[2017] UKFTT 800 (TC)

TC06206

Appeal number: TC/2016/4480

Income Tax – Accelerated payment notice – penalty for failure to pay – time to pay arrangement, reasonable excuse, special circumstances. Held: a belief that an APN was unlawful could be, but on the facts was not, a reasonable excuse.

FIRST-TIER TRIBUNAL
TAX CHAMBER

FRANCIS CHAPMAN **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public in Norwich on 26 July 2017 with additional written submissions on 26 September and 5 October 2017

The Appellant in person together with Assad Noorani of Tayabali Tomlin

Sophie Rhind for the Respondents

DECISION

1. Mr Chapman appeals against the assessment of a penalty for the failure to make the payment required by an Advance the Payment Notice (an "APN").

The relevant legislation.

2. So far as relevant to this appeal the provisions are the following.

3. Section 306 FA 2004 defines "notifiable arrangements" as arrangements which (i) fall within a description specified in regulations; (ii) might be expected to enable a person to obtain a tax advantage and (iii) are such that the main benefit or one of the main benefits that might be expected to accrue is the obtaining of a tax advantage.

4. The Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2004/1543 prescribes nine “Descriptions” of arrangements as notifiable.

5. Description 6 describes arrangements where the promoter expects more than one individual to implement the same, or substantially the same, arrangement and the arrangements are such that informed observer could reasonably conclude that the main benefit of those arrangements would be the provision of tax losses and that individuals participating would be expected to use those losses to reduce their liability to income tax or capital gains tax.

6. If an arrangement is a notifiable arrangement then the promoter is required to notify it to HMRC, and, under section 311 FA 2004, the promoter is given a reference number for the arrangements, a “DOTAS” number.

7. Section 219 FA 2014 provides that "DOTAS arrangements" means notifiable arrangements for the purposes of FA 2004 to which HMRC has allocated a reference number.

8. Section 219 FA 2014 permits HMRC to issue an "Accelerated Payment Notice" ("an APN") if three conditions are satisfied. So far as relevant to this appeal these conditions are:

(1) Condition A: a tax enquiry is in progress in relation to a tax return;

(2) Condition B: in the return was made on the basis that a particular tax advantage arises from particular arrangements; and

(3) Condition C: the arrangements are DOTAS arrangements.

9. Section 220 FA 2014 specifies what an APN must contain. By 220(2)(b) that includes the amount of an accelerated payment (“AP”).

10. Section 220(3) provides that the AP is "an amount equal to the amount which a designated HMRC officer determines, to the best of that officer’s information and belief, as the understated tax. And by subsection (4) "the understated tax" means the additional amounts that would be due and payable in respect of tax if --

(b) in the case ... where the DOTAS requirements are met ... such adjustments were made as are required to counteract what the designated HMRC officer determines, to the best of that officer's information and belief, as the denied advantage.

By section 220(5) the "denied advantage" means so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise. This is a difficult provision to construe.

11. Section 222 FA 2014 provides that if a person who has been served with an APN makes representations within 90 days then HMRC must consider those representations and give notice of their decision as to whether as a result the APN should be affirmed, varied or cancelled

12. Section 223 FA 2014 provides that a person to whom an APN has been issued must pay HMRC the amount specified therein within the later of 90 days after it is given and 30 days after HMRC give their decision on any representations made in accordance with section 222.

13. Significantly none of the provisions of FA 2014 permit any appeal to this tribunal against HMRC's actions and decisions in relation to an APN. A taxpayer's only route to challenge is by judicial review.

14. Section 226 provides that a taxpayer becomes liable to penalties of 5% of the unpaid amount if he does not make the AP on time. It provides for a first penalty if the AP is not made on the due date, a second penalty if payment is made more than five months after the due date and a third penalty if it is made more than 11 months after that date.

15. Section 226(7) FA 2014 applies the provisions of paragraphs 9 to 18 schedule 56 FA 2009 to these penalties as they apply to a failure to make a payment of tax. Paragraph 13 of schedule 56 permits an appeal to be made to this tribunal, and it is under that provision that this appeal is made. Schedule 56 also contains three provisions of particular relevance to this appeal which I set out in their entirety later in this decision. They are:

(1) The time to pay exception – see Discussion (A) below

(2) The reasonable excuse provision – see Discussion (B) below

(3) The special circumstances provision. – see Discussion (C) below.

The Evidence and findings of fact.

16. I received oral evidence from Mr Chapman and Ms Rhind and had before me a bundle of copy correspondence between the parties. I find the following facts.

17. Mr Chapman's return for 2007/8 showed income from various sources together with capital gains. A loss was set against both the income and the gains, with the

result that the computation in the self assessment showed no net taxable income or gains, and accordingly that an overpayment of tax of £7,988 had been made The return indicated that the loss arose from a DOTAS arrangement..

18. HMRC opened an enquiry into the return on 8 December 2009, and on 23 July 2015 issued an APN to Mr Chapman requiring an AP by 26 October 2015. The AP was calculated as the tax that would have been payable if the loss had not been claimed plus the amount of the tax shown on his return as repayable, but omitted the effect of a claim for EIS relief which had been made in the return.

19. On 16 September 2015, within 90 days of the receipt of the APN, Mr Chapman's accountants wrote to HMRC drawing their attention to the omission of the EIS relief. On 2 October 2015 HMRC wrote back with an amended notice indicating an amount which was calculated after taking account of the EIS relief. The amended notice (oddly carrying the same date as the original notice) specified 26 October 2015 as the date on which payment was due (thus without making any adjustment which would have been required if Mr Chapman's accountant's letter had been treated as a "representation").

20. On 9 October 2015 Mr Chapman's accountants wrote to HMRC arguing that the date for the payment of the revised notice was wrong and should have been 90 days after the date of that revised notice.

21. The 14 October 2015 (that is to say before the expiration of the 90 day period from the date of the original APN) Mr Chapman, on the advice of his accountants wrote a technical letter to HMRC disputing the validity of the APN. The letter argued that there was no "notifiable DOTAS tax scheme" and accordingly that Condition C to the issue of the notice was not satisfied. In the same letter he said

> "I may also wish to enter into a "time to pay" arrangement, resulting in there being no penalty imposed. Please let me know who to contact about this."

22. At about this time that Mr Chapman became one of the applicants in judicial review proceedings challenging the validity of the APN.

23. HMRC tried to ring Mr Chapman's accountants on 20 October and 21 October to try to discuss that letter but Mr Noorani was unavailable.

24. On 20 November 2015 HMRC wrote to Mr Chapman in relation to his letter of 14 October 2015, setting out their view that Condition C was satisfied and that AP was correctly calculated, and requiring the AP to be made 30 days after notification of that conclusion. The due date appears to have been taken as 29 December 2015 although it is not mentioned in that letter. The letter gave Mr Chapman and number to ring if he wished to set up "a time to pay arrangement".

25. Mr Chapman did not make payment on 29 December 2015 and on 20 January 2016 HMRC issued a first penalty notice. Mr Chapman's accountants appealed against this penalty in a letter of 17 February 2016.

26. On 3 March 2016 HMRC replied upholding the assessment of that first penalty.

27. On 17 March 2016 Mr Chapman's accountants accepted the offer of a review of the penalty. In that letter they referred to Mr Chapman's participation in the judicial review to challenge the validity of the APN. They said that Mr Chapman

> "...had joined a Judicial Review Application…and has provided a hardship statement about the payment of the AP…which our client... has no means of paying…"

28. The reference to the hardship statement was to a statement Mr Chapman had made for the purposes of the judicial review proceedings.

29. On 6 May 2016 HMRC provided its review of the first penalty affirming their decision to assess it. No appeal has been made to this tribunal against the first penalty.

30. On 27 May 2016 Mr Noorani wrote to the review officer saying that he had tried to call him and had been given the number of HMRC's a accelerated payment (AP) team, but that the number had failed to connect. He asked the review officer to call him. The letter was received by HMRC on 31 May 2016.

31. On 27 or 28 May 2016 Mr Noorani was called abroad because a member of his family was seriously ill. He recalled speaking to Mr Chapman before he left about the progress of his tax affairs but could not recall any details of the conversation.

32. On 29 May 2016, the date five months after 29 December 2016 (the date HMRC say that the AP was due) Mr Chapman had made no payment.

33. On 6 June 2016 Mr Spencer of HMRC replied to Mr Noorani's letter of 27 May saying that it was not appropriate for him to discuss the matter.

34. On 9 June 8, 2016 HMRC issued the second penalty assessment (against which this appeal is made) for the failure to make the AP within five months after 29 December 2015.

35. On 14 June 2016 Mr Chapman's accountants wrote to HMRC to appeal and to say that Mr Chapman had been informed that he was not expected to pay the penalty and had tried to start a time to pay arrangement.

36. On 14 September 2016 HMRC wrote to MR Chapman confirming an arrangement for him to pay the outstanding amount of the AP by instalments.

Telephone calls.

37. Mr Chapman told me he recalled making calls to HMRC in which the following things were said

> (1) at sometime before March 2016: when he had spoken to a lady from HMRC who had been very helpful. He remembered mentioning time to pay arrangements. He said he recalled her saying that "it can be organised";

(2) on 31 May 2016: when he spoke first to a Miss Wortley who, having taken his details, said that she hadn't got him down to pay tax, and when Mr Chapman asked why therefore he was being assessed to a penalty, referred him to a Mr James Bradley. Mr Chapman then phoned Mr Bradley who said he would investigate and that the ball was firmly in his court. Mr Bradley did not make any further contact with Mr Chapman;

(3) in February 2017 when he queried a later penalty notice because he had paid part of the amount due.

38. Ms Rhind told me that each department of HMRC kept telephone attendance logs and that she had requested copies of the logs held by the AP department, the Appeals and Reviews Department and the Debt Management Department for telephone conversations involving Mr Chapman. The only record provided to her was that of a conversation between Bernie Parks of AP Redruth and Mr Chapman on 31 May 2017 in which Mr Parks had said that the appeal against the first penalty had failed, that the date on which the second penalty would accrue (29 May 2017) had passed and gave Mr Chapman the number for the Debt Management Department.

39. Having read this note Mr Chapman told me that he did not recall talking to Mr Parks. He said that he was 67 and his memory was not quite what it was. His recollection of the conversation with Miss Worsley and Mr Bradley had been bolstered by the fact that he had sent Mr Noorani an e-mail about those conversations.

40. Whilst Mr Noorani's sudden absence precipitated Mr Chapman into action on 31 May 2016 , there seemed to have been nothing specific which Mr Chapman could recall which gave rise to the first conversation of which Mr Chapman spoke- quite understandably so since he had no note of the conversation so could not be precise what was said. I concluded that his evidence of that first call proved that he had had some earlier conversation with an HMRC official in some department other than that dealing with a APN's, penalties or the collection tax in which he had asked whether HMRC ever permitted a taxpayer to pay in instalments or to defer payment. I was not however persuaded by his evidence that it was likely that he had, during the course of that call asked for time to pay beyond the date due date of the APN.

Discussion

(A) General issues.

41. Mr Chapman and Mr Noorani both told me how difficult it had been dealing with HMRC in relation to the APN.

42. When they had attempted to discuss the issues over the APN with a responsible officer either: (i) they could not get through, (ii) when they did get through, they did not get through to the relevant person and were put on hold while they were told they were being transferred, but the line went dead, (iii) if they did get through to a relevant responsible official they would be told that they would be phoned back but they were not and (iv) some officers like Mr Spencer said it was not appropriate to discuss the matter.

43. They also said that written correspondence was beset by difficulties: HMRC's letters would bear a date but they were often received many days after that date so for example: HMRC's letter of 17 March 2016 had not been received until 24 March 2016; HMRC's review team's letter of 6 May 2016 confirming the first penalty was not received into until about 20 May 2016 – and that left only 9 calendar to deal with the upcoming 29 May penalty date.

44. I accept this evidence and appreciate that the way in which telephone calls were answered and delays in posting correspondence, together perhaps with delays in the post, will cause difficulties. But as a general point I note that Parliament has not enacted that what is sauce for the goose is sauce for the gander in this field. Instead it has enacted a regime which imposes duties on the taxpayer to act in a timely way and penalties if he does not. More specifically it is only if the actions (or inactions) of HMRC are such that they give rise to circumstances which permit the taxpayer to rely upon one of the escape provisions in the legislation that HMRC's conduct can be relevant to the task given to me - namely to determine whether in accordance with the legislation properly construed, and on the facts as I find them, the taxpayer is liable to a penalty.

45. Mr Chapman and Mr Noorani also attacked the legitimacy of the AP legislation. They say that it results in the taxpayer having to pay an estimated amount which represents tax which may not even be due. To pay the amount claimed a taxpayer might (as would Mr Chapman) have to sell assets when eventually the tax might not be due. Indeed a reasonable expectation would be that a well-designed avoidance scheme would work - and merely because it is an arrangement to avoid tax that does not mean that it does not have that effect.

46. Mr Chapman is, as I have said, one of the applicants in JR proceedings challenging the legality issue of the APN. He told me that he had been reputably advised that eventually the AP demand would be found to be unlawful.

47. As I have noted the legislation does not provide for an appeal to this tribunal against the issue of an APN or its contents. 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.

(B) Route 1: Time to pay

49. Paragraph 10 schedule 56 FA 2004 provides:

> (1) This paragraph applies if -
>
> (a) P fails to pay an amount of tax [which by s 224 FA 2004 includes an amount of an AP] when it becomes due and payable,
>
> (b) P makes a request to HMRC that payment of the amount of tax be deferred, and
>
> (c) HMRC agrees that payment of that amount may be deferred for a period ("the deferral period").
>
> (2) If P would (apart from this subparagraph) be liable, between the date on which he makes the request and the end of the deferral period, to a penalty [under FA 2004] for failing to pay that amount, he is not liable for that penalty.
>
> (3) But if -
>
> (a) P breaks the agreement (see subparagraph (4)), and
>
> (b) HMRC serves on P a notice specifying any penalty to which P would become liable apart from subparagraph (2),
>
> P becomes liable at the date of the notice, to that penalty.
>
> (4) P breaks an agreement if
>
> (a) P fails to pay the amount of tax in question when the deferral period ends, or
>
> (b) the deferral is subject to P complying with the condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.
>
> (5) If the agreement mentioned in subparagraph (1) (c) is varied at any time by a further agreement between P and HMRC, this paragraph applies from that time to the agreement as varied.

50. It is clear form the lack of temporal order of the conditions in subsection (1) that the effect of these provisions is that so long as the request is made before the penalty date it matters not whether HMRC's agreement is given before or after that date.

51. Ms Rhind says that these provision require that there be agreement by HMRC to the request made by the taxpayer. There must be, she says, a correlation between the request and the agreement. Thus for example if a taxpayer asks for a 30 year deferral of £1,000 and then later asks for a two-year deferral of £1,000 and HMRC agree to the latter, then, in applying subsection (2) the request there referred to is the second, the two-year request, not the first, so liability to a penalty can only be removed by subparagraph (2) in relation to the period starting with the two-year request, not that starting with the three year request.

52. It seems to me, however, that the correlation required by the section is limited to the amount of tax which is to be deferred. Paragraph (1) refers to an amount of tax, paragraph (b) to "the" amount of that tax, and paragraph (c) to "that" amount,. The paragraph does not refer to agreement by the taxpayer, and the definition in subparagraph (4) of when a person breaks an agreement indicates to me that the provision does not envisage the kind of meeting of minds required for a contractual agreement, but rather that "agreement" has the quality of acquiescence by HMRC to the late receipt of the amount due.

53. In my opinion for the relief to apply, the request must identify a particular amount and HMRC must agree to that amount being deferred. There is no requirement that the period of the deferral agreed by HMRC or any other conditions attached to the arrangement need to be requested by a taxpayer before it can be said that for the purposes of this section he has made a request to which the relief given by the section applies. This construction provides a practical system. If P asks for the moon in relation to an amount and HMRC agree only to something more terrestrial, then P can take the benefit of that agreement (even if its terms are not those P suggested) or not, and if he does not may find himself liable to a penalty.

54. But before a period in which paragraph 10 can begin to provide freedom from a penalty there must be a "request" to HMRC in relation to an amount, and the request must be for that amount to be deferred. Only once a request satisfying those conditions has been identified can the protection afforded by paragraph 10 start to apply.

55. Thus in relation to the second penalty paragraph 10 will provide protection to Mr Chapman only if such a request was made before 29 May 2016 (and HMRC agreed that the specified amount could be paid after the due date: this last condition being satisfied in relation to the 29 May 2016 penalty date, for on 14 September 2016 HMRC agreed to the deferral of the outstanding amount of the AP on conditions).

56. There were three possible occasions on which Mr Chapman might be said to have made a request within paragraph 10 (1) (b) before 29 May 2016:

(1) in the telephone call Mr Chapman made sometime before March 2016. However for the reasons I have set out earlier I am not persuaded that in that call Mr Chapman made a request that any particular amount be deferred.

(2) On 14 October 2015 in the technical letter Mr Chapman sent disputing the validity of the APN and saying "I may also wish to enter into "time to pay" arrangements resulting in no penalty being imposed. Please let me know who to contact about this."

In this context that statement impliedly related to the amount shown in the APN because the previous sentence but one had addressed an objection to the amount claimed and a request for a review. However, the letter was carefully drafted and in that context the use of "may" does not seem to me to be a request for a deferral; rather it is an indication that a deferral might be sought.

(3) On 17 March 2016, when Mr Chapman's accountants, referring to HMRC's letter setting out their reasons for maintaining the first penalty, explained that Mr Chapman "provided you with a hardship statement about the APN" (that was as part of the judicial review application) and said that certainly he had no means of paying. In that hardship statement Mr Chapman had said: "I had not budgeted for the payment and I can confirm I will suffer financial hardship if I do have to pay ... I have not made provision to pay this ..." he explained that he had mortgage and school fees obligations.

Ms Rhind argues that the import of this letter, being in response to the letter about the first penalty, was about that penalty and was intended to explain why Mr Chapman had not paid it and to offer an excuse for that failure to payment, rather than the making of a request.

I consider that Ms Rhind is correct. The letter also refers to the stress caused by the APN and seeks a review. Whilst the context could indicate that if it were a request the amount sought to be deferred was the amount of the AP, the letter cannot in my view be read as a request to defer the payment within para 10(1)(b).

(4) On 27 May 2016 when Mr Chapman's accountants wrote to Mr Spencer at HMRC saying that they had tried to call but failed ,and asking him to call "so that we can discuss our clients position with you and decide the best way forward."

Ms Rhind notes that the letter was not received by HMRC until 31 May 2016. She says therefore that even if it was a request to defer it was not made before 29 May 2016 (the second penalty date) and so cannot assist with a paragraph 10 defence to that penalty.

I am not convinced that a request is made only when it has been received. The statute does not refer to notice being given - words which elsewhere in the legislation may indicate (and absent other provisions) that the matter has been brought to a person's notice.

However, even if I am correct in my doubts, it does not seem to me that discussing "the best way forward" is the same as requesting deferal. That might be one thing which could later be discussed, but it is not such a request.

57. I therefore conclude that no request for deferment within paragraph 10 (1)(b) was made before 29 May 2016, and accordingly that paragraph 10 can provide no protection to Mr Chapman.

(C) Route 2: Reasonable excuse.

58. Paragraph 16 Sch 56 FA 2009 provides:

"(1) Liability to a penalty under [s 226 FA 2004] does not arise in relation to P's failure to make 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 subparagraph (1) -

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

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

60. There were three matters to which Mr Noorani and Mr Chapman referred as excuses for Mr Chapman's failure to pay on 29 December 2016; a fourth matter related to the interim relief granted in the judicial review proceedings.

61. The *first* was the difficulty they had had communicating with HMRC: the problems with telephone calls, and the speed of communication. I do not consider that these difficulties can be said to be an excuse, and therefore cannot be a reasonable excuse, for the failure to make payment. The methods for payment were set out in the APN and whatever Mr Noorani and Mr Chapman wished to discuss and HMRC's officers that did not affect Mr Chapman's ability to make payment if he had the funds.

62. The *second* was Mr Chapman's lack of liquid funds to make payment. But paragraph 16(2)(a) expressly provides that that cannot be a reasonable excuse unless attributable above to events outside the taxpayer's control. No such events or other reason for lack of funds appeared from the evidence.

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]:

> "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.

75. Finally I should mention the argument that because the interim relief order in the judicial review proceedings prevented HMRC from enforcing the payment of the AP or any penalty, (although expressly permitting the assessment of penalties), it was reasonable not to make payment. I do not consider that this was a reasonable excuse for not paying. The terms of the order acknowledged that if the action was unsuccessful payment and penalties would become due; not paying was therefore taking a calculated risk rather than necessarily a reasonable response. Whether it was reasonable to take that risk depended on the nature of the belief that the action would be successful – and I have dealt with that issue in the preceding paragraphs.

76. I conclude that there was no reasonable excuse for non-payment.

(D) Route 3:Special circumstances.

(a) the statutory provision and the test

77. Paragraph 9 Schedule 56 provides for the possibility of a special reduction in a penalty:

> (1) If HMRC think is right because of special circumstances, they may reduce a penalty under any paragraph of this schedule.
>
> (2) in subparagraph (1) "special circumstances" does not include --
>
> (a) the ability to pay, or ...

78. Paragraph 15 permits in the tribunal on appeal to apply this paragraph but only if it considers that HMRC's decision was "flawed" in the judicial review sense. In other words only if the tribunal considers that the decision failed to take into account relevant circumstances, took into account irrelevant circumstances, made a material mistake of law or was a decision which no reasonable person could have made.

79. In *Warren* [2012] UKFTT 57(TC) the Tribunal said of "special circumstances":

> "[53.] We were not referred to (and could not find) any authority on he meaning of " special circumstances ". Plainly it must mean something different from, and

> wider than, reasonable excuse, for (i) if its meaning were confined within that of reasonable excuse, paragraph 9 would be otiose, and (ii) because paragraph 9 envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer.
>
> [54.] The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty."

80. The meaning of the expression "special circumstances" in the equivalent provisions of Schedule 24 Finance Act 2007, was also examined by the Tribunal in *Collis v Revenue & Customs* [2011] UKFTT 588 (TC). The Tribunal said (at paragraph 40):

> "To be a special circumstance the circumstance in question must operate on the particular individual, and not be a mere general circumstance that applies to many taxpayers by virtue of the scheme of the provisions themselves."

Because of the concluding nine words, I do not understand the tribunal in this passage to be saying that to be special it is always a condition that the circumstance applies to only a few taxpayers.

81. In *Algarve* the tribunal considered these and other cases and cited the decision of the Court of Appeal in *Clarks of Hove Ltd v Bakers Union* [1978] 1 WLR 1207 at page 1215 H:

> 20 "…to be special the event must be something out of the ordinary, something uncommon; …"

82. In *White* [2012] UKFTT 364 (TC) the tribunal had noted that "It was evidently the *Bakers Union* decision that those drafting [an equivalent provision] had in mind (see the Drafting Notes to the Finance Bill 2007)".

83. I do not consider that something is special, "peculiar", "distinctive" "uncommon" or "out of the ordinary" only if it affects only one or a few people. A hurricane or an earthquake is plainly uncommon but it may affect millions.

(b) the test as applied by HMRC

84. In their letter of 2 November 2016, giving their review of the second penalty, HMRC say they took into account in deciding whether to apply a reduction under paragraph 9: (i) the fact that Mr Chapman was a claimant in the judicial review proceedings, and (ii) the fact that payment of the APN would cause financial hardship. They concluded that there were no special circumstances which allowed them to reduce the penalty.

(c) the parties' arguments

85. Mr Noorani argued that the particular difficulties they had in dealing with HMRC and the hardship which Mr Chapman which suffer if he had to pay were circumstances that should be taken into account.

86. I note also Mr Chapman's evidence that he had been reputably advised that the judicial review action would succeed.

87. In relation to the matters considered by HMRC, Ms Rhind says that thousands of taxpayers were parties to judicial review actions in relation to APs. That was too many to make being a party a "special circumstances". "Special" required, she said, something uncommon. And, even if it were a special circumstance, it did not provide any reasonable ground for a reduction in the penalty.

(d) Conclusions

88. It is not clear whether HMRC considered that neither of the two factors they mentioned were special or whether they accepted that they were special but considered that they did not warrant a deduction. But it is clear that they considered the two factors and concluded that no reduction was warranted.

89. The first question is whether HMRC took into account all relevant factors. Mr Chapman and Mr Noorani advert to three considerations: the difficulties in communicating with HMRC, Mr Chapman's hardship, and the advice in relation to the judicial review action.

90. I do not consider that the first factor a relevant special circumstance. It seems to me that for the circumstances to be a relevant special circumstance it must somehow have influenced, or participated in giving rise to, the failure. The difficulties Mr Noorani and Mr Chapman had in getting in touch with HMRC did not seem to me to have that type of connection. There was no evidence that those circumstances had hindered the making of the payment. Even the fact that HMRC's letter of 6 May had been delivered on 20 May and so left only nine days' consideration did not explain the fact that payment had not been made or how it delayed the making of the payment, and as a result I cannot see it as being relevant.

91. I also considered whether the fact that Mr Noorani was called away on 27 May, two days before the second penalty date, was relevant. Again I do not see how this affected Mr Chapman's ability to pay the amount demanded. Therefore that circumstance did not seem to me to be relevant for these purposes.

92. The second factor was the difficulties Mr Chapman faced in raising funds to make payment special circumstances and the consequent hardship. Paragraph 9 (2) excludes lack of ability to pay from being a special circumstance so the difficulty in raising funds cannot be relevant. Hardship is in effect a complaint that the effect of the legislation may be to require payment when ultimately none is found to be due (for if it is eventually found to be due it cannot be a relevant hardship having to pay

it). But it is plainly the purpose of the legislation that that consequence may result. That cannot therefore be a relevant circumstance.

93. The third factor relates to the judicial review action. This may be split into two limbs: (i) the fact of the action and (ii)the nature of the advice received by Mr Chapman. HMRC took into account the first but not the second.

94. In relation to the fact of the judicial review action I do not accept Ms Rhind's argument that because thousands of taxpayers were party to such actions they were not special circumstances. That argument ascribes an unduly narrow meaning to special. Seen against the conduct of the affairs of an ordinary taxpayer, being a party to such a proceeding was uncommon. This was a peculiar situation. I think therefore that HMRC were right to take it into account.

95. So far as concerns the advice given to Mr Chapman, it seems to me that this could be a special circumstance, although HMRC could fairly take into account any advice they had received on the topic. But the fact of that advice was not, on the evidence before me, known to HMRC. The test must be applied in relation to facts available to HMRC when the decision was made.

96. As a result I find that there were no factors which HMRC should have taken into account and did not.

97. On that basis was their decision irrational? It seems to me that it was within the bounds of what a reasonable person might do in the circumstances.

98. As a result I find that HMRC's decision was not flawed. That means I cannot substitute my own view, and no reduction under this heading is available to Mr Chapman.

Conclusion

99. None of the escape routes avail Mr Chapman. I dismiss the appeal.

Rights of Appeal

100. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 7 November 2017