to 35 pages of close typescript and 144 sections analysing and comparing his circumstances with that which had been found as fact in *Andreae.* That Bundle also includes other references to *Andreae.* Further, the letter of 16 October 2022 included an Annex A extending to 75 pages which the appellant stated showed that in his case and *Andreae* , "the term 'Appellant' can be considered almost interchangeable".

49. Of course, we have read all of those documents, and *Andreae,* and considered them but we do not propose to address all of those points because each appeal to the Tribunal turns on its own facts and the facts that are found by each Tribunal are based on the evidence produced to that Tribunal.

50. In any event, the most that can be said of any First-tier Tribunal decision is that it might be persuasive. It would never be binding upon another Tribunal. For the avoidance of doubt, and unsurprisingly, we agree with the legal principles referred to by the Tribunal in *Andreae.*

51. We do not address the various arguments about *Huitson* since as the decision in *Andreae* makes clear at paragraph 111, it was an issue in that case because of the cross-examination of that appellant. That did not arise here.

52. HMRC argue that beyond the facts that both in this case and in *Andreae* the Scheme and Montpelier were used and FN penalties were incurred for failing to take corrective action, the appellant's circumstances are not identical or similar to those of the appellant in *Andreae*.

53. In particular HMRC rely on the facts that in *Andreae* the taxpayer not only took corrective action but he had also appointed new agents quickly, once he realised that he could not rely on Montpelier.

54. A key issue that we should address is that the appellant insisted at the end of the hearing that he had taken corrective action because he had made an offer to settle as demonstrated by the Supplementary Bundle. As we have pointed out at paragraph 128 above "corrective action" is defined in the legislation and as at the date of the hearing the appellant certainly had not taken corrective action.

55. The hearing was almost five years after the amended date for corrective action. The appellant had only taken advice from WTT Group in September 2022.

56. There are other key differences, the most significant of which, in our view, is that in *Andreae,* the date for taking corrective action was postponed only <u>once</u> after the representations were lodged (from 7 February 2017 to 16 November 2017) but in this case HMRC extended the deadline <u>three</u> times from 14 February 2017 to 7 November 2017 and then to 29 March 2019 and then again to 12 April 2019. In popular parlance he had three bites at the cherry.

57. In his oral evidence, when asked to expand on his written assertion that 7 November 2017 had been a "watershed moment" (see paragraph 171(d) above) the appellant explained that until then he had thought that Montpelier had been "working well for me". He had felt reassured and thought that they were "on top of things but from then on [having received HMRC's letter of 14 November 2017] it fell apart like a car crash". In his Bundle he said that there was the same "watershed moment" in *Andreae* when the APN and FN deadline lapsed without having been warned by Montpelier at the end of 2017. Both had then taken "a more proactive and meticulous approach to everything including Montpelier".

58. Whilst it is obvious that in *Andreae* once the deadline expired prompt action, including corrective action was taken, the appellant's position is rather different. It is certainly the case that he made contact with HMRC from mid-January 2018 but, that was implementing the advice received from Montpelier on 11 January 2018 about making payments.

59. The contemporaneous documentation does not support his assertion that there was a "watershed moment" in November 2017. The only difference was that in addition to using templates provided by Montpelier, he corresponded himself with HMRC but he needed to do that to make the payments on account which was a course of action endorsed at that stage by Montpelier.

60. As can be seen, he continued to use Montpelier, and act on their advice, until, in September 2019, he found out that they were facing liquidation.

61. In particular, he seems to have acted on Montpelier's advice on 27 February and 25 March 2019 (see paragraphs 99 and 102 above). That was that he should not take corrective action by the deadlines that he was then facing. Ms Arnold put it to him that given that HMRC's letters setting those deadlines were written in plain English and were explicit, he had made a conscious decision not to take corrective action. She took him to examples. He did accept that he had understood the letters and deadlines and that penalties would follow if no corrective action was taken.

62. He referred to page 24 of his Bundle arguing that after November 2017 he had started to notice that "Montpelier were making mistakes, especially when they advised him that he did not need to pay the APNs in 2017" but that they had then improved and offered good advice. We observe that he also said that he had grave concerns about Montpelier and never fully trusted them again. We find that that is not consistent with the contemporaneous documentation in a number of respects.

63. There is no evidence that Montpelier told him not to pay the APNs in 2017. On the contrary, as can be seen from paragraphs 15, 26, 29 and 32 above, Montpelier's stance was largely neutral and certainly not negative. The letter to which we refer at paragraph 15, and in particular at 15(d), appears to suggest settling or the purchase of a certificate of tax deposit pending the outcome of the judicial review challenge. The appellant knew that the judicial review had ultimately been withdrawn and indeed he was never part of a judicial review challenge.

64. Furthermore, in his evidence-in-chief, the appellant had confirmed that Montpelier had not told him not to pay but rather he had taken the view that because they did not make a positive recommendation the implication was that he did not need to do so.

65. As we have pointed out, HMRC had suggested payment on numerous occasions over the years and there is no evidence that the appellant asked for advice on his personal circumstances.

66. We know (see paragraph 117 above) that he had taken "secondary advice" from an accountant in 2008 to leave the Scheme so he ought to have been aware that there were question marks about its efficacy.

67. However, we find that, beyond that, there is no evidence in the documentation that the appellant had any concerns about Montpelier at any stage, let alone grave concerns. On the contrary, as can be seen from paragraphs 69, 92 and 108 above, he appeared to have confidence in Montpelier after the said "watershed moment".

68. We are not directly concerned with the APNs or payment of them in this appeal. The issue is the failure to take corrective action timeously. As we have noted at paragraph 60 above, Montpelier had warned the appellant that it was important to avoid a 50% penalty and the appellant knew that that could only be avoided by taking corrective action (see paragraph 55 above). He does not appear to have taken any action in relation to that warning. We say that because he argued that the imposition of the penalties in the letter of 14 November 2017 had come as a huge shock. That is not consistent with the other evidence. He conceded in oral evidence that he had been aware since 2015 that if he did not take corrective action timeously then he would face penalties.

69. We explored with him his argument that following the "watershed moment" he looked for a "reliable and cost effective Tax Adviser".

70. He confirmed in oral evidence that he had not taken HMRC's advice to discuss matters with JSA and said that he did not really talk to them and had focussed on Montpelier. He told

Ms Arnold that he had not believed that JSA could offer useful help and they had not been relevant to his decision-making at the time.

71. His explanation was that he then spoke to friends who were also with Montpelier and he researched the internet checking various forums and attending some webinars and a chat room through his work. He said that he had asked everyone that he could think of and who would listen to him. He had obtained "lots of advice from many sources". What that advice might have been we do not know. He states that he talked to various advisers and reached out to, for example, the Loan Charge Action Group. In his Bundle he said that after the correspondence and emails with HMRC "engaging with tax consultant/advisor didn't make financial sense". He also said that "Post-2018 Montpelier advice was still very useful (& free) especially compared/cross checked with other sources/forums as well as with the HMRC".

72. We find that that sums up his relationship with Montpelier before and after the "watershed moment".

73. In closing submissions he frankly stated that he had been unable to find an adviser at a "reasonable price" and he thought that tax advisers were too time consuming and too expensive.

74. He managed to obtain free advice from the WTT Group in September 2022; that is almost four years after the "watershed moment".

75. When that was put to him he explained that tax was a foreign world to him, he had been naïve, he had had a young family and other pressures in life. Whilst we understand that, and, although he did not advance that argument, we are aware that Covid may also have been a factor. However, we also noted his oral evidence that it had been a relief when "it went quiet" although he had known it would not go away. We accept that his perception was that he was between a rock and a hard place and he could not see a way out although he had always hoped that it would resolve itself.

76. He made it clear, both in his Bundle and in his oral evidence, that having spoken to "people" he had hoped that one of the various litigations that Montpelier had told him about would ultimately be successful. He believed that he was in a "Catch 22" situation and one of those litigations might be the light at the end of the tunnel. He was not a party to any of them.

77. As the Upper Tribunal made clear at paragraph 33(3) of *Comtek,* the phrase "reasonable in all the circumstances" must be viewed in light of the legislative context. A position which viewed in context, frustrates the purpose of the legislation is not likely to be reasonable in all the circumstances. To see how other litigation plays out would be to defeat the purpose of the legislation which is to discourage taxpayers from pursuing their dispute in avoidance cases once their arrangement has been shown to fail in another party's litigation.

78. It would not be reasonable to sit back and wait, particularly in circumstances, as here, where the appellant knew extremely little about any such litigation.

79. Ms Arnold put it to the appellant that he had shown no sense of urgency about taking corrective action and she argued that to a large extent he had simply acted as a "post-box" forwarding letters to HMRC and using the templates provided by Montpelier in replies to HMRC. He said that he had spoken to lots of people.

80. We do not accept the appellant's other argument that he needed to sort out the "Missing Expenses" and he felt that HMRC might have negotiated with him. There is nothing in any correspondence from HMRC that supports that argument. On the contrary, HMRC repeatedly told him what he needed to do. In any event, the "Missing Expenses" were only raised by the appellant after the statutory period for representations had expired.

81. In summary, we have considered the arguments that have been put to us and for the reasons given, we do not accept that the appellant has established that he had a reasonable excuse to fail to take corrective action timeously. Although he is certainly not a tax expert, he is an intelligent man but, objectively considered, his actions were not those which a prudent and reasonable hypothetical taxpayer would have taken in his situation and in the particular circumstances pertaining at the time.

82. Simply put, notwithstanding his protestations that he did not trust Montpelier, he chose to rely on them and their free advice. He took a conscious decision not to take corrective action notwithstanding what he accepted were serious warnings from HMRC. He knew the consequences.

83. For all these reasons we find that the appellant has not discharged his burden of proof.

The quantum of the penalties and whether they are proportionate

84. As we have indicated, the appellant confirmed that the quantum of the maximum penalty is not disputed. In terms of the then relevant legislation, if corrective action was not taken by the specified time a penalty of 50% became due under section 209 FA 2014. In terms of section 210 FA 2014, that penalty could be reduced to a minimum of 10% for cooperation (quantified by relation to timing, nature and extent). The maximum penalty is indeed 50%.

85. HMRC must, and did, look at the five conditions in section 210(3) FA 2014 when computing reductions in the quantum of a penalty. The original calculation allowed nil reductions so it was the maximum penalty of 50%.

86. The issue therefore is whether the reduction of 20% applied to the 40% penalty range (ie between the maximum of 50% and the minimum of 10%) is correct and proportionate. The mathematical calculation is correct. Therefore the question is whether the percentage reduction is appropriate and proportionate?

87. Dealing with proportionality first, as far as the legislative scheme itself is concerned, as opposed to its application to the appellant, we agree with Judge Popplewell at paragraphs 31 and 35 in *Glasby v HMRC* [2020] UKFTT 353(TC) ("Glasby") that the FN penalty regime is a proportionate one.

88. As we have indicated, on review, HMRC reduced the amount of the penalties in both of the relevant tax years by increasing the reduction for condition (a) in section 210 FA 2014 for having "provided reasonable assistance to HMRC in quantifying the tax advantage". That was on the basis that their policy had changed and HMRC had not required anything further from the appellant to establish the value of the denied advantage.

89. We have set out the provisions of section 210 FA 2014 at paragraphs 129-131 above. Section 210(1) refers to a situation where a taxpayer has co-operated with HMRC. There is no time constraint and we agree with Judge Hellier in *Barlow v HMRC* [2020] UKFTT 486 (TC) ("Barlow") where he stated that "…consideration should be given to the whole of the taxpayer's conduct in relation to dealings relating to denied advantage". We have done so as we have also done in relation to whether it was reasonable not to take corrective action. Much of the reasoning in that regard applies in this context.

90. Turning first to section 210(3)(a), whilst we are not bound by HMRC's policy to allow a reduction of up to 20% for "reasonable assistance" in quantifying the tax advantage, very little was done by the appellant. Montpelier disclosed the amount of income paid from the Scheme in each of the relevant tax years and the tax advantage is based on that. Although Montpelier confirmed to him on more than one occasion that the figures were correct, in recent years, the appellant has challenged those figures, inaccurately, for the reasons that we have described in relation to the written submissions.

91. Section 210(3)(b) relates to counteraction of the denied advantage.

92. HMRC relied on paragraph 45 of *Comtek* which reads:

> "45. In our judgment, the concept of 'counteraction' needs to be understood purposively. The purpose of the follower notice regime is to provide taxpayers with a strong disincentive to continue to consume public resources by continuing tax disputes which appear to have been resolved by other finally decided cases. Therefore, in our judgment, full 'counteraction' occurs, in the case of a follower notice issued after an appeal has been commenced, if the taxpayer gives up the appeal and communicates that fact to HMRC. The requirement to consider 'timing' means that the amount of credit

available for such counteraction will reduce the later it takes place. The requirement to consider 'nature' and 'extent' means that partial credit may be available for steps on the way to full counteraction."

93. HMRC argue that the appellant has still not counteracted the denied advantage. Whilst he states that he wishes to settle with HMRC, as can be seen from the correspondence, he is only prepared to do so on his terms. He has not given up the appeals. HMRC has repeatedly made it very clear to him that the "Missing Expenses" cannot reduce the FN penalties. He does not accept that but the consequence is that he has not yet counteracted the denied advantage. Accordingly, no reduction is appropriate under that heading.

94. Although we have looked at section 210(3)(a) and (b) FA 2014 because HMRC have done so, we have adopted the approach of the Upper Tribunal at paragraph 52(1) of *Comtek* where it is said that they approached the question of penalties holistically and sought to look at the overall level of co-operation. That is where the timing, nature and extent of the co-operation are particularly relevant.

95. We have set out the text of paragraphs 52(2) and (3) of *Comtek* at paragraph 170 above. The problem that the appellant has is that, at every stage, he has frustrated the statutory purpose and his actions have not only not been effective in meeting the purpose of the legislation but have drawn the process out.

96. As far as timing is concerned, since the appellant has not counteracted the denied advantage there can be no reduction. The nature and extent of his co-operation has been very limited. He has simply repeated the same arguments and some of those arguments such as PAYE and agency and the £11,000 were not included in the representations. He has chosen not to employ a tax adviser or to take corrective action. That is his prerogative but it distinguishes his appeal from *Andreae, Barlow, Glasby* and many others and it does not amount to co-operation.

Decision

97. For all these reasons the appeal is dismissed and the penalties, as varied by HMRC, are upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

98. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 13th JUNE 2024