[2018] UKFTT 301 (TC)

TC06531

Appeal number: TC/2017/01758

INCOME TAX – accelerated payment notice – penalties for non-payment – jurisdiction to consider whether Condition A for issue of accelerated payment notice was satisfied – whether reasonable excuse for non-payment where validity of notice is being challenged in judicial review proceedings – special circumstances – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN FRASER **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 13 February 2018

Mr Michael Jones of counsel instructed by Camp IV Ltd for the Appellant

Ms Sophie Rhind of HM Revenue & Customs Solicitor's Office and Legal Services for the Respondents

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DECISION

Introduction

1. This is an appeal against three penalties notified to the appellant following non-payment of an accelerated payment notice ("APN"). In each case the penalty assessed is £608.66. There are three separate appeals, the first two of which had been consolidated prior to the hearing. Both parties are content that a stay in relation to the third appeal should be lifted and that it too should be consolidated. I direct accordingly.

2. The APN is dated 5 January 2016 and states that it covers tax year 2011-12 and that it relates to the Appellant's participation in a tax avoidance scheme called "Contractor Solution". The APN is expressed to be made pursuant to section 219(4)(b) Finance Act 2014 ("FA 2014"). The sum due pursuant to the APN is £12,173.20 and payment was said to be due on or before 7 April 2016.

3. Following receipt of the APN the Appellant made written representations to HMRC dated 1 April 2016. The representations referred to judicial review proceedings which the appellant had commenced, together with others who had used the Contractor Solution scheme. The representations set out the basis on which the APN was being challenged by way of judicial review. In addition, it was stated that certain other objections may be included in the grounds for judicial review, including that none of the conditions for issuing an APN were satisfied and the amount of tax stated in the APN was incorrect. For present purposes I am concerned with the appellant's contention that Condition A in section 219(2)(a) FA 2014 had not been met. I refer to Condition A in detail below. It requires there to be a tax enquiry in progress into a return made by the taxpayer for the relevant tax year. The appellant maintained in his representations that he had not received any enquiry notice in relation to tax year 2011-12.

4. HMRC issued their determination to confirm the amount specified in the APN on 14 June 2016. In relation to Condition A, HMRC considered that it was satisfied and the APN was confirmed. The due date for payment was therefore 30 days from the date that the Appellant was notified of that determination. It appears to be common ground that the due date for payment was 20 July 2016.

5. The appellant did not pay the sum stated to be due in the APN by the due date and HMRC have issued the three penalties. Notices of penalty assessments for 5% of the sum due, each in the amount of £608.66 were issued on 26 August 2016, 15 March 2017 and 6 July 2017.

6. I set out below details of the statutory framework, the basis on which the APN was issued, and the penalty regime. Briefly, FA 2014 makes provision for a penalty of 5% of the sum specified as due in an APN if it is not paid by the due date. Liability to a penalty will not arise where the taxpayer has a reasonable excuse for failing to pay the sum by the due date. A penalty may also be reduced by HMRC in the case of special circumstances.

7. The decisions to issue the penalty assessments were confirmed by HMRC on review and the appellant notified the present appeals to the tribunal. The grounds of appeal may be summarised as follows:

(1) The appellant has challenged the basis of the APN in judicial review proceedings in which he has filed a witness statement indicating that if he is required to pay the sum demanded he will suffer considerable financial hardship.

(2) The requirement to pay the APN is suspended pending the pending final determination of the judicial review.

(3) In the circumstances the appellant has a reasonable excuse for non-payment.

(4) HMRC's decision to issue of the penalties was unlawful, irrational and unreasonable.

8. The appellant made an application dated 21 August 2017 to amend his grounds of appeal to add a further ground in relation to the first and second penalties. The further ground was that because the appellant had not received a notice of enquiry for 2011-12, no APN or penalties could be issued, alternatively that he had a reasonable excuse for non-payment because no APN could validly be issued. Permission to amend was granted on 26 September 2017. A notice of appeal in relation to the third penalty was lodged with the tribunal in November 2017. The grounds already included the appellant's case that no notice of enquiry had been received by him for 2011-12.

9. In his skeleton argument and oral submissions Mr Jones on behalf of the appellant refined the grounds of appeal being pursued by the appellant. He submitted as follows:

(1) If Condition A was not satisfied then the notice given by HMRC on 5 January 2016 was not an APN and there could be no penalty for non-payment.

(2) Alternatively, there was a reasonable excuse for non-payment of the sum demanded because the appellant had a reasonable belief, robustly founded, that the APN was not lawfully issued. In particular, because Condition A was not satisfied.

(3) In the further alternative, the circumstances amount to special circumstances and the penalty should be subject to a special reduction.

10. I heard evidence from the appellant and his wife Mrs Nuran Fraser to the effect that the appellant had not received a notice of enquiry into his 2011-12 tax return. There was no direction for witness statements, but both produced witness statements which were served shortly prior to the hearing. The appellant also gave evidence as to why he did not pay the sum stated as due in the APN. The appellant attended the hearing in person to give his evidence and was cross examined. Mrs Fraser attended the hearing by telephone to give her evidence and was also cross examined.

Statutory Framework

11. The circumstances in which an APN may be issued are set out in section 219 FA 2014 which provides as follows:

> “ **219 Circumstances in which an accelerated payment notice may be given**
>
> 5 (1) HMRC may give a notice (an “accelerated payment notice”) to a person (“P”) if Conditions A to C are met.
>
> (2) Condition A is that—
>
> (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax….
>
> 10 (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 arrangements (“the chosen arrangements”).
>
> (4) Condition C is that one or more of the following requirements are met—
>
> …
>
> 15 (b) the chosen arrangements are DOTAS arrangements;
>
> …
>
> (5) “DOTAS arrangements” means—
>
> (a) notifiable arrangements to which HMRC has allocated a reference number under section 311 of FA 2004,
>
> 20 (b) notifiable arrangements implementing a notifiable proposal where HMRC has allocated a reference number under that section to the proposed notifiable arrangements, or …”

12. Section 220 FA 2014 sets out certain requirements for an APN given pursuant to section 219(2)(a). In particular, the APN must specify the payment required to be 25 made as an accelerated payment within the period set out in section 223. The terms of section 220 read as follows:

> “ **220 Content of notice given while a tax enquiry is in progress**
>
> (1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while a tax enquiry is in progress).
>
> 30 (2) The notice must—
>
> (a) specify the paragraph or paragraphs of section 219(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,
>
> 35 (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."

13. Section 222 FA 2014 entitles the recipient of an APN to make representations to HMRC objecting to the APN on the grounds that Conditions A to C in section 219 are not satisfied, or objecting to the amount specified in the APN. Any representations must be made within 90 days of the date the notice was given and HMRC are obliged to consider any representations that are made. The payment period is extended where representations are being considered by HMRC.

14. Section 226 FA 2014 imposes a penalty for failure to comply with an APN and provides 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.
>
> …
>
> (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."

15. There is no statutory right of appeal against HMRC's decision to issue an APN. There is a right of appeal to this Tribunal against a penalty that is imposed as a result of failure to make an accelerated payment by the due date.

16. Section 226(7) FA 2014 applies certain provisions of Schedule 56 Finance Act 2009 ("Schedule 56") to penalties charged under that section. Paragraph 13 Schedule 56 confers a right of appeal to this Tribunal. The scope of the right of appeal is set out as follows:

> " **13 Appeal**
>
> (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."

17. Paragraph 15 Schedule 56 sets out the scope of the Tribunal's jurisdiction on an appeal against a penalty as follows:

5 " 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

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

18. Paragraph 16 Schedule 56 sets out a defence of "reasonable excuse" as follows:

" **16 Reasonable excuse**

(1) Liability to a penalty under any paragraph of this Schedule does not arise in
15 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
20 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
25 remedied without unreasonable delay after the excuse ceased."

19. Schedule 56 also includes provisions which entitle HMRC to reduce a penalty by reason of "special circumstances" and a limited right of appeal against HMRC's decision on special circumstances. Paragraphs 9 and 15 provide as follows:

" 9(1) If HMRC think it right because of special circumstances, they may reduce a
30 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.

35 …

15(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.

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

Judicial Review Proceedings

20. The appellant is one of a number of claimants in judicial review proceedings
10 filed on 5 February 2016 whereby the appellant is challenging the validity of the APN. I understand that those proceedings are stayed pending the final determination of *R (otao Rowe & Others) v HM Revenue & Customs [2015] EWHC 2293 (Admin)*.

21. There was an application for interim relief in the appellant's judicial review proceedings to prevent HMRC from taking any steps against the appellant to enforce
15 the sum due under the APN and associated penalties. HMRC objected to that application for interim relief and matters have not progressed further. Hence, there is no order for interim relief. Ms Rhind pointed out that in other judicial reviews concerning Partner Payment Notices where interim relief had been granted it was expressly on the basis that it did not inhibit HMRC from issuing penalties for non-
20 payment.

22. The appellant in his grounds of appeal states that the requirement to pay the APN in the present case is suspended pending the final determination of his judicial review. It appears, as Ms Rhind states in her skeleton argument, that this is not accurate and there is no such interim relief in place. In any event, this was not a
25 ground of appeal relied on by Mr Jones.

Reasons

23. I shall deal separately with each of the three grounds of appeal put forward by Mr Jones on behalf of the appellant.

(1) Validity of the APN

30 24. The first ground of appeal is that if Condition A was not satisfied then the notice given by HMRC on 5 January 2016 was not an APN and there could be no penalty for non-payment. I shall consider this argument in principle at this stage, without regard to the evidence of the appellant and Mrs Fraser as to whether the appellant actually received a notice of enquiry for 2011-12.

35 25. It is common ground that to open an enquiry into a self-assessment tax return, HMRC must give notice to the taxpayer of their intention to do so within prescribed

time limits. The notice must be received by the taxpayer. The appellant contends that he did not receive a notice of enquiry for 2011-12.

26. This argument did not appear in the original grounds of appeal and there was only a footnote reference to it in Mr Jones' skeleton argument. However, the argument was included in the amended grounds of appeal for which permission was given and Mr Jones made detailed oral submissions, to which Ms Rhind responded.

27. Mr Jones submitted that the tribunal has jurisdiction in a penalty appeal to examine whether what was issued was a "procedurally valid APN". He submitted that an "APN" purportedly issued when the conditions in section 219 are not met is not an APN but some other form of document. He submitted that Parliament had given the tribunal an apparently broad jurisdiction in relation to penalty appeals. There was no reason to construe that jurisdiction as limited such that the tribunal on a penalty appeal could not enquire into the validity of the APN.

28. There are a number of decisions of the FTT which have held that the tribunal does not have jurisdiction on a penalty appeal to consider the validity of the underlying APN. I was referred to what I had previously said in this context in Goldenstate v HM Revenue & Customs [2017] UKFTT 568 (TC), although strictly it was not necessary to decide the issue in that case:

> " 31. In any event, and by way of aside I am not satisfied that the Tribunal has any jurisdiction on the present appeal to determine the validity of the APN. A number of decisions of this Tribunal indicate that the Tribunal has no jurisdiction to consider the validity of an APN – see *O'Donnell v Commissioners for HM Revenue & Customs [2016] UKFTT 743 (TC)* at [26], [37] and [41] and *Nijjar v Commissioners for HM Revenue & Customs [2017] UKFTT 175 (TC)* at [28] and [29]. I gratefully adopt what was said by Judge Jonathan Richards in the latter case:
>
> > " 28. The starting point for the Tribunal in determining whether a penalty is payable, or the amount of any penalty, must be s226 of Finance Act 2014 which imposes the penalty. That section makes no mention of Conditions A to C. The trigger for the imposition of the penalty is the failure to pay the amount specified in the APN. There is nothing in the express wording of s226 that suggests that the Tribunal must, or may, consider Conditions A to C.
> >
> > 29. Nor do I consider that it is implicit that Parliament intended the Tribunal to consider Conditions A to C. Those conditions go to whether the APN was validly issued in accordance with s219. The statutory scheme in Finance Act 2014 envisages that a taxpayer who considers that Conditions A to C are not met should make representations under s222 of Finance Act 2014 and, if not satisfied with HMRC's response to those representations, take judicial review proceedings. The statutory scheme does not give taxpayers who consider that APNs have been wrongly issued (for example on the grounds that Conditions A to C are not satisfied) any rights of appeal to the Tribunal. That cannot be an oversight given the central role that the Tribunal plays in the adjudication of other tax-related disputes of which Parliament would have been well aware when enacting Finance Act 2014. In those circumstances, Parliament cannot have intended that taxpayers should be able, in penalty proceedings, to litigate the

> very issues relating to the validity of the APN on which the Tribunal has been denied jurisdiction."

> 32. I note what Judge Richards also said at [25(2)] of his decision in Nijjar where he referred to the burden of proof on HMRC, including proof of the following facts:

> " … (2) That the APN was issued pursuant to s219(2)(a) of Finance Act 2014 (while an enquiry was in progress) as that is a precondition to a penalty falling due under s226 of Finance Act 2014. Mr Nijjar accepted that this was the case (see [4(1)] above)."

> 33. It does not seem to me that Judge Richards was saying in that paragraph that there was a burden on HMRC in a penalty appeal before the Tribunal to satisfy the Tribunal that Condition A was satisfied. Rather, HMRC must satisfy the Tribunal that the APN was given by virtue of section 219(2)(a). That is established not by evidence that Condition A is satisfied, but by reference in the APN itself that it was given by virtue of section 219(2)(a). In other words, it is not necessary for HMRC to establish that Condition A was satisfied but they must establish that the APN was intended to be given pursuant to section 219(2)(a).

> 34. Support for the proposition that the Tribunal has no jurisdiction to consider the validity of an APN in a penalty appeal may be derived from the decision of the Administrative Court in *PML Accounting Limited v Commissioners for HM Revenue & Customs* [2017] EWHC 733 (Admin). That case concerned penalties arising from non-compliance with an information notice. It was held that the Tribunal had no jurisdiction to consider the validity of the information notice."

29. I was also referred to *Beadle v HM Revenue & Customs [2017] UKFTT 0544 (TC)* where there was a preliminary issue as to whether on a penalty appeal the tribunal has jurisdiction to determine whether the amount of understated tax specified in a partner payment notice ("PPN") was the proper, lawful figure. It was submitted by the appellant that the lawful figure was nil and that therefore the accelerated partner payment could only be nil and there could be no penalty for failure to make that payment. Judge Richards held that the tribunal had no such jurisdiction.

30. The provisions in relation to PPNs and accelerated partner payments are contained in Schedule 32 Finance Act 2014 and are broadly similar to the provisions for APNs. In Beadle there was no dispute that Conditions A, B and C had been met. The provisions also required the PPN to specify the amount of the accelerated partner payment that the taxpayer must pay. The challenge in Beadle was to the amount specified in the PPN. Judge Richards considered in detail the purpose of the statutory scheme and various common law authorities relevant to the question of statutory construction as to whether such challenges were available in an appeal against the penalty or were required to be brought by way of judicial review. I was referred to Judge Richards' conclusion at [42], [43] and [50]:

> " 42. Reading the statutory provisions in context, and with due regard to the purpose for which they are enacted, I do not consider that the Tribunal has jurisdiction to consider an argument that no penalty should be payable because the accelerated partner payment either is, or should be, less than the amount specified in the PPN

43. Parliament has chosen to penalise taxpayers who do not pay an accelerated partner payment when due. The accelerated partner payment is an amount that HMRC alone are entitled to determine subject, of course, to the taxpayer's right to make representations against that determination and to HMRC's duties under public law. Parliament has not given taxpayers who are dissatisfied with HMRC's calculation of an accelerated partner payment the right to appeal to the Tribunal. This cannot be an oversight given the central role that the Tribunal plays in adjudicating generally on tax disputes between HMRC and taxpayers. All of those are strong indications that Parliament did not intend the Tribunal to be able to decide, in a penalty appeal, that the accelerated partner payment was, or should be, some figure other than that set out in the PPN.

…

50. My conclusions as to the effect of the statutory provisions are fortified by considering the purpose for which they were enacted. Parliament has decided that, in tax avoidance situations where particular conditions are met, HMRC should have the right to demand accelerated payment of their determination of the tax in dispute before a court or tribunal has determined the amount of tax, if any, that the taxpayer owes. If Mr Ewart were correct in his submissions the result would be that a taxpayer could simply refuse to pay the accelerated partner payment demanded, wait until HMRC commenced enforcement proceedings and only then argue that HMRC applied a flawed approach to calculating the sum claimed. Moreover, the same arguments could be deployed in penalty proceedings. While courts and tribunals consider these arguments, the taxpayer would retain the use of the tax in dispute. Furthermore, a logical corollary of Mr Beadle's approach would be that taxpayers could always argue in enforcement and penalty proceedings that the underlying tax avoidance scheme succeeded in its objective so that no additional tax could ever be due as a matter of law. In those cases, penalty appeals or enforcement proceedings might turn into "mini trials" on the merits of the avoidance scheme, or at very least might be stayed until a court or tribunal had adjudicated on the efficacy of that scheme. I do not consider that Parliament could have intended any of these results in the context of legislation whose very purpose was to remove cash flow advantages from taxpayers who enter into tax avoidance arrangements."

31. When the substantive appeal was heard in *Beadle v HM Revenue & Customs (No 2) [2017] UKFTT 0829 (TC)*, the appellant argued reasonable excuse, special circumstances and also made certain "procedural challenges" to the penalty. Mr Jones argued that in Beadle No 2 the tribunal accepted that such procedural challenges could be made to the PPN on a penalty appeal.

32. HMRC accepted in Beadle No 2 (see [138] and [139]) that there was a burden on them to show that a PPN had been issued, namely a document that:

(1) stated it was a PPN;

(2) satisfied certain statutory requirements as to the contents of a PPN such as specifying the provision by virtue of which the notice was given and the payment required to be made.

33. This was what the tribunal in Beadle No 2 (Judge Rupert Jones) described as the "procedural validity" of the PPN. It is clear however that the issue was restricted to

considering statutory requirements as to the formal content of the PPN. The tribunal did not look beyond the formal content of the PPN and went on to hold that the PPN was procedurally valid. I do not consider that the case provides any support for Mr Jones' argument that the tribunal has jurisdiction in a penalty appeal to consider whether Conditions A, B or C are satisfied.

34. In *Nijjar v HM Revenue & Customs [2017] UKFTT 175 (TC)* Judge Richards set out his view as to the extent of the burden on HMRC to establish the formal validity of an APN on an appeal against a penalty for non-payment. At [25] he stated as follows:

> " 25. This is a penalty appeal and therefore I consider that HMRC have the burden of proving the facts and circumstances that result in the penalties being due. In the context of this appeal, that means that they must prove all of the following facts:
>
> (1) That the document issued to Mr Nijjar was an APN. If it were some other kind of document (for example a mere suggestion that Mr Nijjar's exposure to interest would be mitigated if he made a payment on account) there would be no statutory penalty for failing to pay the amount specified in it. I am satisfied that the document I saw was indeed an APN not least since it complied with all of the requirements of s220 of Finance Act 2014 and stated that it was an accelerated payment notice.
>
> (2) That the APN was issued pursuant to s219(2)(a) of Finance Act 2014 (while an enquiry was in progress) as that is a precondition to a penalty falling due under s226 of Finance Act 2014. Mr Nijjar accepted that this was the case (see [4(1)] above).
>
> (3) That Mr Nijjar had not made the accelerated payment by the due date for payment. Mr Nijjar accepted that this was the case (see [4(4)] above).
>
> (4) That HMRC had calculated the resulting penalty correctly. (As noted at [4(5)] and [4(6)], this was not in dispute.)"

35. I am satisfied for the reasons given in Nijjar, Beadle, Beadle No 2 and in my own decision in Goldenstate that the scope of any challenge to the validity of an APN in a penalty appeal is limited to the formal requirements in section 220(2) FA 2014. That is what an APN must contain and if it does not then it is not an APN, subject to section 114 Taxes Management Act 1970 which is not engaged in the present appeal.

36. There is now a line of FTT decisions (also including Chapman which I refer to below) in which the tribunal has set out the limits of its jurisdiction in penalty appeals arising from non-payment of APNs and PPNs. The arguments of the appellant in the present appeal do not satisfy me that the previous decisions have taken an unnecessarily restrictive view of the jurisdiction of the tribunal hearing an appeal against a penalty.

37. The APN dated 5 January 2016 did satisfy the formal requirements of section 220. That conclusion is sufficient for me to dismiss the first ground of appeal. I have

considered whether I should make findings of fact as to whether or not the appellant received a notice of enquiry for tax year 2011-12. Having heard the evidence it is right for me to do so in case I am wrong on the issue of jurisdiction.

38. The requirement for a notice of enquiry to be given is contained in section 9A Taxes Management Act 1970 ("TMA 1970"). There was no issue between the parties that there would only be an open enquiry into the 2011-12 tax year if HMRC had given notice of the enquiry to the appellant. The position in relation to the giving of a notice to open an enquiry was summarised by the FTT (Judge Barbara Mosedale) in *Tinkler v HM Revenue & Customs [2016] UKFTT 170 (TC)* as follows:

> " 71. In summary, the law is that a notice of enquiry must be received by the taxpayer within the enquiry window to be effective, but the taxpayer is deemed by s 115(2) and s 7 IA 78 to have received it if it was sent to any place specified in s 115(2) unless the taxpayer can prove the letter did not arrive or arrived after the enquiry window closed."

39. The parties were content to adopt this summary, which is not affected by a subsequent decision of the Upper Tribunal in that case allowing an appeal by HMRC.

40. Section 115(2) TMA 1970 provides as follows:

> " 115 Delivery and service of documents
>
> ...
>
> (2) Any notice or other document to be given … under the Taxes Acts may be served by post, and, if to be given … to … any person by the Board, by any officer of the Board, or by or on behalf of any body of Commissioners, 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, or
>
> (b) ..."

41. The respondents contend that a notice of enquiry was sent to the appellant at his usual place of residence as permitted by Section 115 Taxes Management Act 1970. The respondents then rely on the deeming effect of section 7 Interpretation Act 1978 ("IA 1978") which provides as follows:

> " 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."

42. The appellant relied on his own evidence and that of his wife to the effect that they had not received the notice of enquiry.

43. I do not consider that HMRC are able to rely on the deeming effect of section 7 IA 1978. The only evidence before me that the notice was properly addressed is a

copy of the notice said to have been sent. However, there is no evidence that it was pre-paid and posted by HMRC. I do not consider that those matters can be inferred simply from the existence in HMRC's records of a notice of enquiry dated 15 March 2013. Other than the fact that HMRC were able to produce an unsigned copy of a notice there was no other record to support their case that it was sent to the appellant.

44. The appellant has a degree in mathematics and works as a senior project engineer in the defence sector. He submitted his self assessment return for 2011-12 on 23 August 2012. HMRC's copy of the letter notifying the appellant that they were opening an enquiry into his 2011-12 tax return was dated 15 March 2013. The appellant's evidence is that he never received that letter until he was provided with a copy under cover of their response to his representations in relation to the APN dated 14 June 2016.

45. The address on the copy notice of enquiry relied on by HMRC was the appellant's residential address. He has lived there for 23 years. I am satisfied that the appellant is methodical and assiduous when it comes to dealing with important correspondence, including communications from HMRC. He scans all such correspondence and saves it on his computer where he has a separate folder for each month. He has no record of receiving the notice of enquiry for 2011-12. He does have records of receiving notices of enquiry for 2012-13 and 2013-14.

46. The appellant was also in the habit of forwarding to his professional advisers copies of all HMRC correspondence relating to any disputes with HMRC. His professional advisers had received copies of notices of enquiry for 2012-13 and 2013-14 but not for 2011-12.

47. The appellant was working away from home in the period 10 March 2013 to 22 March 2013, returning on the weekend in the middle of that period between 15 March 2013 and 17 March 2017. Mrs Fraser was at home throughout that period. She works as a senior lecturer in logistics and supply chain management. Whenever the appellant was away from home, Mrs Fraser would put post in brown envelopes from HMRC addressed to the appellant to one side on a table in the study, unopened. The appellant asked Mrs Fraser to inform him by telephone when such post arrived because it may be time sensitive and she would do so. It is not surprising that neither had any specific recollection of receiving or indeed not receiving a letter from HMRC in the above period.

48. I am satisfied that no notice of enquiry for 2011-12 came to the attention of the appellant or his wife. The question therefore is whether something went awry in the posting, delivery or receipt of the notice of enquiry. In other words, I must consider what is more likely – that for some reason the notice was never posted, that it went astray in the course of delivery or that it was mislaid after it had been delivered to the appellant's home address.

49. Based on the evidence before me I am satisfied that the least likely explanation is that it was mislaid after delivery to the appellant's home. I find on the balance of probabilities that the appellant did not receive the notice of enquiry for 2011-12.

(2) Reasonable Excuse

50. The second ground of appeal is that there was a reasonable excuse for non-payment of the sum demanded because the appellant had a reasonable belief, robustly founded, that the APN was not lawfully issued. In particular, because the appellant had not received a notice of enquiry into his tax return for 2011-12 and therefore Condition A was not satisfied.

51. In making this submission Mr Jones relied on a decision of the FTT (Judge Charles Hellier) in *Chapman v HMRC [2017] UKFTT 800 (TC)*. He distinguished an attack on the validity of an APN in the first ground of appeal with reliance on a reasonable excuse, namely a reasonable belief robustly founded that the APN was invalid.

52. In Chapman, having noted at [13] that there was no appeal to the tribunal against HMRC's decision to issue an APN or its lawfulness, Judge Hellier stated:

> " 47. This is an appeal against the penalty only. I do not consider that the legislation allows the lawfulness of the APN to be adjudicated through the back door of an appeal against the penalty. If a document has been issued by HMRC which complies with the contents requirements of section 220 FA 2014, I must work on the basis that it creates a lawful demand unless or until it is found to be unlawful in a judicial review action.
>
> 48. But the legislation provides three specific escape routes. I address later in this decision whether issues in relation to the perceived validity of the APN might affect the operation of those escape routes. The following three sections are written on the basis that the legislation requires me to work on the basis that Mr Chapman's failure to pay the amount set out in the APN by 29 May 2016 makes him liable to a penalty under section 226 (3) the 5% of the amount of the AP unless one of those escape supplies."

53. The "escape routes" referred to by Judge Hellier are the existence of a reasonable excuse, the existence of special circumstances and also provisions in relation to time to pay, which are not relevant for present purposes. Mr Jones relied in his submissions on what Judge Hellier said in relation to reasonable excuse. The judge rejected HMRC's argument that recognising a reasonable excuse based on a belief that the APN was unlawful or invalid would defeat the purpose of the scheme for accelerated payments. His reasoning which I set out in full was as follows:

> " 63. The *third* reason was that Mr Chapman, on reputable advice considered the APN invalid. He says that it is reasonable not to pay a bill which you do not believe his due: if you reasonably believe that a demand made upon you is a hoax or made illegally then surely it is reasonable not to make payment?
>
> 64. Ms Rhind says that such a belief cannot be a reasonable excuse for non payment. She says that the scheme under which the AP was issued must be taken to be lawful until held unlawful. She cites Simler J dealing with parallel legislation in relation to partner payment notices in *R (on the application of Rowe) v HMRC* [2015] EWHC 1511 (Admin) in which she said at [41]:

> 54. "The scheme introduced by Parliament… ought to take effect unless and until successfully challenged. It ought not lightly to be assumed that HRC has acted unlawfully"

65. I am not persuaded that Ms Rhind's proposition can be drawn from Simler J's words. Simler J was concerned with the scope of interim relief, not with whether or not conduct was reasonable. There is also a difference between a belief that the scheme of the legislation was unlawful and a belief that a particular APN was unlawful. But I accept the force of the statement that a person should not lightly assume that HRC are acting unlawfully.

66. Ms Rhind says that if it were reasonable for a person to fail to pay simply because he believed his judicial review action would succeed, then even if he were unsuccessful he would effectively have defeated the APN and frustrated Parliamentary intention because without any penalty he would have deferred the very payment intended to be accelerated by the scheme.

67. I accept that the purpose of the scheme is to remove the cash flow advantage of an unsuccessful tax avoidance scheme asserted in the taxpayer's return. But if belief in the unlawfulness of an APN founded a reasonable excuse and the challenge to the APN was unsuccessful, the result would be a reduction rather than an elimination of the counteraction of the cash flow advantage, because after the failure of the challenge the excuse would cease, and failure to pay pending the closure of the enquiry would attract a penalty.

68. Nor do I believe that the purpose of the accelerated payment scheme can be prayed in aid of the construction of what is a reasonable excuse in legislation which antedated the scheme. Similar issues may arise if a taxpayer believes that an amendment to a self assessment is wrong and fails to pay the tax when due. The question asked by that legislation is whether that conduct is, taking into account all the circumstances reasonable.

69. Ms Rhind notes that Simler J said in *Rowe* at [37] and [38] that if the judicial review was successful the obligation to pay any penalty would fall away, but if unsuccessful it would have been the case that all along the taxpayer should have made payment "In that scenario…there would have been no justification for preventing the …application of the penalty regime." Thus Ms Rhind says that either the Appellant will succeed in the judicial review action and any penalty quashed or the action will be unsuccessful and there will not have been a reasonable excuse for the failure to pay.

70. I do not accept this argument for two reasons. First, Simler J was considering the terms of an interim order and whether or not it should prohibit the assessment of penalties. The reasoning is not transferable to reasonable excuses.

71. Second, it seems to me that this argument is in effect that if something is lawful it can never be a reasonable excuse to act on a belief that it is unlawful. To my mind that affords "reasonable" too little scope. No doubt all decisions of the High Court are reasonable, although some are shown to be wrong: it would not be unreasonable I think to act on a High Court decision nevertheless. There must I think be circumstances in which it is reasonable to consider an APN unlawful and on that basis reasonably decline to pay it.

72. But those circumstances will I believe be exceptional. If one starts from the presumption that HMRC should not lightly be taken to act unlawfully, it will generally be only where there is an obvious or gross error in the notice (even though it may comply with the formal requirements of section 220) that belief in its unlawfulness could be a reasonable excuse for non payment. An example might be where the decimal point had slipped in the statement of the amount to be paid.

73. If a tribunal finds that such a belief is a reasonable excuse for the failure to pay, it is not overstepping its jurisdiction by adjudicating on the lawfulness of the notice; rather it is indicting that it is reasonable to conclude that it is very likely that the notice would be found to be unlawful, and that in those circumstances failing to pay is a reasonable response.

74. However, for such a belief reasonably to lead to non payment, it must be robustly based, and the decision to act on it must be reasonable. An opinion, even from an eminent practitioner, that "you should win" may not be enough. In this appeal neither Mr Chapman nor Mr Noorani pointed to any patent error in the APN, and I was not shown the advice received. I was therefore not able to conclude that it was so robust that it would have been reasonable not to pay."

55. In Beadle No 2, the appellant also argued that his belief that the PPN sought payment of an excessive amount was a reasonable excuse for non-payment. He contended that he had a reasonable belief, based upon expert advice, that the calculation of the understated partner tax was unlawful and that he therefore had a reasonable excuse for non-payment. The tribunal in Beadle No 2 rejected that argument as follows:

" 196. Likewise, Mr Gordon's second argument, superficially attractive as it may be, must also fail. The Tribunal will not embark on an exercise of examining the reasonableness of the appellant's belief that the sum set out in the PPN was not payable in law based on the first argument, the lawfulness of the tax avoidance scheme or any other legal argument.

…

198. In order to do examine the reasonableness of the appellant's belief as to any of the potential legal arguments regarding the underlying partner tax liability, the Tribunal would need to examine the merits of the substantive arguments which it has no jurisdiction to determine. To do so would again run contrary to the Parliamentary intention in the FA 2014. If, the appellant is successful in any challenge to the partner tax liability, by whatever route, he may obtain a repayment or refund of the sum payable under the PPN. In the mean-time, statute provides that he should not have benefit of the cash advantage while this dispute is resolved. The appellant's belief, even if reasonable, in the merits of the underlying challenge to the partner tax liability, in whatever form, cannot be relied upon to found a reasonable excuse for not paying the sum set out in the PPN.

…

203. Applying the test in the *Clean Car Company*, a reasonable taxpayer in the appellant's position would make payment of the sum under the PPN within the payment period and make whatever challenges (whether statutory or extra statutory) to

the underlying liability he or she chose to do in the mean-time. This would be the case, whatever his or her reasonable belief as to the merits of his substantive challenge. If such a challenge were successful then the appellant would receive a refund or repayment but this cannot reasonably excuse making a payment on the sum due under the PPN that Parliament has required should be made in the interim."

56. The decisions in Beadle No 2 and Chapman were both released in November 2017 and reached different conclusions as to whether in principle a reasonable belief as to the invalidity of an APN could give a reasonable excuse for non-payment.

57. Ms Rhind submitted that Beadle No 2 was to be preferred to Chapman. Neither is binding on me, but even if Chapman does correctly state the principle, she submitted that it emphasises the circumstances where a belief in the invalidity of an APN is a reasonable excuse for non-payment will be exceptional. It was suggested that there would have to be an obvious or gross error in the APN, such as a decimal point that had slipped when stating the amount of tax. Ms Rhind suggested that an alleged non-compliance with Condition A, B or C could not meet that high threshold.

58. I do prefer the reasoning in Beadle No 2 to that in Chapman. I do not consider that a reasonable excuse based on a belief as to the invalidity of an APN would be consistent with the purposes of the statutory scheme. It is acknowledged at [67] of Chapman that the purpose of the scheme is the removal of the cashflow advantage in unsuccessful tax avoidance schemes. In my view it is no answer to say that if a reasonable excuse based on the invalidity of then APN operates then the cashflow advantage is merely reduced rather than extinguished which appears to be the proposition in [67]. Nor do I consider that the fact Schedule 56 and the reasonable excuse provisions therein pre-date the APN provisions means that the purpose of the APN scheme cannot be relevant to what is a reasonable excuse. It would be surprising if what amounts to a reasonable excuse could not be construed in the context of all the circumstances, including the purpose of the legislation with which a taxpayer fails to comply.

59. Even if a reasonable belief robustly founded as to the invalidity of an APN could give rise to a reasonable excuse, I am not satisfied that it does so in the present circumstances.

60. The first penalty for non-payment of the APN was issued to the appellant on 26 August 2016. The appellant wrote to HMRC on 2 September 2016 appealing against the penalty. His grounds of appeal were as follows:

> "The grounds for appeal are that I am challenging the lawfulness of the APN by way of Judicial Review proceedings, and my Judicial Review claim has not yet been determined.
>
> …
>
> Accordingly, whilst the lawfulness of the APN remains under legal challenge, I have, for the purposes of paragraph 16 of Schedule 56 of the Finance Act 2009, a reasonable excuse for non-payment of the sum demanded in the APN, and no penalty is due."

61. In a letter dated 14 October 2016 accepting the offer of a review of HMRC's decision to reject his appeal, the appellant re-stated his position that as the challenge by way of judicial review was proceeding it was reasonable for him not to pay the sum demanded in the APN.

5 62. It is notable that there was no mention in this correspondence of any challenge to the APN based on a case that no notice of enquiry had been served in relation to 2011-12. That remained the position when the appellant sought to challenge the second penalty.

63. In his witness statement the appellant stated that the reason he had not paid the 10 APN was because of advice he had received from "ME Office", an association of affected taxpayers which was funding the judicial review proceedings. The appellant was pressed as to whether he took the decision not to pay because of the advice he had received, rather than the fact he did not believe the APN was valid because he had not received a notice of enquiry for 2011-12. The appellant did not provide any clear 15 answer that question.

64. There was no evidence before me as to the content of the advice the appellant received from ME Office. However, the challenge to the validity of the APN in the judicial review proceedings was not made on the basis that Condition A had not been satisfied and I infer that this did not form part of the advice received.

20 65. Non-receipt of the enquiry notice was first raised in the representations dated 1 April 2016 made by the appellant on receipt of the APN to which HMRC responded on 14 June 2016. There was no further reference to the matter until a letter dated 4 August 2016 from the appellant's accountants. HMRC maintained their position relying on section 115 TMA 1070 in a response dated 19 September 2016. The 25 appellant's accountants challenged HMRC's position and their reliance on section 115 in a letter dated 11 October 2016. Despite this correspondence, the grounds of appeal in relation to the first and second penalties did not rely on non-receipt of the enquiry notice.

66. I am not satisfied that the reason the appellant failed to pay the sum demanded 30 in the APN was because he considered that Condition A had not been met. On the evidence before me I find that the appellant failed to pay the sum demanded in the APN because he had received advice that he did not have to because he was challenging the validity of the APN in judicial review proceedings. Without seeing the content of that advice I am not satisfied that the appellant had the reasonable 35 belief robustly founded that Mr Jones submitted was sufficient to found a reasonable excuse.

67. Mr Jones argued that even if the appellant was not acting on a belief that the APN was invalid because no notice of enquiry had been received, that could still provide him with a reasonable excuse for non-payment. He submitted that it was not 40 necessary for the reasonable excuse relied on in this appeal to have been in the appellant's mind at the time of non-payment. It was sufficient if the taxpayer had a

reasonable belief that the APN was invalid, without understanding precisely why that might be the case.

68. I do not accept that submission. The appellant was acting on the advice he had received. In the present circumstances I do not consider that the appellant can seek to establish a reasonable excuse for non-payment by reference to matters which were not operative in his decision not to pay the sums required by the APN. At best, those circumstances might amount to special circumstances to justify a special reduction in the penalty.

69. For all the reasons given above I am not satisfied that the appellant had a reasonable excuse for non-payment.

(3) Special Circumstances

70. The third ground of appeal is that the circumstances amount to special circumstances and the penalty should be subject to a special reduction. This was very much a subsidiary argument and did not appear in the grounds of appeal or Mr Jones' skeleton argument. Indeed, it only appeared to arise because the question of special circumstances was raised by Ms Rhind in her skeleton argument. Ms Rhind did not object to the appellant relying on arguments as to special circumstances and I shall treat it as a separate ground of appeal.

71. The jurisdiction of the tribunal in relation to special circumstances arises only where it finds that HMRC's decision on special circumstances was "flawed" in the sense that they failed to take into account a relevant factor, took into account an irrelevant factor, erred in law or reached a decision which was perverse or irrational such that no reasonable authority could have reached it.

72. HMRC's decision on special circumstances was set out in their review decisions following the appellant's notification of his appeals against the penalties. Those decisions were dated 10 February 2017, 24 May 2017 and 26 July 2017. The appellant did not rely at that stage when making his appeals to HMRC on the fact that he had not received a notice of enquiry for 2011-12. The appellant in making his appeals was simply relying on the fact that he was challenging the APN's by way of judicial review. I do not consider therefore that HMRC's decision in relation to special circumstances could be described as flawed in failing to take into account the appellant's present case that Condition A was not satisfied.

73. Further, what amounts to special circumstances must also be considered in the light of the purpose of the statutory scheme. In my view special circumstances cannot be based on an allegation that the APN is invalid. Such arguments would be inconsistent with the statutory scheme in the same way that they are for reasonable excuse.

Conclusion

74. For the reasons given above I must dismiss the appeals.

75. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 11 JUNE 2018