[2017] UKFTT 406 (TC)

TC05870

Appeal number: TC/2016/03255

Incom tax – accelerated payment notice – penalty for non-payment – APN specified two different payment amounts – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GRAHAM PITCHER **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**

Sitting in public in The Royal Courts of Justice, London on 24 February 2017

The Appellant appeared in person

Thomas Chacko, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal is against a penalty imposed in respect of the failure to make payment as required by an Accelerated Payment Notice ("APN"). Essentially this decision is concerned with the following issues: whether the APN in question was "given" to the appellant, whether the appellant had a reasonable excuse for non-payment and whether his liability to a penalty should be affected by claimed rights to repayment of tax. In addition, the APN itself identified two different figures for the required amount of the accelerated payment, and the implications of that inconsistency are considered in this decision.

The facts

2. I was furnished with a small bundle of documents and I also heard oral testimony from the appellant. I find the following facts.

3. In the tax year 2007-08, the appellant had employment income of £127,800 plus benefits in kind, from which income tax was deducted at source under the PAYE system. He also entered into a tax avoidance scheme called "Liberty 2 (Syndicate)" (which had been allocated a scheme reference number 55413422 by HMRC under the DOTAS rules) with a view to generating a loss for 2007-08 which could be set against his income. After taking account of this loss claim, his return for 2007-08 claimed a repayment of £39,641 of the £44,946 income tax deducted at source from the employment income and interest he had received.

4. HMRC opened an enquiry into the appellant's 2007-08 return on 9 December 2009, with specific reference to the appellant's "claim for loss relief of £246121 arising from your trading in financial instruments."

5. In the meantime, the appellant had been arrested in 2008 on suspicion of conspiracy to defraud; he was finally tried and convicted in 2011, shortly after which his savings ran out. He served a custodial sentence following his conviction. He was transferred in April 2015 from Highpoint Prison in Newmarket to an open prison from which he was released on 20 July 2015.

6. While he was in prison, there was correspondence with HMRC involving his historic tax position (an enquiry had also been opened into his 2006-07 tax return, at least partly as a result of his participation in a tax avoidance scheme called "Icebreaker" in relation to that year). In particular, HMRC had written to the appellant at Highpoint Prison on 9 March 2015, informing him of their intention to issue an APN in respect of his use of the Liberty 2 scheme in relation to 2007-08. The appellant did not deny having received that letter.

7. In their 9 March 2015 letter, HMRC had said it was their intention to issue the APN "in the next 1 to 6 weeks"; they said it would show "the amount that we believe relates to your use of the scheme. When we send you the notice, we will also tell you

how we have worked out the amount." They sent with the letter a fact sheet (CC/FS24) setting out further information about APNs.

8. On 23 July 2015, HMRC sent a document purporting to be an APN to the appellant, addressed to him at Highpoint Prison. Unknown to them, he was no longer there. HMRC state they have no record of that letter being returned undelivered to them. However, their records do show that on 3 August 2015, the appellant's address for self-assessment purposes was changed to his current home address; they are unable to explain how the record came to be changed, or who provided them with the new address. The appellant denies ever having received the 23 July 2015 letter and enclosed notice, and I accept his evidence on this point. I find, on a balance of probabilities, that the 23 July 2015 letter never reached him but it did reach the prison to which it had been addressed and the Prison Service contacted HMRC in response to it, giving them the appellant's new address. I make no finding as to whether the Prison Service returned the letter to HMRC or not, when notifying the appellant's new address to them.

9. The letter dated 23 July 2015 enclosed a document with a banner heading "Accelerated payment notice issued under Part 4, Chapter 3 of the Finance Act 2014". The main body of the document started as follows:

> "**Notice for the year ended 5 April 2008**
>
> **Amount due in respect of this notice:**
>
> £56,905.20
>
> **Payment due on or before:**
>
> 26 October 2015
>
> (Payment may be due on a later date if representations are made under section 222 of the Finance Act 2014.)
>
> **This accelerated payment notice relates to:**
>
> Scheme name Liberty 2 (Syndicate)
>
> Scheme reference 55413422"

10. The document included further information in what appears to be a standard form under various headings.

11. Under the heading "About this notice", it recited the statutory basis upon which it was given (essentially, though without specifically saying so, identifying how "Conditions A to C" in section 219 FA 2014 were satisfied).

12. Under the heading "About the accelerated payment", it stated:

> "The amount of the accelerated payment is determined by virtue of Section 219(4)(b) of the Finance Act 2014.
>
> The accelerated payment is to be treated as a payment on account of "the understated tax" as defined by section 220(4) of Finance Act 2014. The understated tax is the additional amount which would be due and payable in respect of tax in accordance with our view of the effect of the DOTAS arrangements."

13. The reference in the first paragraph is clearly wrong, as section 219(4)(b) simply reads: "the chosen arrangements are DOTAS arrangements;". I infer that the reference should have been to section 220(4)(b), which specifies that in the case of a notice under section 219(4)(b), the "understated tax" means "the additional amount that would be due and payable in respect of tax if… such adjustments were made as are required to counteract what the designated HMRC officer determines, to the best of that officer's information and belief, as the denied advantage".

14. The second paragraph is also open to some criticism, first because it paraphrases somewhat inexactly the meaning of "understated tax" given in section 220(4) and second because it fails to identify that it is section 223(3) that states that the accelerated payment is to be treated as a payment on account of that "understated tax".

15. After a short section headed "Postponing payment" (which effectively states that no such postponement is possible, but which also explains what happens about repayment if a tribunal or court upholds the relevant DOTAS arrangements as effective), there is a section headed "Penalties for not paying on time", which reads as follows:

> "If you do not pay in full and on time, you will be liable to penalties. Any such penalties would be payable in addition to the amount due. If you do not pay in full:
>
> - on or before the date it is due, you will be liable to a penalty equal to 5% of the amount you still owe
>
> - on or before 5 months of the date it is due, you will be liable to a penalty equal to 5% of the amount you still owe – this is as well as the 5% explained in the previous bullet
>
> - on or before 11 months of the date it is due, you will be liable to a penalty equal to 5% of the amount you still owe – this is as well as the 2 previous 5% penalties
>
> If we charge a penalty, we will send you a notice of penalty assessment telling you how much the penalty is and the period to which it relates. You will then have 30 days to pay the penalty.
>
> If you receive a penalty assessment, you will be able to appeal against the penalty if you disagree with it. Your appeal and other rights relating

> to penalties are set out in section 226(7) of the Finance Act 2014 by reference to Schedule 56 of the Finance Act 2009."

16. The next section, headed "How to pay", provided logistical details (bank account, reference number and so on) but also specified the "Amount due" as £53,063.70. It will readily be seen that this is a different amount from the figure of £56,905.20 specified right at the start of the notice as the "Amount due in respect of this notice". This point is considered further below.

17. Finally, the recipient was invited to telephone if there were likely to be problems in paying, and a section headed "What to do if you disagree with this notice" set out the procedure and deadline (26 October 2015) for making representations in accordance with section 222 FA14, including representations that "the amount shown on the notice is not correct – if this is the case you will need to tell us what you think the correct amount is and why." Finally, the notice stated that if representations were made "before the date the payment is due, and we do not withdraw the notice", the due date for payment would be deferred until "30 days after the date on which we notify you of our decision in respect of your representations", if that was later than the original due date.

18. The notice itself was not signed, and the covering letter did not include the name of any particular HMRC officer issuing it, it simply ended:

> "Yours sincerely
>
> **Accelerated Payments**
> Team 3".

19. In the absence of any response from the appellant, HMRC wrote to him (at his new home address) on 9 September 2015, referring to the notice sent to him on 23 July 2015 to "remind" him that payment of £56,905.20 was due by 26 October 2015. This letter repeated the warning about penalties set out in the original APN. The appellant does not deny receiving this letter promptly, and explains his lack of immediate response to it by saying he thought it related to ongoing correspondence with HMRC in relation to his use of the "Icebreaker" avoidance scheme in relation to 2006-07.

20. On 5 November 2015, still having heard nothing from the appellant, HMRC issued a notice of penalty assessment to him at his home address, notifying the assessment of a penalty of £2,653.18, calculated as 5% of the £56,905.20 referred to at the start of the APN issued on 23 July 2015.

21. By letter dated 21 November 2015, the appellant wrote to HMRC, informing them he had never received the original APN and asking for a calculation of how the amount stated in it had been arrived at.

22. By letter dated 30 November 2015, HMRC responded to the appellant and informed him that as the 90 day period for representations had expired following the issue of the APN, the matter could not be considered any further. A copy of the APN

was enclosed with this letter (which was, again, simply signed "Accelerated Payments Team 3", even though it had been written in the first person singular). Although not referred to in the covering letter, it appears HMRC also sent a one page summary calculation to the appellant with it (a copy of which, dated 30 November 2015, the appellant produced at the hearing). This calculation essentially showed two calculations of the appellant's 2008-09 tax liability, one column "based on returned figures" and the other "based on revised figures". The first column showed a figure for "losses" of £137,302, which reduced the appellant's taxable income to nil (in fact, to a negative figure); given that the appellant had suffered deduction of income tax at source (£44,820 of tax on employment income and £126 of tax on interest income), it therefore showed an overpayment figure of £44,946. The second column did not include any figure for "losses", and the resultant total income figure was £132,077, which was calculated to give rise to income tax of £39,065.90 and class 4 NICs of £1.76 (total £39,067.66). After taking account of the tax deducted at source, this left a net repayment amount due to the appellant of £5,878.34.

23. The two columns also contained separate CGT calculations, the "as returned" figures disclosing a taxable gain of £27,640 with resultant CGT liability of £5,305 and the "as revised" column disclosing a taxable gain of £48,257, resulting in a CGT liability of £19,302.80. No explanation was given (either in the calculation, elsewhere in the documents before me or at the hearing) of the difference between the two "taxable gain" figures. In particular, there was no evidence as to whether the adjustment to the capital gains figures had anything to do with the appellant's participation in the Liberty 2 (Syndicate) scheme.

24. The net result of the "as returned" column was therefore an overall tax overpayment of £39,641 and the net result of the "as revised" column was an underpayment of £13,424.46. The difference between these two figures (£53,065.46) was identified at the head of the document. On close inspection, it can be seen that this figure is £1.76 more than the second of the two figures included in the original APN, and the inference must be that this £1.76 difference is explained by the class 4 NICs of that amount shown in the calculation. It appears therefore that although HMRC had originally stated at the start of the original APN that the amount required to be paid under it was £56,905.20, their original intention had been that the appellant should pay only the lesser amount of £53,063.70 specified later in the APN (though their subsequent view was that he should in fact pay £1.76 more than that lesser amount).

25. On 23 December 2015, the appellant wrote back to HMRC. He maintained that the 90 day time limit for making representations (he actually referred to "an appeal") could not apply where the original APN had not been served correctly; his 90 days should run from when he first received it with HMRC's letter dated 30 November 2015. He pointed out that the £39,641 figure represented a repayment of tax that had been withheld from him anyway, so he should not be required to pay it again. He submitted that the APN had therefore clearly been "issued erroneously" and it should be cancelled, along with the associated penalty. He also submitted that if a revised APN was issued for just the £13,424.46 amount, it should also be set off against a repayment to which he was entitled for 2006-07.

26. HMRC responded to this letter on 1 February 2016. The letter was only signed "**Accelerated Payments** Redruth Team 3", in spite of again being written in the first person singular.

27. The letter stated that the APN had been sent to the appellant's last known place of residence and accordingly had been validly served under section 115 Taxes Management Act 1970 ("TMA"), though it also accepted that the appellant had not received the original notice. It referred to the fact that the 9 September 2015 follow up letter (which had admittedly been received by the appellant) referred to the earlier notice, and observed that it was "fair to have expected you to contact us when you received the reminder letter to question what it was referring to" and to have asked for a copy of the APN before the 21 November 2015 letter.

28. As to the calculation of the amount in the APN, the letter explained it had been issued "in the gross amount of £56,905.20, with the "How to pay" section having been reduced to £53,063.70 to allow for a loss carry back claim that was not processed." It went on to say that:

> "…we did not repay the overpayment of £39,641.15 in respect of the tax year ended 5 April 2008. Instead this amount was withheld under the authority of S59B(4A) Taxes Management Act 1970, which allows HMRC to retain overpayments until the enquiries into your tax return have been completed.
>
> On this basis, you never received the benefit of the overpayment that was calculated as due for this particular tax year and, as such, your Accelerated Payment Notice should have been adjusted to allow for this overpayment that was never repaid to you.
>
> I can confirm that I have now arranged for this amount to be set against the Accelerated Payment Notice and this reallocation leaves an amount of £13,422.55 due and payable."

29. The letter then went on to refuse to permit the set-off of the claimed 2006-07 repayment against the APN amount, on the basis that there was an open enquiry in respect of that year and the credit was not available for set-off until that enquiry was concluded.

30. Finally, the letter went on to state that because of these findings, the correct penalty should have been 5% of £13,422.55 and not the higher amount previously charged; accordingly the original penalty was withdrawn and a notice of assessment of a revised penalty of £671.12 was issued, both on the same date (1 February 2016). The new penalty comprised in the notice of assessment dated 1 February 2016 is the penalty to which this appeal relates.

31. On 23 February 2016 (incorrectly dated 2015), the appellant wrote to HMRC expressing his wish to "request a review/make representations/appeal", arguing in broad terms that:

(1) the APN had never been served on him and therefore the penalty should be withdrawn;

(2) the "basic and fundamental miscalculation" that was illustrated by the reduction in the amount demanded from over £53,000 to over £13,000 meant that he could not accept the reduced amount, especially since no justification of the calculations had been provided; and

(3) the tax repayment of £42,493.52 claimed in respect of the year 2006-07 ought to be credited against the 2007-08 APN.

32. HMRC treated this letter as an appeal and a request for a statutory review, which they then carried out. The result of that review was communicated to the appellant in a letter dated 14 April 2016. They upheld their decision to charge the reduced penalty. Further inconclusive correspondence ensued between the appellant and HMRC until he eventually submitted an appeal to the Tribunal (received on 9 June 2016). The appeal was technically late but HMRC did not object to its lateness and permission for it to be notified late was given.

33. Following the appellant's release from prison, he is now living in rented accommodation, acting as carer for his wife who suffers from fibromyalgia, and he receives minimal benefits. His house was repossessed and sold for less than his mortgage debt and the court made a confiscation order against him which was originally limited to a notional £1 due to his limited means. In 2016, this was amended to £1,797.18 to take account of the value of the appellant's rights under a small pension scheme to which he obtained access on reaching the age of 55 in that year. This compares with the amount of the "benefit figure" stated in the confiscation order of £532,221. Associated with the confiscation order was a restraint order which had prevented him from accessing any of his own funds (including pension funds) until the confiscation order was made. The appellant submitted that this demonstrated his inability to pay any amount, and that inability was attributable to circumstances beyond his control, namely his total inability to obtain any employment because of his conviction and the need in any event to care for his wife.

The law

34. The provisions relating to APN's and associated penalties are contained in sections 219 to 229 FA14 and (by reference) schedule 56 Finance Act 2009. The broad scheme of the legislation is to permit HMRC to require users of tax avoidance schemes to pay "up front" the amount of tax intended to be saved, without having to await the outcome of the appeals process.

35. Section 219 sets out the circumstances in which an APN may be given, by reference to the satisfaction of three conditions. In the present case, "Condition A" was satisfied (by reference to section 219(2)(a)), as there was a tax enquiry in progress into the appellant's return for the year ended 5 April 2008; "Condition B" was satisfied because the return had been made on the basis that a particular tax advantage resulted from particular arrangements (namely the appellant's participation

in the Liberty 2 (Syndicate) tax avoidance scheme); and "Condition C" was satisfied by reference to section 219(4)(b) because the Liberty 2 (Syndicate) arrangements were DOTAS arrangements (to which a reference number had been allocated by HMRC – see section 219(5)(a)). There was no dispute about the application of any of these provisions, so I consider them no further.

36. Section 220 provides that in a situation such as the present (where Condition A is satisfied because of the existence of a current enquiry into a return), an APN must:

> "(a) specify the paragraph or paragraphs of subsection 201(4) by virtue of which the notice is given,
>
> (b) specify the payment (if any) required to be made under section 223 and the requirements of that section,
>
> (c) explain the effect of sections 222 and 226, and of the amendments made by sections 224 and 225 (so far as relating to the relevant tax in relation to which the accelerated payment notice is given), and
>
> (d) if the denied advantage consists of or includes an asserted surrenderable amount, specify that amount and any action which is required to be taken in respect of it under section 225A."

37. The payment at (b) above is defined as follows in section 220(3):

> "The payment required to be made under section 223 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."

38. "The understated tax", in cases such as the present (where, as in this case, the APN is served by virtue of section 219(4)(b) – DOTAS arrangements), is defined in section 220(4):

> "'The understated tax' means the additional amount that would be due and payable in respect of tax if –
>
> …
>
> (b) … such adjustments were made as are required to counteract what the designated HMRC officer determines, to the best of that officer's information and belief, as the denied advantage;"

39. Finally, "the denied advantage" in section 220(4)(b) is defined in cases such as the present by section 220(5)(b) as:

> "…so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise"

I find this last definition somewhat obscure when considered in its context. At first sight, it appears to apply so as to deny tax advantages which do not flow from the use of the arrangements in question. This surely cannot have been the intention, so I take it to refer to so much of an asserted advantage as is not, to the best of the officer's information and belief, an effective tax advantage, whether as a result of the operation of the "chosen arrangements" in question (i.e. in this case the DOTAS scheme) or on any other basis.

40. FA14 provides no mechanism to appeal against the issue of an APN but section 222 makes provision for a taxpayer who receives an APN to send written representations to HMRC "within 90 days beginning with the day that notice is given", either objecting that the conditions for issuing the APN were not satisfied or (in a case such as the present) objecting to the amount of the payment required to be made. HMRC are required to consider any such representations, and (in broad terms) can either confirm, withdraw or amend the APN (including the amount due under it).

41. Section 223 sets out the effect of giving an APN in a case such as the present:

> "**223 Effect of notice given while tax enquiry is in progress: accelerated payment**
>
> (1) This section applies where –
>
> (a) an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while a tax enquiry is in progress) (and not withdrawn), and
>
> (b) an amount is stated in the notice in accordance with section 220(2)(b).
>
> (2) P must make a payment ("the accelerated payment") to HMRC of that amount.
>
> (3) The accelerated payment is to be treated as a payment on account of the understated tax (see section 220).
>
> (4) The accelerated payment must be made before the end of the payment period.
>
> (5) 'The payment period' means –
>
> (a) if P made no representations under section 222, the period of 90 days beginning with the day on which the accelerated payment notice is given, and
>
> (b) if P made such representations, whichever of the following periods ends later –
>
> (i) the 90 day period mentioned in paragraph (a);

(ii) the period of 30 days beginning with the day on which P is notified under section 222 of HMRC's determination.

…

(7) If P pays any part of the understated tax before the accelerated payment in respect of it, the accelerated payment is treated to that extent as having been paid at the same time.

…"

42. The next provision relevant to this appeal is section 226, which provides (so far as relevant) as follows:

"**226 Penalty for failure to pay accelerated payment**

(1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while tax enquiry is in progress) (and not withdrawn).

(2) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.

(3) If any amount of the accelerated payment is unpaid after the end of the period of 5 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.

(4) If any amount of the accelerated payment is unpaid after the end of the period of 11 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.

(5) "The penalty day" means the day immediately following the end of the payment period.

(6) …

(7) Paragraphs 9 to 18 (other than paragraph 11(5)) of Schedule 56 to FA 2009 (provisions which apply to penalties for failures to make payments of tax on time) apply, with any necessary modifications, to a penalty under this section in relation to a failure by P to pay an amount of the accelerated payment as they apply to a penalty under that Schedule in relation to a failure by a person to pay an amount of tax."

43. Relevant extracts from paragraphs 9 to 18 of Schedule 56 to the Finance Act 2009 are set out as an appendix to this decision.

44. Sections 114 and 115 Taxes Management Act 1970 ("TMA") and section 7 Interpretation Act 1978 ("IA"), upon which HMRC rely, provide (in relevant part) as follows:

"**114 Want of form or errors not to invalidate assessments, etc**

(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

(2) An assessment or determination shall not be impeached or affected—

(a) by reason of a mistake therein as to—

(i) the name or surname of a person liable, or

(ii) the description of any profits or property, or

(iii) the amount of the tax charged, or

(b) by reason of any variance between the notice and the assessment or determination.

115 Delivery and service of documents

(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.

(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person [by HMRC] may be so served addressed to that person—

(a) at his usual or last known place of residence, or his place of business or employment…

7 References to service by post

Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

The arguments

The appellant

45. The appellant's stated grounds of appeal in his notice of appeal simply referred to the content of a letter dated 3 June 2016, which included the following text:

> "As I understand the law following the Cotter decision in the Court of Appeal whilst a return is under enquiry under s9A, HMRC can decide not to make a "repayment" of tax for that year (relying on TMA 1970 s59B(4)), but it must still "give effect" to the claim by some other means, in accordance with the mandatory requirements of paragraph 2(6).
>
> Consequently HMRC has no legally enforceable power that would allow it to collect tax (by virtue of the APN) that arises as a result of ignoring the effect of the "free standing" tax credit in relation to the previous years return."

46. In the covering letter for his notice of appeal, however, the appellant also referred to his letter dated 23 February 2015 as including grounds of appeal. That letter (which was clearly misdated) is summarised at [31] above.

47. In a short "skeleton argument" submitted at the hearing, the appellant developed these points a little further and also argued that his personal circumstances gave rise to a reasonable excuse for his non-payment of the APN amount; here he referred to his imprisonment, the ongoing confiscation proceedings and his inability to work due to his criminal record and his role as carer for his wife. He also made reference to an allowable loss which he believed should be available to set against the APN amount by reason of the disposal of his house.

48. When I raised at the hearing my concerns about the APN containing two different amounts (see below), the appellant indicated he also wished to rely on that as a ground of appeal.

HMRC

49. In relation to the question of whether the APN had been validly served, Mr Chacko relied on section 115 TMA, along with section 7 IA. So far as HMRC were concerned, when they posted the APN to the appellant at Highpoint Prison, that was his last known place of residence. There was no evidence to suggest it had not been received at that address. Accordingly, the APN had been properly served. He referred to *Calladine-Smith v Saveorder Limited* [2011] EWHC 2501 (Ch) in support of this submission (at [26]).

50. In response to the appellant's argument that, based on *HMRC v Cotter* [2012] EWCA Civ 81, his claim for a tax repayment from the previous year should have been credited against the accelerated payment due under the APN, Mr Chacko referred to the decision of the Supreme Court in *Cotter* [2013] UKSC 69 (in particular at [31]),

which made it quite clear that any claim for such credit could not be acted on while the year in question was still under enquiry (as was the case here).

51. As to the argument that the APN could not be relied on because HMRC had changed the amount due under it so significantly and without any clear explanation, Mr Chacko countered that the only way to dispute the amount of the accelerated payment due under the APN was through the mechanism of representations under section 222 (or, of course, judicial review proceedings). The amount specified by HMRC was definitive and in any event Mr Chacko pointed out that HMRC had subsequently provided an explanation in their letter of 5 February 2016.

52. As to the discrepancy between the two amounts stated in the APN as required to be paid, he submitted that the document in question quite clearly was an APN, and accordingly any uncertainties about the amount due under it could be clarified through representations. The difference between the two numbers in the APN was "a matter of detail". He also pointed out that the original APN did contain a statement of the amount required to be paid, albeit that it also contained another number as well (also identified as the amount to be paid). Finally, he argued that any minor error in the APN was saved by section 114 TMA.

53. As to the matter of reasonable excuse, he argued that insufficiency of funds to pay the accelerated payment was not enough; the appellant could hardly argue that his conviction and imprisonment for fraud, followed by the confiscation orders and associated restraining orders (which appeared to have been the ultimate underlying cause of his inability to pay) were events outside his control.

Discussion and decision

54. As to question of due service of the APN, I have found that it was sent to the appellant by post by HMRC at his last known place of residence, and that it was delivered to that address. It follows that it was duly given (and I note, and agree with, the extensive analysis of the relevant provisions set out in the Tribunal's decision in *Tinkler v HMRC* [2016] UKFTT 170 (TCC), which leads to the same conclusion).

55. I also agree with Mr Chacko that the Tribunal has no role in deciding whether the circumstances for the valid issue of an APN were satisfied – i.e. whether "Conditions" A, B and C were satisfied. That is, as the Tribunal observed in *Nijjar v HMRC* [2017] UKFTT 0175 (TC), a matter to be addressed by representations under section 222 and/or judicial review proceedings. I agree with that approach. Even if some part of the increased capital gains tax liability included in HMRC's calculations were not in fact attributable to participation in the Liberty 2 (Syndicate) scheme, that is a matter which I also consider proper to be addressed only in the context of representations under section 222 and/or judicial review proceedings; it would not be appropriate in the context of this appeal for the Tribunal to second-guess that process.

56. I also agree with Mr Chacko that there is no right to have a claimed repayment from an earlier year set off against the accelerated payment in a situation where the return giving rise to the claimed repayment is still under enquiry. The Supreme Court

in *Cotter* have put that beyond doubt (to the extent any doubt actually existed on the facts of this case).

57. Similar observations apply to the appellant's claim for credit arising from an allowable loss he has claimed. Unless and until it is established that the appellant has made good that claim, it would be entirely inappropriate for credit to be given for it against an accelerated payment.

58. As to the appellant's submission that he had a reasonable excuse for not paying, I also consider Mr Chacko's submission to have more force. Where the stated reason for not paying is an inability to pay through "an insufficiency of funds", the Tribunal must decide whether that insufficiency was "attributable to events outside [the appellant's] control". As he said himself, the underlying reason for the appellant's insufficiency of funds in this case was his conviction, imprisonment and related consequences. It is difficult to avoid the conclusion, however harsh it may seem, that all these events were attributable to the appellant's own conduct and were not, therefore, "outside his control". For this reason, I find that the appellant has not made out a reasonable excuse for his non-payment.

59. This does not dispose of the matter, however. In order to impose a penalty, HMRC must establish that the facts entitling them to do so have occurred.

60. The penal provision in this case is section 226(2), which imposes liability for a penalty "if any amount of the accelerated payment is unpaid at the end of the payment period".

61. This requires HMRC to establish that some part of "the accelerated payment" was unpaid at the relevant time.

62. "The accelerated payment" is defined (in section 229) as having "the meaning given by section 223(2)".

63. Subsection 223(2) requires 'a payment ("the accelerated payment") of that amount', and in this context the phrase "that amount" can only refer to subsection 223(1)(b), which requires that "an amount is stated in the notice in accordance with section 220(2)(b)". Thus "the accelerated payment" must be "an amount" which is so stated.

64. Subsection 220(2)(b) requires the notice to "specify the payment (if any) required to be made under section 223 and the requirements of that section". Subsection 220(3) goes on to explain (in conjunction with subsections 220(4) and (5)) how that amount is to be determined.

65. All of these provisions are drafted on the basis that there is only <u>one</u> amount which is specified as the accelerated payment. That amount should be calculated after taking account of all credits which are properly available to set against the extra tax liability that notionally arises as a result of counteracting the "denied advantage".

66. In the present case, the APN stated, right at the start:

"**Amount due in respect of this notice:**

£56,905.20"

67. Later, in the body of the APN, it stated this:

"**Amount due:** £53,063.70"

68. Mr Chacko argues first that this confusion in the numbers is a matter of detail, to be resolved through representations, so should not be seen as potentially undermining the validity of the penalty; second, he argues that this is just the sort of error that section 114 TMA is intended to "save"; and third he points to the fact that the APN did in fact include the amount of the accelerated payment (as it was considered to be at the time), the fact that it also included another figure being irrelevant; it should have been clear to the appellant that he had to pay one or other of the two amounts given, and he could not use the "excuse" of the discrepancy between them to avoid paying anything at all.

69. I regret that I cannot agree. When a penalty imposed by the state is under consideration, it is axiomatic that a penalty can only be imposed if it is clear to the citizen exactly what he has to do to avoid the penalty. This is an embodiment of the principle of legal certainty. The legislation requires HMRC to "specify the payment… required to be made" in the APN. In default of payment of that stated amount, the recipient of an APN is exposed to penalties calculated by reference to that amount. Where HMRC instead specify two different amounts to be paid, they place the recipient in an impossible position. Should he pay the lesser amount, in the hope that it is sufficient, or should he pay the higher amount, even though HMRC appear to be saying they will accept the lesser amount? Then, when calculating the penalties, are they to be based on the higher or lower amount? It matters not, in my view, that the two amounts may be only slightly different, the difficulty caused remains in principle the same. Nor, on the facts of this case, can it be said that the appellant should have clarified the amount due as part of the representations process; he had not received the APN in time to do so. That argument may arise in another case.

70. In terms of the legislation, because HMRC have purported to give two different amounts in the APN as the accelerated payment, they have failed to specify "the payment required to be made" and accordingly it is impossible to ascertain with certainty the amount of "the accelerated payment" required to be made by the APN. In that situation, it is impossible to identify for the purposes of section 226 what amount is to be used as the basis of calculation of any penalty. It must follow that HMRC have deprived themselves of the ability to impose any penalty under section 226.

71. I do not consider that section 114 TMA can assist HMRC in this situation. The underlying defect which gives rise to their difficulty is contained in the original APN; the saving in subsection 114(1) only applies where the relevant "assessment or determination, warrant or other proceeding" is "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts". Where an APN is required to "specify the payment (if any) required to be made under section 223 and

the requirements of that section" but it specifies two different such amounts, I do not consider the APN (which, for this purpose, I consider to be some "other proceeding" within the meaning of subsection 114(1)) can properly be said to be "in substance and effect in conformity with or according to the intent and meaning of" the relevant provisions. Subsection 114(2) cannot assist HMRC either, as the matter involved in this case is none of those listed in that subsection – the APN is neither an assessment nor a determination.

72. Accordingly, it appears to me that HMRC's decision that a penalty is payable is unsustainable and accordingly HMRC's decision to impose a penalty should be cancelled pursuant to paragraph 15(1) of Schedule 56 to Finance Act 2009.

Conclusion

73. It follows that the appeal is ALLOWED.

74. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 9 MAY 2017

Appendix

Extracts from paragraphs 9-18 Schedule 56, Finance Act 2009

Special reduction

9—

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) "special circumstances" does not include—

(*a*) ability to pay, or

(*b*) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

(3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—

(*a*) staying a penalty, and

(*b*) agreeing a compromise in relation to proceedings for a penalty.

…

Assessment

11—

(1) Where P is liable for a penalty under any paragraph of this Schedule HMRC must—

(*a*) assess the penalty,

(*b*) notify P, and

(*c*) state in the notice the period in respect of which the penalty is assessed.

(2) A penalty under any paragraph of this Schedule must be paid before the end of the period of 30 days beginning with the day on which notice of the assessment of the penalty is issued.

(3) An assessment of a penalty under any paragraph of this Schedule—

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

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

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

(4) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of an amount of tax which was due or payable.

(4A) If an assessment in respect of a penalty is based on an amount of tax due or payable that is found by HMRC to be excessive, HMRC may by notice to P amend the assessment so that it is based upon the correct amount.

(4B) An amendment made under sub-paragraph (4A)—

(*a*) does not affect when the penalty must be paid;

(*b*) may be made after the last day on which the assessment in question could have been made under paragraph 12.

…

Appeal

13—

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

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

14—

(1) An appeal under paragraph 13 is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(2) Sub-paragraph (1) does not apply—

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

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

15—

(1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—

(*a*) affirm HMRC's decision, or

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

(3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9—

(*a*) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or

(*b*) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

(4) In sub-paragraph (3)(*b*) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

Reasonable excuse

16—

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

(2) For the purposes of sub-paragraph (1)—

(*a*) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

(*b*) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(*c*) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

…