Neutral Citation: [2024] UKFTT 00968 (TC)

Case Number: TC09340

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2023/07471

LATE PAYMENT PENALTY – failure to pay APN whilst challenging by way of judicial review – whether reasonable excuse – no – special circumstances – no – other challenges considered – appeal dismissed

Heard on: 4 September 2024
Judgment date: 22 October 2024

Before

TRIBUNAL JUDGE AMANDA BROWN KC

Between

STEPHEN RAY

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: no one appearing

For the Respondents: Ms Reynolds litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties the form of the hearing was a video hearing using Microsoft Teams. A face-to-face hearing was not held because it was expedient not to do so. The documents to which I was referred were contained in a bundle prepared by HM Revenue & Customs (**HMRC**) of 656 pages and a bundle prepared by Stephen Ray (**Appellant**) of 485 pages together with a skeleton argument from HMRC.

2. 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.

3. This corrected decision has been issued pursuant to rule 37 Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (**FTT Rules**) corrections of slips rules. The only amendments made are to what is now paragraph 8.

HEARING IN APPELLANT'S ABSENCE

4. The hearing of this appeal was originally listed to be heard using the Tribunal Video Platform. However, due to issues with the platform, on 2 September 2024, the forum of the hearing was changed to a Microsoft Teams meeting.

5. I joined the hearing using the Microsoft Teams meeting ID and passcode, having been unable follow the "Join the meeting now" link in the invitation sent to me on 2 September 2024 through my Teams app, I was able to join using the web browser but did not choose to do so. HMRC were present in the meeting. We waited for the Appellant to join but he did not do so. I asked the Tribunal admin team to confirm to me that the Appellant had been sent the invitation to the Teams meeting. This was confirmed and there was no indication that the Appellant had made contact with the Tribunal centre to indicate any technical difficulties.

6. In light of the Appellant's absence HMRC made an application under rule 33 FTT Rules for the matter to be heard despite his absence. Rule 33 permits me to hear the appeal if I am satisfied that the Appellant has received notification of the hearing and it is in the interests of justice to proceed in their absence.

7. As, on 4 August 2024, the Appellant had served a bundle for the hearing and I had been sent a copy of the email sent to him on 2 September 2024, I was satisfied that he had been duly notified of the hearing. I also considered it in the interests of justice to proceed to hear the appeal.

8. I heard from HMRC and was satisfied that the conditions required to issue the late payment penalties were established. I had previously read the bundles prepared by each of the parties including the Appellant's grounds of appeal, response to the statement of reasons and other correspondence which detailed the basis on which he challenged the penalties. Having considered them I concluded that the penalties were validly raised and there was no basis on which to set them aside as the documents did not make out a reasonable excuse or demonstrate that HMRC's decision not to apply a special reduction was flawed. I gave an ex tempore judgment dismissing the appeal.

9. At 12:19 the Appellant emailed the Tribunal stating that he had been unable to attend the hearing due to technical difficulties. He said that the "Join the meeting now" link had not worked and his work computer had precluded him from joining using the meeting ID and passcode. He does not say that he made any further attempt to contact the Tribunal or use another device to join the meeting. He requests that the hearing be rescheduled.

10. As the hearing had been completed by the time the email was received and I had delivered judgment the hearing cannot simply be rescheduled.

11. I set out below my fully reasoned decision for dismissing the appeal by reference to the material available to me. If, having read the decision, the Appellant considers it appropriate he may apply to either set it aside (and invite the First-tier Tribunal to rehear the appeal and make a fresh decision) or apply for permission to appeal the decision as set out to the Upper Tribunal (see paragraphs 50 and 51 below).

BACKGROUND FACTS

12. This is an appeal bought by the Appellant against the imposition of seven late payment penalties arising from the non-payment of Accelerated Payment Notices (**APNs**).

13. The relevant chronology is as follows:

(1) The Appellant participated in two registered tax avoidance schemes: Self-employed Contractors Reward Strategy scheme DOTAS number 17668675 (**Strategy**) and The Grange Trust A.k.a. Avenue Trust scheme DOTAS number 96665240 (**Grange**).

(2) Following the submission of his 2010/11 tax return HMRC opened an enquiry into that tax year and subsequently issued APNs requiring the payment of the amounts HMRC considered represented the income tax and National Insurance Contribution (**NICs**) advantages arising to the Appellant from the Strategy and Grange Schemes in that tax year. As was his statutory right the Appellant made representations in relation to the issue of those APNs.

(3) The Appellant rendered his tax returns as follows:

(a) For tax year 2011/12 – 18 October 2012 in which he disclosed that he had participated in the Strategy and Grange schemes.

(b) For tax year 2012/13 – 22 November 2013 in which he disclosed participation in the Grange scheme.

(c) For tax year 2013/14 – 14 January 2015 in which he again disclosed participation in the Grange scheme.

(4) HMRC opened enquiries into each of those tax years on 11 October 2013, 15 April 2014 and 17 September 2015 respectively.

(5) On or around 19 June 2015 the Appellant (as part of a group) commenced judicial review proceedings challenging HMRC's power to issue APNs in respect of the Strategy scheme. Subsequently on or before 8 March 2016 similar proceedings were commenced regarding the Grange scheme. In both sets of proceedings the court issued interim relief orders precluding HMRC from collecting the sums due under the APNs. The order in respect of the Strategy scheme expressly provided that it was without prejudice to HMRC's ability to issue penalties issued for any failure to pay the APNs.

(6) On 19 February 2016 HMRC issued seven APNs requiring the payment of the amounts HMRC considered represented the income tax and National Insurance Contribution advantages arising to the Appellant in each tax year 2011/12 - 2013/14 as a consequence of his participation in the tax avoidance schemes identified in those returns. The APNs notified the Appellant that the payment in each case was "due on or before 26 May 2016 (Payment may be due on a later date if representations [were] made under section 222 of the Finance Act 2014".

(7) No representations were made with the consequence that the amounts stated on the APNs became due on 26 May 2016. The Appellant did not make payment on the due date.

(8) On 9 August 2016 HMRC issued the first late payment penalties.

(9) The Appellant made in time appeals against the penalties to HMRC on 5 September 2016. HMRC issued a view of the matter letter on 27 September 2016. The letter confirmed that enforcement of the penalties would be postponed.

(10) Subsequent penalties were issued but they do not form part of this appeal as they were not appealed in time and, in a judgment released on 25 January 2024, Judge Harkness refused the Appellant's application to bring late appeals.

(11) On 21 September 2020 the Appellant agreed to settle the outstanding liabilities for tax years 2011/12 – 2013/14 by way of compromise with HMRC. The agreed settlement: concluded HMRC's enquiries and provided for to a time to pay arrangement in respect of the income tax and NICs then determined as due. The settlement agreement and associated time to pay arrangement specifically excluded the late payment penalties currently under appeal.

(12) The Grange and Strategy judicial reviews were formally discontinued by notices dated 29 September 2020 and 3 March 2022 respectively.

(13) On 11 November 2022 (in respect of the Grange judicial review) and 20 January 2023 (in respect of the Strategy judicial review) HMRC notified the Appellant that the stay on enforcement of penalties had been lifted and that they would seek to collect the penalties.

(14) The Appellant notified his appeal to the Tribunal on 27 February 2023.

SUMMARY OF RELEVANT LEGISLATION

14. Finance Act 2014 (**FA14**) makes provision for the issue of APNs. So far as relevant in this appeal, section 219 permits HMRC to issue an APN where HMRC have an open enquiry into a return rendered by a taxpayer which gives rise to tax advantage derived from a registered tax avoidance scheme. Section 220 provides that the amount specified in the APN is "an amount equal to the amount which a designated HMRC officer determines, to the best of that officer's information and belief, as the understated tax" Understated tax is defined, in the case of an APN issued in respect of a registered tax avoidance scheme, and in respect of which there is an ongoing enquiry, as the amount necessary to deny the tax advantage. A taxpayer has a right to make certain representations to HMRC concerning the APN under section 222 FA14 specifically as to the quantum\calculation of the sum demanded. Where, as here, no representations are made under section 222 FA14, section 223 FA14 requires that the sum to which the APN refers is required to be paid within 90 days of the notice and is treated as a payment on account of the understated tax (as defined in section 220 FA14).

15. By virtue of section 226 FA14 here a taxpayer fails to pay an APN by the due payment date, they become liable to a penalty of 5% of the sum on the APN. Pursuant to section 226(7) FA14 certain provisions of Schedule 56 Finance Act 2009 apply in respect of the penalty. So far as relevant these provide:

(1) Through paragraph 9 that HMRC may apply a special reduction to the penalty where there are special circumstances which justify a lower amount; but special circumstances do not include an inability to pay;

(2) No penalty will be due if, before the due date for payment of the underlying amount, HMRC agree a time to pay in respect of it (paragraph 10);

(3) The imposition of the penalty is subject to a right of appeal (paragraph 13);

(4) On an appeal concerning HMRC's power to grant a special reduction the Tribunal's jurisdiction is limited to considering if HMRC's decision is flawed (paragraph 15);

(5) No liability to a penalty arises where the taxpayer establishes to the satisfaction of HMRC or the Tribunal that they had a reasonable excuse for non-payment. Insufficiency of funds and reliance on a third party do not represent reasonable excises. Where a reasonable excuse comes to an end payment is required to be made within a reasonable period of the excuse ending (paragraph 16).

16. Section 227 FA14 provides that where an APN has been given it may be withdrawn by notice to the taxpayer and where it is withdrawn it is treated as never having been issued and any associated penalties are cancelled.

BURDEN OF PROOF

17. In this appeal HMRC were required to establish, on the balance of probabilities, that:

(1) The Appellant had rendered tax returns in respect of which the tax had been calculated by reference to the use of a registered tax avoidance scheme;

(2) Enquires had been opened;

(3) APNs had been issued;

(4) The APNs were final because no representations had been made an/or had been responded to and

(5) Payment had not been made by the due date in respect of those APNs.

18. Where HMRC so proven the Appellant then needes to establish, again on the balance of probabilities, that he had a reasonable excuse for non-payment of the APN by the due date and/or that there were special circumstances which meant that HMRC's decision not to reduce the penalty was flawed.

EVIDENCE AND FACTS

19. The evidence before me consisted of the documents provided by each of the parties.

20. By the online tax returns, letters by which the enquires were opened, the admitted absence of representations, the copy APNs and the Appellant's admission/acceptance that payment was not made, HMRC have proven the requirements set out in paragraph 17 above.

21. The penalties will therefore stand unless the Appellant can satisfy me that he has a reasonable excuse or HMRC's decision to refuse a special reduction was flawed.

22. By his notice of appeal and correspondence, and by way of relevant summary, the Appellant's evidence and assertions are that:

(1) He challenged the APNs by way of judicial review with the penalties being issued whilst the judicial review proceedings were ongoing.

(2) He should be treated as having made an "innocent tax mistake" as he had disclosed the DOTAS scheme numbers in his self-assessment tax returns and that he was only aware that HMRC considered him to be non-compliant many years after using the arrangements.

(3) As he settled the tax the APNs should have been withdrawn with the associated consequence that the penalties too would fall away (as is the case when withdrawn in consequence of section 222 FA14 representations, as provided for in section 227 FA14

and as explained in section 2.13.3 HMRC's public guidance on APNs and Follower Notices).

(4) The amounts due under the settlement agreement do not match the APNs indicting that the APNs were unenforceable such that the penalties in respect of them should not be payable. By reference to observations made in the case of *Kevin Graham v HMRC* [2018] UKFTT 661 (TC) the status of an APN following a settlement is uncertain

(5) Given HMRC have accepted a time to pay for the tax it should be apparent that he cannot make full payment of the penalties, a matter which is reflected in the Morse review.

(6) The APN regime should never have applied to him as it was too draconian and it was always going to be impossible to find the money to meet the APNs.

(7) HMRC had never prosecuted any of the promoters of the schemes.

(8) It is unreasonable for HMRC to charge interest on the late payment of the penalties because it was a consequence of HMRC delays that no effort was made to collect the sums more quickly.

23. I note that, in the main, the Appellant's challenges to the penalties are not framed as establishing a reasonable excuse or identifying special circumstances. I address below the extent to which the grounds establish a legal challenge to the penalties but for present purposes I assess them and the broader terms of the correspondence so as to find the following facts relevant to the question as to whether there is a reasonable excuse/special circumstances:

(1) The Appellant "used various tax avoidance schemes from 2005 – 2013 (accepted in his letter of 10 September 2023 to the Tribunal).

(2) The Appellant's tax returns declared use of the DOTAS schemes.

(3) The Appellant was a participant in judicial review proceedings which sought to challenge the validity of the APNs but the proceedings were discontinued and thereby the validity of the APNs was confirmed.

(4) Witness statements were prepared and served by the Appellant in connection with the judicial reviews establishing that the Appellant would suffer hardship if required to make payment on the APNs i.e. that there was an inability to pay/insufficiency of funds at the time the APNs fell due (witness statement in the Strategy juridical review dated 16 June 2015 and for Grange judicial review dated 8 March 2016).

(5) Such inability to pay may be inferred until at least 83 months after the settlement agreement was signed (i.e. until August 2027) when the time to pay agreement comes to an end.

(6) The settlement agreement reached between HMRC and the Appellant settled the tax due and closed the enquiries for the years to which the APNs relate.

REASONABLE EXCUSE

24. Whether a taxpayer has a reasonable excuse in connection with non-payment of an APN is a matter which has been considered with some frequency by the Tribunal. Some of the appeals have gone on up to the Upper Tribunal and Court of Appeal.

25. The approach to such appeals has recently been summarised by the Court of Appeal in the case of *William Archer v HMRC* [2023] EWCA Civ 626 (***Archer***) as follows (relevant statutory references for the present appeal have been substituted):

> "***Reasonable Excuse: General***
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> 18. Reasonable excuse is not defined in the legislation but useful guidance on the approach to be adopted by a tribunal was given in *Christine Perrin v HMRC* [2018] UKUT 0156 (TCC), [2018] STC 1302 (UT Judges Herrington and Poole) at [81], in the following terms:
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> > "When considering a 'reasonable excuse' defence, therefore, in our view the FTT can usefully approach matters in the following way:
> >
> > (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience and relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
> >
> > (2) Second, decide which of those facts are proven.
> >
> > (3) Third, 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 be taken 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. It might assist the FTT, in this context, to ask itself the question 'was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?'
> >
> > (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again decide the matter objectively, but taking 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."
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> 19. Reasonableness is to be determined in each case depending on the facts. The analysis of Judge Berner in *Barrett v HMRC* [2015] UKFTT 329 (TC) at [161] is of assistance:
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> > "The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different."
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> 20. Inability to pay is not a reasonable excuse (see section 59C(10)), but a tribunal can consider the underlying cause of the taxpayer's default, as was made clear in *C&E Commissioners v Steptoe* [1992] STC 757, where the Court of Appeal upheld the decision of the tribunal that persistent late payment by the trader's largest client, which caused the taxpayer to lack

funds, was a reasonable excuse for late payment of VAT. Lord Donaldson MR said that the question was "whether the underlying cause constitutes a reasonable excuse", p 770 d. The taxpayer must therefore establish that the excuse put forward is the cause of, or real reason for, the non-payment of the tax.

21. The standard to be adopted is that of the responsible trader, explained by Judge Medd QC in The *Clean Car Co Ltd v C&E Commissioners* [1991] VATTR 234 as follows:

> "The test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

22. The burden of proof is on HMRC to show that the necessary conditions were met for the imposition of a surcharge and that the surcharge was validly imposed under [paragraph 16 Schedule 56 Finance Act 2009]. If that burden is met by HMRC, the burden shifts to the taxpayer to show, on a balance of probabilities, that he had a reasonable excuse for the late payment of the tax throughout the period of default.

Reasonable excuse: The APN cases

23. In a number of cases, the tribunals and courts have considered whether a reasonable excuse exists for non-payment of APNs or PPNs. The earliest such case that we were shown is *Francis Chapman v Commissioners for HM Revenue and Customs* [2017] UKFTT 800 (TC), in which the taxpayer had issued judicial review proceedings to challenge an APN and relied on those judicial review proceedings as one of several excuses for not paying the tax. Judge Charles Hellier described the general approach in terms that are not controversial:

> "59. It seems to me that for something to be an excuse it must be such that absent that thing payment would have been made; and that an excuse is a reasonable excuse if, taking into account all the circumstances including those of the taxpayer, it was reasonable for him to have acted or failed to act as he did."

24. Judge Hellier considered the purpose of the APN legislation and concluded that there were circumstances in which it was reasonable to consider an APN to be unlawful and on that basis for a taxpayer reasonably decline to pay it ([71]); but he thought such cases were "exceptional" and would generally only arise in cases where there was an "obvious or gross error in the notice" ([72]); in such cases, for non-payment to be reasonable, it had to be based on a belief that was "robustly based" ([74]).

25. In *Beadle v Revenue and Customs Commissioners* [2020] EWCA Civ 562; [2021] 1 All ER 237, the Court of Appeal held that the alleged invalidity of PPNs was not a matter that the FTT could consider in the context of a reasonable excuse defence to penalties for non-payment of the PPNs ([57], per Simler LJ).

26. In *Sheiling Properties Ltd v Revenue and Customs Commissioners* [2020] UKUT 175 (TCC); [2020] STC 1380 (decided on appeal in relation to different points at [2021] EWCA Civ 1425; [2022] 1 WLR 1298), the UT (Trower J and Judge Thomas Scott) held that a taxpayer had not shown a

> reasonable excuse for non-payment of an APN. The UT noted the case of *Perrin* (at [66]). The UT said the "particular question" for them was how to assess reasonableness in the context of a taxpayer's belief that the APN was not valid; more specifically, the question was the extent to which the legislative policy underpinning the APN regime affected that assessment ([68]). The UT drew a distinction between substantive and procedural invalidity at [69] and held that substantive invalidity could not be a reasonable excuse, drawing on Beadle; by contrast, procedural invalidity could be a reasonable excuse ([70]-[78]). The UT thought that any taxpayer who believed an APN to be invalid should commence a judicial review, as this taxpayer had done; it was undesirable for the FTT to have to conduct a mini-trial of that judicial review in order to determine the question of reasonable excuse for non-payment ([80]); rather, in this case, the UT assessed the objective reasonableness of the taxpayer's belief that the APN was procedurally invalid (see [81]).
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> 27. In *Exclusive Promotions Ltd v Revenue and Customs Commissioners* [2022] UKFTT 103 (TC); [2022] SFTD 747 (Judge Redston and Ms Corrigan), the appellants had challenged APNs by way of judicial review and had been granted interim relief by the Court on terms that specifically reserved HMRC's ability to impose penalties for non-payment in the event that HMRC succeeded in the judicial review. The FTT relied on Beadle and Sheiling to conclude that there was no reasonable excuse demonstrated for not paying the APNs while the judicial review progressed.

26. This appeal is an APN case like those reviewed and summarised by the Court of Appeal in *Archer*. Like the taxpayers in those cases the Appellant contends that as he was challenging the APN by way of judicial review he should not have been penalised for non-payment of the APNs which were the subject of his judicial review challenges. As set out above, the underlying policy of the APN legislation and the effect of the interim relief orders preclude a conclusion that he thereby has a reasonable excuse for non-payment.

27. The Appellant also refers to a discrepancy between the sum settled and the amount stated on the APNs. For present purposes I have considered whether such discrepancy may amount to a "robustly based" "gross or obvious error" in the notice and/or a procedural invalidity in the notice which might constitute a reasonable excuse. In my view it does not.

28. First and foremost, the amount required to be stated on the APN is the amount determined by an officer of HMRC to the best of their information and belief, to be the amount required to deny the tax advantage designed by the DOTAS scheme to have been achieved when the self-assessment return was rendered. The amount settled (and on which the enquires were closed) is the final tax payable for the tax year in question taking account of all reliefs, entitlements and any other errors on the return. The amount settled (and/or closed) may be the same as that stated on the APN but need not necessarily be so and any difference does not indicate either procedural invalidity or an error (never mind a gross and obvious error) in the APN.

29. Secondly, a calculation error giving rise to an objection to the amount specified in the APN is expressly a matter which would have entitled the Appellant to make representations to HMRC under section 222 FA14. Had such representations been made the due date for payment of the APN would have been suspended pending HMRC's consideration of such representations and for 30 days after their response such that no liability for a penalty would have arisen whilst the calculation error was being considered. However, the Appellant did not make any representations. Even were there an error (which I do not consider there was) it cannot therefore have been an obvious and gross error, as such an error would have prompted

a reasonable taxpayer possessing the knowledge and skills of the Appellant, who had previously made representations against earlier APNs, to have made representations here thereby suspending the due date for payment.

30. A similar conclusion was reached by Judge Thomas in *Kevin Graham* but for slightly different reasons.

31. Further, it is plainly apparent, on the evidence, that the real cause for non-payment of the APNs was an insufficiency of funds. Such insufficiency was the very basis on which interim relief was granted to the Appellant in connection with both the Strategy and Grange APNs. Paragraph 16 Schedule 56 Finance Act 2009 precludes any reasonable excuse on that basis.

32. Accordingly, I find that there is no evidence of a reasonable excuse for non-payment of the APNs in this case.

SPECIAL CIRCUMSTANCES

33. As outlined in paragraph 15.(1) a special reduction can be given by HMRC where there are special circumstances justifying the reduction. An inability to pay is excluded as a special circumstance. There is no statutory definition of special circumstances, but the Upper Tribunal has held in *Barry Edwards v HMRC* [2019] UKUT 131 (TCC) that the provision gives a broad discretion to reduce a penalty where it is "right" to do so because the circumstances are "sufficiently special".

34. Here, like many other taxpayers who had deployed the Strategy and Grange tax avoidance schemes or similar, the Appellant sought to reduce their tax liability through the use of arrangements that they knew were registered with HMRC as avoidance schemes. The Appellant's tax returns noted in the white space disclosure, that HMRC may take a different view of his liability to tax than he had because of the use by him of the disclosed schemes. Extensively through correspondence the Appellant asserts that his use of these schemes were "innocent mistakes" relying on comments made by Jim Harra, managing director of HMRC, to the select committee relating to Nadhim Zahawi. With respect to the Appellant I do not find that they were innocent mistakes. I am prepared to accept, on the basis of the correspondence made available to me, that, led by those promoting the schemes, he believed that his tax returns were complete and correct and that the tax avoidance schemes on which they had been calculated would, when or if challenged, be found to give rise to the advantage he sought. However, he took a calculated risk in that regard knowing that the schemes were considered to be tax avoidance and that HMRC may take a different view. That was a conscious decision taken appraised of the risks and not a mistake.

35. In any event, the penalties under consideration by me in this appeal do not penalise the Appellant for the errors on his tax return. The penalties have been issued because he failed to pay the APNs by their due date. As I have already found the reason he did not pay them was not an innocent mistake, it was because he could not afford to do so, and an inability to pay is specifically excluded as a special circumstance.

36. Therefore I find there is no basis on which to conclude that HMRC's conclusion that there were no special circumstances is flawed and is, in fact, correct.

APPELLANT'S ALTERNATIVE LEGAL CHALLENGES

37. In this section I deal with the remaining points raised by the Appellant as a basis on which he challenges the penalties.

Settlement requires the APNs and associated penalties to be withdrawn

38. First, I deal with the Appellant's position that because of the settlement HMRC should withdraw the APNs which will then carry the consequence that the penalties too would be withdrawn.

39. I have carefully considered the provisions of part 4 chapter 3 FA14 concerning APNs and conclude there is no need for HMRC to withdraw an APN where settlement is reached.

40. Section 219 FA14 provides for HMRC to issue an APN during an enquiry into a return rendered on the basis of the use of a DOTAS scheme which is under enquiry. The purpose and effect of an APN (in consequence of section 220 and 223 FA14) is simply to accelerate the requirement to make payment in respect of the asserted tax advantage. The legislative policy for the provision is summarised, again, in *Archer*:

> "78. A key part of HMRC's case was that the "pay now, argue later" principle was engaged in this case, because APNs had been issued to the appellant. In order to address HMRC's argument, it is necessary to make a number of basic points drawn from the case law on APNs:
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> a. First, the APN legislation is exceptional in its design and effect. *In R (Rowe and others) v Revenue and Customs Commissioners; R (Vital Nut Co Ltd and Another) v Revenue and Customs Commissioners* [2017] EWCA Civ 2105; [2018] 1 WLR 3039 Arden LJ said that the APN legislation was designed to deprive taxpayers of the benefit of statutory provisions on self-assessment which are "normally" available ([6]); it contained "unusual powers" ([61]); and the "breadth of the powers contained in this regime call for caution" ([50]).
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> b. Secondly, the purpose of the legislation (and the justification for its exceptional nature) is to deter marketed tax avoidance schemes by removing the cashflow benefit which would otherwise accrue to taxpayers while such schemes are contested (*Beadle* at [49]); the giving of an APN determines who should hold the disputed tax pending determination of the underlying tax liability, namely HMRC (Beadle at [50]). This is the "pay now, argue later" principle, as Mr Ghosh characterised it.
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> c. Thirdly, the legislation incorporates provision for a taxpayer to make representations against an APN to HMRC (section 222 FA 2014); if that occurs, the notice is not payable unless and until the APN has been confirmed by HMRC in answer to those representations (section 223(5) FA 2014). In *Rowe*, the Court recognised the taxpayer's right to make representations as an aspect of the duty of fairness at [110] per Arden LJ, alternatively as a means of satisfying Article 6 ECHR at [214] per McCombe LJ. The need for HMRC to consider representations seriously and carefully was emphasised in *R (on the application of Archer) v Revenue and Customs Commissioners* [2019] EWCA Civ 1021, [2020] 1 All ER 716, [2019] 1 WLR 6355 (a different Archer case brought, I believe, by this appellant's wife), by Henderson LJ at [94]:
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> > "The duties imposed on HMRC by s 222 are heavy ones, particularly in the absence of any statutory appeal to the FTT, and it would be quite wrong for us to assume that HMRC would be likely to treat the exercise as a formality. Clearly, it is their duty to give serious and careful consideration to the representations which are made, supplemented if necessary, by HMRC's acknowledged duty to deal in good faith with proper representations made to them by taxpayers, whether or not falling strictly within the scope of the APN."

> d. Fourthly, disagreement with the tax liability shown on the APN is not a reasonable excuse for non-payment: *Beadle*. However, there are some cases, uncertain in their scope, where non-payment of an APN may be reasonable, for example, where the defect is "gross and obvious" (Chapman) or where the APN is "procedurally invalid" (*Sheiling*). …

41. By reference to the statutory purpose and the language of sections 219, 220 and 223, I consider that once a section 28A Taxes Management Act 1970 (**TMA**) closure notice (or the equivalent – here the settlement agreement which explicitly closed the enquiries on terms which met the requirements of section 28A(2) because it stated the basis on which the tax was considered due and made the appropriate adjustment to the Appellant's self-assessment) has been issued, there is no longer any tax to accelerate the payment of. The amount which was due under an APN issued pursuant to section 219(2)(a) has been finally determined and that tax has become due and payable by virtue of section 59B(5) read with Schedule 3ZA TMA whose provisions require payment within 30 days of the notice of closure (or settlement agreement). Thus, from the issue of the closure notice (or equivalent) the APN was superseded.

42. I take comfort in this conclusion from the provisions of section 219(2) FA14 which provide separately for the issue of an APN where there is an open enquiry (paragraph (a)) and where there is an assessment (including one stated in a closure notice) which is under appeal and the tax has been postponed (paragraph (b)). I consider that in a case where a taxpayer received an APN under paragraph (a) but did not pay it then received a closure notice which was appealed HMRC would either need to refuse to exercise their discretion under section 55 TMA to postpone the tax or, more likely, would issue a new APN under paragraph (b).

43. I am further reinforced in my view by virtue of the provisions of section 227(12) FA14 which provides that where an APN is withdrawn it is treated as never having had effect with the consequence that amounts paid under it or penalties paid by virtue of the notice are required to be repaid. It would be entirely anomalous for a taxpayer who refused to pay an APN, thereby continuing to have the cash flow benefit from avoidance arrangements, to have the penalties imposed precisely to enforce the "pay now argue later" legislative policy later removed when settlement was reached whereby the taxpayer accepts that the tax which HMRC sought to accelerate the payment of was actually due.

44. Having reached this conclusion I respectfully disagree with the assumption which might appear to underly Judge Thomas's observation at paragraph 55 in *Kevin Graham*. He observes that where an enquiry is settled in lieu of a closure notice there is nothing in FA14 or TMA which enables an unpaid APN to be "scrubbed from the books" with the consequence that it may be revived. If his observation is limited to a settlement which does not also formally close an enquiry, then he may be right, though the taxpayer would, in my view, be protected by administrative law from the revival of an APN in such circumstances. However, where, as here, the enquiry is stated to have been closed an unpaid APN serves no purpose and any enforcement action would be taken on the section 59B(5) TMA debt.

Remaining issues

45. As identified in paragraphs sub paragraphs (5) – (8) of paragraph 22 the Appellant also raises objections to the penalties on the basis that the regime it too draconian, he cannot afford the penalties, the scheme promotors have not been prosecuted and he should not be charged interest because the delay was HMRC's fault.

46. As set out in the Upper Tribunal judgment in *R&J Birkett v HMRC* [2017] UKUT 89 (TCC):

> 30. …

> (1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], BT Trustees at [133].
>
> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at 5 [143].

47. *Birkett* goes on to acknowledge that in some limited situations the Tribunal may, in certain situations, consider questions of public law. Paragraph 44 of *Beadle* confirms that where HMRC have a discretion in connection with enforcement action (including the issue of a penalty) public law considerations can be taken into account by the Tribunal unless the ability to do so has been excluded by Parliament. In the context of APN penalties *Beadle* concluded, at paragraph 48, that "the ability to raise a collateral public law challenge to the validity of the underlying PPN is excluded at the penalty and enforcement stages" for the reasons then set out in detail in paragraphs 49 – 55.

48. HMRC decisions concerning whether to grant a time to pay arrangement and regarding the imposition or calculation of interest are not decisions which are specified under the taxes acts as matters within the jurisdiction of the Tribunal to consider.

49. Accordingly, I have no jurisdiction to consider the objections raised regarding the asserted draconian nature of the regime or HMRC's conduct vis a vis promoters, time to pay or interest.

RIGHT TO APPLY FOR PERMISSION TO APPEAL/APPLY TO SET ASIDE

50. This appeal was heard in the Appellant's absence pursuant to rule 33 FTT Rules. As such, and pursuant to rule 38 FTT Rules, the Appellant may apply for the decision to be set aside and the appeal reheard by the First-tier Tribunal. Any application for set aside must be made in writing and received by the Tribunal no later than 28 days after this decision is sent to the parties.

51. 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 FTT Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

AMANDA BROWN KC
TRIBUNAL JUDGE

Release date: 22nd OCTOBER 2024