Neutral Citation: [2022] UKFTT 142 (TC)

Case Number: TC08473

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: **TC/2019/03906**

INCOME TAX *– Follower Notice – Penalty – Sections 204-214 of Finance Act 2014 – necessary corrective action not taken – reasonable in all the circumstances – appeal allowed*

Heard on: 11 October 2021
Judgment date: 21 April 2022

Before

TRIBUNAL JUDGE ANNE SCOTT

Between

DAVID ANDREAE **Appellant**
and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: Mark Taylor of Buzzacott LLP

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

DECISION

Introduction

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

2. On 29 October 2018, HMRC issued penalty notices in the sums of £13,056.04 for the tax year ended 5 April 2007 and £4,843.23 for the tax year ended 5 April 2008.

3. The penalties were issued on the basis that the appellant had failed to take corrective action by the due dates.

4. The review conclusion letter dated 2 May 2019 upheld the penalties on the basis that the applicable judicial ruling (in terms of Section 205 FA 2014) was dated 3 September 2015 and became final on 23 January 2016. The FNs were validly issued on 4 November 2016, it had not been reasonable for the appellant not to have taken corrective action before the relevant deadline and therefore penalties were due and payable.

5. On 31 May 2019, the appellant appealed to the Tribunal. Correspondence continued, not least about the quantum of the penalties.

6. In terms of the then relevant legislation, if corrective action was not taken by the specified time a penalty of 50% became due under Section 209 FA 2014. In terms of Section 210 FA 2014, that penalty could be reduced to a minimum of 10% for cooperation (quantified by relation to timing, nature and extent).

7. The quantum of the maximum penalty is not disputed.

8. HMRC look at five conditions (A-E) when computing reductions in the quantum of a penalty. The original calculation allowed nil reductions for Conditions A, C and E and 1% and 10% for Conditions B and D for both years. Effectively these were minimal reductions.

9. On 4 April 2020, HMRC intimated that they would increase the reduction for Condition A to 20% and Condition B to 5%. That reduced the net penalties for each year to £10,307.40 and £4,843.23 respectively.

10. On further review, on 18 December 2020, HMRC reduced the amount of the penalties to £9,734.76 for the tax year ended 5 April 2007 and £3,611.18 for the tax year ended 5 April 2008 by increasing the reduction for Condition B to 10% treating compliance as having been within 27-52 weeks.

11. Accordingly the penalty originally assessed was 45.6% of the denied advantage and was later reduced to 34%. The appellant argues that if a penalty is due, which is denied, even the reduced penalties are excessive in his circumstances.

The hearing

12. I had a joint Bundle extending to 324 pages, an Authorities Bundle extending to 430 pages, and Skeleton Arguments for both parties. In fairness to Ms Arnold, I observe that she was not the author of either HMRC's Statement of Case or their Skeleton Argument. As I point out later there were omissions from the Authorities Bundle.

13. I heard evidence from the appellant who had lodged a witness statement and, as a result of questions from me about the timing of corrective action, I also heard from Mr Taylor.

14. It was not disputed that the burden of proof was on the appellant to establish that it was reasonable in all the circumstances not to have taken corrective action by 16 November 2017.

The Factual Background

15. The appellant works as an IT contractor. Typically IT contractors are engaged through a limited company or another structure. Even currently, the appellant works for a government organisation and is compelled to work through an umbrella company.

16. In the tax year ended 5 April 2005 some of his colleagues recommended Montpelier Tax Consultants (Isle of Man) Limited ("Montpelier") to him. The appellant made checks about Montpelier on the internet and they appeared to him to be one of the top 50 UK accountancy companies. They presented as a big worldwide organisation with offices not only in the UK but worldwide. They employed qualified accountants and retained both an English and Irish barrister. In his view they had a good reputation.

17. The appellant attended a presentation by Montpelier in London in 2004 and decided to utilise their tax planning services. Montpelier promoted a tax scheme involving an Isle of Man trust and an Isle of Man partnership ("the Scheme"). Given that they were an international firm and he was aware that many people used Isle of Man companies he saw no reason to doubt that the Scheme was *bona fide*. The appellant believed Montpelier to be a respectable accountancy firm with significant tax expertise. He did not know about the extent of their vested interest in the Scheme. He knew that the Scheme was disclosed to HMRC and that tax law could change. Montpelier confirmed that they would "take care" of all of the appellant's tax obligations. He understood that to mean that they would advise him on all relevant tax matters.

18. The appellant's accountants, LB Accountancy Services Limited, prepared and submitted his tax returns, in part relying on the information provided by Montpelier, in each year.

19. The appellant's 2007 Self-Assessment Tax Return ("SATR") was received by HMRC on 23 January 2008. On 16 January 2009, HMRC opened an enquiry ("the 2007 enquiry") into that return under Section 9A Taxes Management Act 1970 ("TMA"). At the same time they opened an enquiry under Section 29 TMA for the tax years ended 5 April 2005 and 2006. The 2007 enquiry was focussed on the reference in the SATR to "Profits of IOM Trust. Claim for exemption under Article 3 of the United Kingdom/Isle of Man Double Taxation Agreement. 9DTA".

20. HMRC closed the 2007 enquiry on 21 May 2009 and issued discovery assessments for the two previous years. HMRC amended the SATR for the three years to 5 April 2007 to withdraw the double taxation claims and to include the partnership income.

21. The appellant immediately contacted Montpelier and, on 11 June 2009, they wrote to HMRC on his behalf vigorously attacking the discovery assessments as being invalid and appealing the closure notice.

22. The appellant's 2008 SATR was received by HMRC on 31 January 2009 and HMRC opened an enquiry under Section 9A TMA on 12 January 2010. The 2008 enquiry was closed on 25 August 2011 and again HMRC made amendments to the 2008 SATR to include partnership income from the Isle of Man.

23. The closure notice was appealed on 28 September 2011 by Montpelier. There is no evidence that HMRC took exception to what was technically a late appeal and that is not addressed in the Statement of Case. I therefore accept that it was a valid appeal.

24. On 5 February 2015, HMRC wrote to Montpelier intimating that they intended to issue Accelerated Payment Notices ("APNs") stating that when they did so they would suggest to the taxpayers that "…they contact you if they have any questions about the scheme and their use of it…".

25. Rathowen Limited (hereinafter referred to Montpelier as it was part of Montpelier) sent a copy of HMRC's letter to the appellant on 11 February 2015 stating that "Our Tax Company" had just received the letter. They confirmed that, as Montpelier had advised in a letter sent to the appellant and others the previous day, they had briefed Counsel in relation to Judicial Review and they would be checking the validity of the APNs. That was followed by further advice on 17 April 2015.

26. HMRC issued APNs and FNs on 5 June 2015 in relation to all of the years that the appellant had used Montpelier.

27. On 17 July 2015, Montpelier told the appellant that the APNs were invalid and provided him with representations to send to HMRC which he did that day.

28. On 3 September 2015, the Tribunal released its decision in the case of *Robert Huitson v HMRC*[1] ("Huitson").

29. Mr Huitson had entered into, what the Tribunal found to be, a tax avoidance scheme marketed by Montpelier that did not work. It was basically the same as the Scheme. The deadline to appeal that decision was 23 January 2016. On 14 October 2015, Montpelier wrote to the appellant intimating the decision in *Huitson* stating that they were seeking leave to appeal. That was the case and on 17 November 2015, Mr Huitson applied to the FTT for permission to appeal on four grounds and permission was granted on 21 December 2015. The FTT sent a copy of that decision to Montpelier on the same day. However, Montpelier, who acted for Mr Huitson, did not lodge a Notice of Appeal with the Upper Tribunal by the deadline of 23 January 2016.

30. On 30 December 2015, for the years 2006/07 and 2007/08, HMRC withdrew the APNs and on 6 January 2016 HMRC withdrew the APNs for 2004/05 and 2005/06.

31. On 13 January 2016, Montpelier wrote to the appellant enclosing a copy of a letter that they had received from HMRC intimating that those APNs would be withdrawn as they were not valid but expressing HMRC's view that the Scheme did not work. Montpelier pointed out that HMRC's letter did not say that there was still a technical point to be litigated and that leave to appeal in *Huitson* was being sought.

32. On 6 July 2016, on behalf of Mr Huitson, Montpelier filed an application with the Upper Tribunal for permission to appeal out of time.

33. On 9 August 2016, the Upper Tribunal issued a decision refusing the application for an extension of time. The Tribunal had decided the matter on the papers. That decision had referred to the number of taxpayers affected by *Huitson* using a figure of 8,000 given in a letter from HMRC. It was subsequently ascertained that that figure was incorrect (it should have been 1,724) and on 15 August 2016, a revised version of the decision was issued.

34. On 16 September 2016, Mr Huitson applied to have that decision set aside on the basis that HMRC had failed to copy their response to Montpelier's application and their own request for an expedited decision to either Montpelier or Mr Huitson. An oral hearing was subsequently listed.

35. On 19 October 2016, HMRC issued an advance warning letter to the appellant, and his accountant, setting out its intention to issue APNs and FNs in relation to the Scheme. That letter referred to the withdrawal of the APNs issued in 2015 for 2005-2008 stating "We subsequently withdrew the notice because the condition on which it had been issued had not been met."

[1] [2015] UKFTT 0448 (TC)

36. It went on to say that those APNs had been withdrawn because they had not met any of the three alternative criteria for issue but HMRC had believed then, and still did, that the Scheme had not achieved the intended tax advantage. HMRC stated that that view was supported by *Huitson* and stated that the late appeal in *Huitson* had been rejected by the Upper Tribunal on 5 July 2016.

37. The appellant immediately contacted Montpelier who wrote to him on 24 October 2016 stating "… we are awaiting a hearing date from the Upper Tribunal and therefore HMRC are incorrect when advising that the decision became final in the Huitson case on 23rd January 2016".

38. On 4 November 2016, HMRC wrote to the appellant, and his accountant, and issued FNs for the years 2006/07 and 2007/08. Those required corrective action to be taken by 7 February 2017 to counteract the denied advantage, or to make representations in the alternative. The FNs explained that if the appellant failed to take corrective action by 7 February 2017, he would be liable to pay a penalty under Section 208 FA 2014. APNs were issued to the appellant at the same time.

39. The letters said that the 3 September 2015 decision in *Huitson* was final as it had not been appealed and the APNs and FNs were issued because the Scheme was a similar scheme.

40. The appellant immediately contacted Montpelier who wrote to him on 15 November 2016 stating "We do not believe that follower notices and accelerated payment notices are lawful and will be issuing a representation within the statutory 90 day time limit".

41. On 21 November 2016, an HMRC officer telephoned and spoke to the appellant who confirmed that the FNs had been received and that his agent was dealing with the matter. The officer reminded the appellant that the corrective action forms needed to be returned to HMRC within 90 days to avoid penalty implications.

42. On 23 December 2016, HMRC issued to the appellant, and to his accountant, a reminder letter (dated the previous day) regarding the date for taking corrective action.

43. On 13 January 2017, HMRC telephoned the appellant and he confirmed that he understood what was required in regard to the corrective action forms. He again intimated that his agent was dealing with the matter.

44. Montpelier provided the appellant with extensive representations and on 27 January 2017, he duly lodged those representations against the APNs and FNs. That had the effect of postponing the due date for payment of the APNs and corrective action in respect of the FNs until 30 days following the date of the review conclusion letter.

45. More pertinently, the relevant part of the paragraphs numbered "2" of that letter states that HMRC were not correct to say that there was a final judicial ruling and goes on to read in relation to Condition C:

> "Section 205(3)(c) FA 2014 states that the ruling is a final ruling. Given that Mr Huitson has an application for permission to appeal to be heard by the Upper Tier Tax Tribunal on 9th February 2017, the case cannot be a final ruling….".

46. Montpelier issued a letter to the appellant dated 10 February 2017, telling him that the previous day the Upper Tribunal had issued an oral decision refusing permission to appeal. Montpelier said that they were intending to advise Mr Huitson to appeal to the Court of Appeal. They were awaiting HMRC's responses to representations in respect of a number of FNs and if the representations were not accepted then they would seek permission to challenge by way of Judicial Review.

47. On 11 October 2017, (257 days after the representations were lodged) HMRC issued its conclusion letters upholding the APNs and FNs. The letters advised that payment would need to be made and corrective action taken by 16 November 2017 if penalties were to be avoided. They stated that HMRC were of the opinion that there was a relevant judicial ruling.

48. Their explanation of *Huitson* made no reference to the application to the Upper Tribunal or to Judge Sinfield's decision but reiterated the earlier statement that the time limit for appeals had expired on 23 January 2016. It simply stated that permission to appeal to the Court of Appeal was refused but did not say when.

49. The appellant received the letters on 16 October 2017 and immediately contacted Montpelier who provided him with a letter to send to HMRC.

50. On 26 October 2017 he wrote to HMRC using the letter from Montpelier. At paragraph 6 of that letter he stated, as drafted by Montpelier, that "Insofar as concerns your view that Huitson constitute (sic) a final ruling please note that permission to appeal to the Court of Appeal has been lodged". The letter concluded stating that he would not be taking corrective action by 16 November 2017 because he would be issuing a Judicial Review challenge to the letter of 11 October 2017 within the statutory time limit. He asked that HMRC stay any action pending the outcome of that Judicial Review.

51. On 2 November 2017, the appellant returned a call from HMRC and confirmed that he had received the review conclusion letter. He advised that he had already responded on 26 October 2017 and that he would be instigating a Judicial Review challenge.

52. On 24 November 2017, Montpelier wrote to the appellant stating that Judicial Review proceedings would be commenced, stating that they would indemnify him in regard to the costs of that and seeking a letter of authority. He responded immediately and also asked for advice on Tax Certificates.

53. On 28 November 2017, Montpelier emailed the appellant confirming that they would progress matters and that the *Huitson* case was not "exhausted" implying that there was not a final judicial ruling and therefore HMRC's actions were invalid.

54. On 19 December 2017, Montpelier wrote to the appellant telling him that the application to be added to the existing Judicial Review proceedings had been dismissed but that counsel had recommended a "multiple joint claim" against HMRC on 22 December 2017 and they would add him to that claim if they did not hear from him to the contrary. The claim would be to seek a declarator from the court that the APNs and FNs were not valid.

55. On 17 January 2018, the appellant emailed Montpelier having received surcharge notices for approximately £1,700 stating "Please can you advise me what to do about this urgently, as I'd thought the judicial review thing was addressing the APN notices and the Nov deadline they'd given for payment." He went on to say that all that he could think of doing was to pay HMRC the £35,000 and he wished that he had done so the previous week but he had not done so as he had repeatedly tried to call Montpelier to get advice.

56. There was no response and he emailed Montpelier again on 19 January 2018 saying that he had been unable to make contact by telephone, he had an email ready to go to HMRC but he urgently needed advice. Montpelier replied two hours later stating that their tax adviser was drafting a letter to be sent to HMRC in response to their "threats".

57. Approximately two hours later the appellant again emailed Montpelier, having been contacted by HMRC's Debt Management Unit, stating that he wanted to make the payment, that until that week he had "felt very 'looked after' by them" but "this past week has been very disappointing". He got an immediate reply stating that "HMRC are purely trying to scare you

into making payment and taking corrective action. I understand from our tax adviser that he still does not believe payment is due….". The letter went on to say that if he did pay HMRC then if there was a successful outcome he would be able to get a refund.

58. The appellant made payment of £35,167 to HMRC.

59. On 23 January 2018 Montpelier sent the appellant a letter to send to HMRC and said that they would write later that week with an "update".

60. The following day the appellant wrote to Montpelier with a number of questions, confirming that he had made payment, but in particular stating "You said on the phone that I needn't be concerned about the 'Corrective Action' demand due 16 Nov 2017. Will that be confirmed/explained in the update later this week? It is pretty scary." Montpelier replied stating that "hopefully" the letter would give further information.

61. On 29 January 2018, HMRC replied to the letter of 26 October 2017 arguing that they did not accept that a Judicial Review challenge affected the validity of the APNs and FNs and nor was it reason to stay any action in respect of those notices. They stated that they had no comment to make on *Huitson*. In particular they did not comment on his assertion that leave to appeal to the Court of Appeal had been sought. They stated that they would not seek enforcement in relation to the NICs since there was a potential defence and there would be no penalties in that regard.

62. On 1 February 2018, the appellant wrote to Montpelier because he was seriously worried.

63. On 2 February 2018, HMRC issued a letter warning the appellant that he was liable to penalties of up to 50% due to his failure to take corrective action on time. The "update" letter from Montpelier had not arrived. He sent a number of emails to Montpelier.

64. As far as penalties were concerned, Montpelier sent him a brief email on 6 February 2018 stating that that was "purely scare tactics" by HMRC and they had seen a number of such letters in the previous year but no penalties.

65. Montpelier replied in one email on 8 February 2018 to what they described as his "numerous" emails telling him that the update would follow.

66. The appellant then became concerned because he was unable to contact Montpelier. He had not received the promised letters updating him in regard to the *Huitson* appeal or Judicial Review (that was only ultimately issued in a letter dated 21 May 2018 and still suggested litigation would be successful).

67. He then tried to find someone who could give him a second opinion. He consulted a lawyer, a tax consultant and Buzzacott LLP ("Buzzacott").

68. On 15 February 2018, the appellant wrote to HMRC authorising Buzzacott to act in regard to this matter.

69. On 8 March 2018, the appellant managed to contact a Mr Watkins, who was a director of Montpelier, who reassured him that everything was in order. The appellant remained very concerned and on 16 March 2018 asked Buzzacott to take corrective action. He had lost trust in Montpelier. In the interim on 12 February 2018, Montpelier had written to him stating that if he took corrective action he would be unable to reclaim the monies paid even if litigation was successful.

70. Buzzacott were not familiar with the Scheme and had to review the extensive paperwork and work out the denied advantage. Correspondence ensued and they contacted HMRC on 12 July 2018 confirming that the appellant would settle the matter. Their figures did not agree

with those produced by HMRC but ultimately settlement was achieved on the HMRC figures because it was too expensive to argue further.

71. Unfortunately Buzzacott were unaware that, because HMRC operated a sliding scale for the computation of penalties, the "clock" was running for penalties.

72. On 3 September 2018, Buzzacott sent to HMRC the corrective action forms signed by the appellant on 21 August 2018. Those counteracted and relinquished the denied advantage.

73. On 1 October 2018, HMRC issued a letter providing information about the penalties to be charged and on 29 October 2018, the notices of penalty assessments were issued. Correspondence ensued. The appeal was lodged with the Tribunal on 31 May 2019.

74. As indicated at paragraphs 9 and 10 above on 4 April and 18 December 2020, HMRC having revised the policy by which they give credit for certain matters when applying reductions for cooperation in FN penalty cases, further reduced the amounts of the penalties to those that are now in dispute.

The Law

75. The onus is on HMRC to demonstrate that the conditions for issuing a penalty for failing to comply with the FN are satisfied. The onus is also on HMRC to demonstrate that the penalty amount has been correctly calculated. The appellant has challenged neither and we agree that the penalties have been timeously and competently raised and the quantum before reduction is not disputed.

76. The onus is on the appellant to demonstrate that it was reasonable in all the circumstances not to take corrective action. The onus would also be upon the appellant to demonstrate that he has not been given an adequate reduction for co-operation pursuant to Section 210 FA 2014; as he so contends.

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

The legislation

Statutory provisions dealing with Follower Notices (FNs)

78. The legislation relevant to the issue of FNs and associated penalties, is contained in Sections 204-218 and Schedule 30 FA 2014.

79. The circumstances in which a FN may be issued are set out in Section 204 FA 2014 and that is not in dispute.

80. Section 206 FA 2014 imposes requirements as to the contents of a FN as follows:

1. "A follower notice must—

2. (a) identify the judicial ruling in respect of which Condition C in section 204 is met,

3. (b) explain why HMRC considers that the ruling meets the requirements of section 205(3), and

4. (c) explain the effects of sections 207 to 210."

81. The definition of "judicial ruling" relevant in the circumstances of this appeal is contained in Section 205 FA 2014. The relevant parts of Section 205 FA 2014 read as follows:-

"**205 "Judicial ruling" and circumstances in which a ruling is "relevant"**

…

(1) …

(2) "Judicial ruling" means a ruling of a court or tribunal on one or more issues.

(3) A judicial ruling is "relevant" to the chosen arrangements if-

(a) it relates to tax arrangements

(b) …

(c) It is a final ruling.

(4) A judicial ruling is a "final ruling" if it is-

(a) …

(b) a ruling of any other court or tribunal in circumstances where-

(i) no appeal may be made against the ruling,

(ii) if an appeal may be made against the ruling with permission, the time limit for applications has expired and either no application has been made or permission has been refused,

(iii) if such permission to appeal against the ruling has been granted or is not required, no appeal has been made within the time limit for appeals, or

(iv) if an appeal was made, it was abandoned or otherwise disposed of before it was determined by the court or tribunal to which it was addressed.

(5) Where a judicial ruling is final by virtue of sub-paragraph (ii), (iii) or (iv) of subsection (4)(b), the ruling is treated as made at the time when the sub-paragraph in question is first satisfied."

82. Section 208(2) FA 2014 imposes a liability to a penalty if "necessary corrective action" is not taken in respect of the "denied advantage" before the "specified time". Corrective action is amending the return and notifying HMRC that that has been done and also of the quantum of the denied advantage (the tax that will become due and payable).

83. Section 209(1) FA 2014 states that the penalty is 50% of the additional tax payable as "a result" of counteracting the denied advantage (paragraph 2 Schedule 30).

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

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

"P has co-operated with HMRC only if P has done one or more of the following—

(a) provided reasonable assistance to HMRC in quantifying the tax advantage;

(b) counteracted the denied advantage;

(c) provided HMRC with information enabling corrective action to be taken by HMRC;

(d) provided HMRC with information enabling HMRC to enter an agreement with P for the purpose of counteracting the denied advantage;

(e) allowed HMRC to access tax records for the purpose of ensuring that the denied advantage is fully counteracted."

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

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

"214 Appeal against a section 208 penalty

(1) P may appeal against a decision of HMRC that a penalty is payable by P under section 208.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P under section 208.

(3) The grounds on which an appeal under subsection (1) may be made include in particular-

(a) that Condition A, B or D in section 204 was not met in relation to the follower notice,

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

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

(d) that it was reasonable in all the circumstances for P not to have taken the necessary corrective action (see section 208(4)) in respect of the denied advantage.

…

(8) On an appeal under subsection (1), the tribunal may affirm or cancel HMRC's decision.

(9) On an appeal under subsection (2), the tribunal may—

(a) affirm HMRC's decision, or

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

Overview of the appellant's arguments

88. The appellant knew that he did not know much about tax. He employed an accountant to do his tax returns. That accountant used the figures produced by Montpelier and did not demur.

89. He had researched Montpelier thoroughly before retaining them and until after the date for corrective action had passed, he had had no reason to doubt them whereas he certainly doubted HMRC.

90. The appellant argued that Montpelier's advice in regard to the issue of the previous APNs and FNs had been entirely successful and HMRC had been in the wrong as they had admitted. He had every reason to believe that Montpelier would be successful on this occasion.

90. He had repeatedly been told that *Huitson* was ongoing, that therefore there was no judicial ruling and HMRC were ignoring his protestations on that.

91. He had not asked for a second opinion as he had not known who to ask. Indeed when he did get a second opinion it had been difficult to find someone with relevant expertise. He had

believed that it would have been foolish to have taken corrective action when the advice he had was that he had a very strong case.

92. Furthermore, he felt that HMRC had not only got it wrong in 2015, but he felt that they were bullying him. At the time there was a great deal of "traffic" on the internet saying that that was HMRC's approach to FNs. He had acted extremely promptly as soon as he realised that there might be a problem.

93. The length of the delay was primarily in finding a new and competent adviser and to allow them time to review the extensive paperwork. The size of the penalty in terms on cooperation is excessive.

Overview of HMRC's arguments

94. HMRC's position is that the delay in taking corrective action was 291 days which was not reasonable. The appellant had not behaved as a prudent and reasonable taxpayer and he had relied on the Scheme's promoters for advice. He had made a deliberate choice not to take corrective action. He knew that a Judicial Review in 2015 had failed and he had not produced evidence to support his belief that the FNs would be set aside.

95. Lastly, although the legislation on penalties had changed, following harsh criticism in the House of Lords, it was not retrospective. The penalties were not excessive in the context of a significant delay.

Discussion

96. Although in their Statement of Case, HMRC relied on *Chapman v HMRC*[2], Ms Arnold very sensibly did not. I do not propose to address the arguments on *Chapman* since the jurisprudence has moved on since then.

97. In regard to the words "reasonable in all the circumstances" Ms Arnold relied on paragraphs 169 to 175 of *Onillon v HMRC*[3] ("Onillon"), as did the Skeleton Argument. Whilst I am not bound by either decision, I agree with the reasoning in *Onillon* (although of course this provision has now been considered in a number of cases). I also agree with the reasoning in paragraphs 176 to 180 and in particular Judge Redston's clear statement that it is a "fact specific exercise". It is, and it is for that reason that I have set out the facts in this case at such length.

98. Like Judge Redston, I also agree that in those circumstances the starting point would be I accept that the appellant was sent warning letters, documents with facts and guidance, covering letters and FNs all of which explained what necessary corrective action was required and the consequences, in the form of penalties, which would follow from any failure. I also agree that in those circumstances that starting point would be that the appellant's failure to comply was unreasonable.

99. HMRC's Skeleton Argument also referenced, without any comment, Judge Redston's analysis of the words "reasonable in all the circumstances" in Section 214(3)(d) FA 2014 at paragraphs 125-146 in *Corrado v HMRC*[4] ("Corrado").

100. Mr Taylor also relied on those two authorities.

[2] [2017] UKFTT 800 (TC)
[3] [2018] UKFTT 33 (TC)
[4] [2019] UKFTT 0275 (TC)

101. In argument, Ms Arnold relied on Judge Popplewell in *Bentley v HMRC*[5] ("Bentley") at paragraphs 35-40 where he referenced, and agreed with, Judge Hellier in *Barlow v HMRC*[6].

102. What neither party did was to refer to the revised decision in *Bentley* issued by Judge Popplewell on 30 June 2021 ("Bentley 2")[7]. As Judge Popplewell explains in the Preamble thereto, the revised decision took into account the guidance from the Upper Tribunal in *HMRC v Comtek Network Systems (UK) Limited)*[8] ("Comtek").

103. I do not know why neither was in the Bundle of Authorities. The original paragraphs 35-40 are to be found at paragraphs 43-47 of *Bentley 2* which, like its predecessor quoted extensively from *Corrado* which in turn referred to *Perrin v HMRC*[9] ("Perrin").

104. Fortunately, for the purposes of this decision, the Upper Tribunal in *Comtek* set out a succinct statement of the approach that the FTT should take:

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

105. Turning to the last of these factors first, it was accepted by both parties that the purpose of Part 4 Chapter 2 FA 2014 is to discourage taxpayers from pursuing their dispute in avoidance cases once their arrangement has been shown to fail in another party's litigation. At paragraph 174 of *Onillon*, Judge Redston made the point that, in light of that, it would not be a reasonable excuse if a taxpayer simply decided to see how the litigation played out. The decision not to take corrective action must be an informed choice. I agree.

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[5] [2021] UKFTT 5(TC)
[6] [2020] UKFTT 0486 (TC)
[7] [2021]UKFTT 240 (TC)
[8] [2021] UKUT 81 (TCC)
[9] [2018] UKUT 156 (TCC)

106. Whilst, of course, I accept that a reasonable excuse for not taking corrective action timeously is not the same as whether it was reasonable in all the circumstances, when looking at the appellant's "thought processes" I agree with my fellow FTT judges that *Perrin* provides an excellent guide. At paragraph 81, insofar as relevant, that reads:

> "81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?....".

107. In *Corrado,* Judge Redston expressly adopted the approach in paragraph 81(3) of *Perrin.* It is indeed an objective test.

108. As can be seen, the approach gives a wider context to the test in *Comtek* and the two authorities are complementary.

109. Whilst one factor to be considered is what a reasonable and prudent taxpayer in the position of the appellant might have done if in the appellant's position, the Tribunal must stand back and look at all of the circumstances. It is a fact specific exercise, so although the findings in *Barlow* and *Bentley,* to which Ms Arnold referred me, have some similarities there are numerous differences as also in regard to the evidence exhibited and led.

110. Before I go any further I make it clear that I found the appellant to be a straightforward, honest and wholly credible witness. His evidence was not challenged by Ms Arnold in any material way. There were only two material, and for me, interesting challenges.

111. The first was to ask him why he had not accepted HMRC's repeated statements that *Huitson* was final and in particular the statements in the FNs issued on 4 November 2016 and in the review conclusion letter dated 11 October 2017. Of course, he said that Montpelier had told him that *Huitson* was listed for hearing. He had believed them. He was bolstered in that view because Montpelier had told him that HMRC had made mistakes and he knew that previous FNs had been withdrawn after an admitted error by HMRC. As far as the review conclusion letter was concerned, not only did he still have the other concerns but, in response to the representations provided by Montpelier, HMRC had indicated that they would not enforce the element for NICs because of their concerns about a potential defence to that. That reinforced his view that HMRC's approach was riven with errors.

112. In HMRC's Skeleton Argument, at paragraph 13, HMRC state that HMRC relied on the fact that *Huitson* became final on 23 January 2016 and "…a subsequent late appeal being rejected by the Upper Tribunal (sic) 5 July 2016". They cited only the FTT Decision. The appellant's representative did not take issue with that.

113. I looked for that Upper Tribunal decision and found Judge Sinfield's decision.

114. I observed that Judge Hellier noted at paragraph 6 of *Barlow* that Ms Arnold intimated that leave to appeal out of time had been refused on 22 February 2017 albeit he went on to record at paragraph 23 that, as in this matter, HMRC had written in October 2016 (but on a different date) stating that the late appeal had been rejected on 5 July 2016. I do not know what, if anything, happened on 5 July 2016. Judge Sinfield's decision, which is detailed, suggests that nothing happened then.

115. As Judge Sinfield's decision makes clear, the oral final ruling was only issued on 7 February 2017 with the written decision being issued on 22 February 2017.

116. Pertinently, in my view, as can be seen from paragraph 16 of that decision, HMRC themselves considered that the application for a late appeal by Mr Huitson "…cast doubt on the finality of the FTT's decision and could prejudice HMRC's ability to issue the follower notices…". In my view it certainly did.

117. As far as the appellant is concerned, for him to have decided whether or not the FNs were valid that would have involved an analysis of Section 205 and the appellant would certainly not have had the knowledge or ability to have done so. If HMRC expressed doubts then it is reasonable for the appellant, relying on Montpelier's proven, until that stage, expertise, to have significant doubt.

118. There is a question mark here as to whether the FNs issued in November 2016 were valid. However, I agree with Judge Redston who made it clear at paragraph 140 in *Benton and Others v HMRC*[10] ("Benton") that the FTT has no jurisdiction to decide whether an FN is valid but only whether a penalty should be upheld, set aside or varied.

119. The essence of the appellant's appeal is that the failure to take corrective action was reasonable because he had every reason to believe that, at the point the FNs were issued, there was no final ruling.

120. In her Closing Submissions, Ms Arnold summed up HMRC's position as being that the appellant had made "a conscious decision to ignore HMRC" in relation to *Huitson* and that he ignored HMRC's advice and wished to litigate.

121. Looking at all of the circumstances here, I agree with the appellant that his decision not to take corrective action was not lightly taken. There were in his words "so many reasons". He was not sitting back supinely or passively. He sought advice from Montpelier at every stage as suggested by HMRC (see paragraph 24 above), and crucially, he knew that at the stage the FNs were issued there was a date for hearing of *Huitson* in the Upper Tribunal some months later. HMRC never addressed that point.

122. Had they done so the position might well have been different. The appellant was faced with two opposing versions of what happened in *Huitson* and Judge Sinfield's decision clearly establishes that much of what the appellant states that Montpelier told him was correct. All that is not known is whether and/or when an application was made to the Court of Appeal for leave to appeal Judge Sinfield's decision but that is not material. What matters is that Montpelier had provided the appellant with information that has been proven to be correct, they very promptly told him that leave to appeal had not been granted, but that they would appeal to the Court of Appeal. That was before the written decision by the Upper Tribunal had been issued.

123. Looked at objectively, I find that the appellant had no reason to doubt Montpelier in October 2017 and a number of reasons to doubt HMRC.

[10] [2018] UKFTT 593 (TC)

124. By the time HMRC issued their responses to the representations upholding the APNs and FNs the decision in the Upper Tribunal had been issued but the appellant had known that the day after it happened. He also knew that Montpelier were seeking leave to appeal to the Court of Appeal. Given the delays in getting to the Upper Tribunal it was reasonable to expect that nothing of note had happened by October 2017.

125. The second material challenge in cross-examination was to ask why the appellant had only sought a second opinion more than three months after receiving the review conclusion letter in October 2017. That was an argument advanced in HMRC's Skeleton Argument. The appellant explained that until that point, in his view, Montpelier had kept him well informed, had given him representations such as those for the 2015 APNs and FNs and the NICs in the later APNs and FNs. That advice had proven to be effective and HMRC, given the terms of their own letters on those points, had not appeared to him to have been correct. In particular, when HMRC withdrew the 2015 APNs and FNs their own letter intimated that they had been incorrect but that their fallback position was reliance on *Huitson.* He knew that what they had said about *Huitson* had not been accurate.

126. He had had no reason to doubt Montpelier until January 2018, he had trusted Montpelier in a context where the internet was awash with postings about HMRC's alleged abuse of human rights and bullying tactics. He found the whole thing very difficult and had not been sure as to whom he could turn to for help. He did not know who to trust.

127. I agree with Judge Hellier in *Barlow* where he states at paragraphs 69 *et seq* that:

> "69. I note that section 214(3)(d) specifies as a ground of appeal that it was reasonable for the taxpayer not to take corrective action. Those words do not contain any time limitation and I conclude that they may refer to circumstances both before and after the date specified for corrective action.
>
> 70. I agree with Mr Taylor that a taxpayer who refuses to take corrective action is not necessarily unreasonable. But it depends on the circumstances. I also agree that those circumstances include the experience, knowledge and other attributes of the taxpayer."

128. As I point out at paragraph 50 above, the response provided by Montpelier for him to send to HMRC indicated that *Huitson* was still being appealed. Montpelier, again, told him that *Huitson* was not exhausted on 28 November 2017.

129. As soon as he realised that Montpelier were letting him down, he made every effort to find a new adviser. As can be seen, he wanted to settle with HMRC. I believe him when he said that he did not know where to turn or who to trust. That was understandable. His clear evidence was that when he instructed Buzzacott he wanted to settle with HMRC as soon as possible. I accept that he told Buzzacott to take corrective action on 16 March 2018. The delay thereafter was in Buzzacott reviewing the paperwork etc.

130. That delay by Buzzacott in the context of a penalty could be a potential issue because of HMRC's non-statutory approach (see paragraphs 143 and 144 below) but it does not impact on the failure to take corrective action. In popular parlance, by then that ship had sailed.

131. The appellant frankly agrees that he did deliberately decide not to take corrective action by the due date. He equally freely makes it clear that he knew his limitations and he made no pretence about understanding tax matters. He had "checked out" Montpelier, he had kept notes of the presentation he attended and he promptly sought advice from them on each and every occasion that he heard from HMRC. He has full records.

132. At every stage the appellant has argued that *Huitson* was not final at the time the FNs were issued and HMRC have disregarded those arguments saying simply that their opinion that there was a final ruling was correct.

133. His emails make it clear that he did everything that he could to inform himself and timeously.

134. Ms Arnold argued that he should not have relied on Montpelier, given that they promoted the Scheme. That is an argument which is not nuanced and not supported by HMRC's letter stating that users of the Scheme should contact Montpelier.

135. In *Corrado* Judge Redston cited with approval the passage in *Onillon*, where the FTT had said at [173]:

> "73. I accept that reliance on the advice of an adviser that a scheme works can mean that a taxpayer acts reasonably in not taking corrective action. Not everyone has the time or expertise to check for himself. If the taxpayer has done his homework and found that the qualification and reputation of the adviser are high and if he has carefully considered the opinion of his adviser in the light of his particular circumstances as they change from time to time, it is likely that he would be held to have acted reasonably in reliance on that advice…".

136. I find that then, as now, the appellant required an umbrella company. He knew that the law could change and that Montpelier would advise him. He is not tax literate and employs an accountant who made no demur. He knew that at that time many people used Isle of Man companies but his research told him that Montpelier had a much greater presence than that.

137. HMRC argue that he should have been concerned that Judicial Reviews had failed and that that should have worried or alerted him. Frankly, in the circumstances of this case, I view that as something of a red herring. The issue is corrective action. The appellant's primary reliance at every stage was the perceived lack of a final ruling in *Huitson.* Judicial Review or any other type of claim was on the periphery and just part of the broader picture.

138. In summary, as can be seen from the findings in fact, and the arguments set out above the appellant was not simply waiting to see how the litigation panned out. He very proactively sought advice, and immediately, at every stage. He was very anxious to do the right thing. Unlike Judge Hellier in *Barlow,* I do have the benefit of knowing about the appellant's experience and expertise. I accept that he was stressed and anxious, knew what he did not know, researched Montpelier and relied upon the fact that they had previously successfully challenged HMRC on his behalf. It was reasonable for him to rely on Montpelier until January 2018. His level of engagement with them was extensive and he reacted promptly to every contact from HMRC. He genuinely and reasonably believed that he could rely on Montpelier.

139. I was not referred to the case, and I am not bound by it but I agree with Judge Berner in *Barrett v HMRC*[11] where he found at paragraph 161 when considering a taxpayer's reliance on an adviser that:

> "161. The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one

[11] [2015] UKFTT 329 (TC)

set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are differ ….".

140. I find that the reasonable person in the appellant's position would not have thought it necessary to take further advice from another tax specialist or to contact HMRC directly until January 2018. Indeed given HMRC's approach to the information that he gave them on *Huitson* and their failure to engage with that there was no reason to expect that contact with HMRC would have assisted him.

141. As I have indicated previously, the Tribunal must stand back and look at the overall picture and the day to day reality for the appellant. Whilst, with hindsight, the appellant frankly admits that he wished he had taken corrective action timeously (and not because of the penalties but rather because of what he now knows of Montpelier), in the particular circumstances of this appellant, where objectively considered, he had every reason to believe that *Huitson* was not a final ruling, I find that it was reasonable for him to have decided not to take corrective action not only before but also after the date for corrective action.

142. Accordingly the appeal succeeds since no penalty is due.

143. There is therefore no need for me to consider the discount given by HMRC for cooperation but I agree with Judge Jones in O*nillon* at paragraph 213 where he said that

> "HMRC's non-statutory policy attributing different weight to each of the statutory factors for cooperation contained in section 210 FA 2014 would not bind the Tribunal and the Tribunal would have been entitled to consider the Appellant's level of cooperation afresh".

144. *Comtek* is now binding on both HMRC and the FTT and I observe that the appellant's actions and omissions after the date for corrective action fall to be considered in deciding if any penalty is proportionate. For that reason, for the avoidance of doubt, I record as a finding in fact that the appellant acted promptly as soon as he realised that he required a second opinion. He instructed corrective action shortly after instructing Buzzacott and the subsequent delay was attributable to Buzzacott's work in quantifying the denied advantage. There was correspondence with HMRC and they knew that corrective action would be taken.

DECISION

145. The Tribunal decided that the appellant's failure to take the necessary corrective action was reasonable in all the circumstances. The appeal is allowed and the penalty cancelled.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

146. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 21 APRIL 2022