[2018] UKFTT 593 (TC)

TC06755

Appeal numbers: TC/2016/01473
TC/2016/02200
TC/2016/02521

INCOME TAX – Follower Notice penalty – lead cases – whether to admit witness evidence – whether grounds of appeal require amendment – whether to set aside the penalties because of errors in the Notices – scope of FTT's jurisdiction to set aside penalties – meaning of "reasonable in all the circumstances" – not the same as "reasonable excuse" – whether reasonable in all the circumstances for Appellants not to take corrective action – failure to provide evidence of all the circumstances – whether penalties should be reduced, upheld or increased – appeals dismissed and penalties confirmed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID BENTON **Appellants**
STEPHEN JACKSON
PAUL HUDSON

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON

Sitting in public at Taylor House, Rosebery Avenue, London on 17, 18 and 24 July 2018

Ms Ximena Montez-Manzano of Counsel, instructed by New Dawn Tax Partnership for the Appellants

Ms Aparna Nathan of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and summary

1. Mr Benton, Mr Jackson and Mr Hudson ("the Appellants") were three of many participants in a tax planning arrangement known as "Working Wheels" ("the Scheme").

2. HM Revenue & Customs ("HMRC") issued each Appellant with a Follower Notice ("FN") under Finance Act 2014 ("FA 2014"), s 208. The Appellants failed to take the corrective action required by their FNs.

3. The maximum penalty for failure to take corrective action was 50% of the "denied advantage". HMRC decided to mitigate the penalty to 30% of the denied advantage, and calculated the penalties as being £40,727.72 for Mr Benton, £50,881.32 for Mr Jackson and £25,766.40 for Mr Hudson.

4. Ms Nathan accepted that the penalties had been wrongly calculated; they should have been £50,881.20 for Mr Jackson and £24,543.78 for Mr Hudson. The parties asked the Tribunal to determine Mr Benton's position in principle, on the basis that they would seek to agree the correct calculation of his denied advantage after the hearing.

5. I determine Mr Jackson's penalty as £50,881.20 and Mr Hudson's as £24,543.78. In relation to Mr Benton, I find that the penalty is 30% of the denied advantage. The parties have permission to make further submissions in relation to the calculation of the relevant denied advantage, if they cannot agree the position between themselves.

6. I have come to my decision because:

(1) contrary to Ms Montez-Manzano's submissions, the penalties could not be set aside because of mistakes in the wording of the FNs, see §§126ff;

(2) the "reasonable in all the circumstances" test is different from "reasonable excuse" because it requires findings about "all" relevant circumstances. The Appellants failed to provide evidence about certain key circumstances, see §§172ff and §§180ff;

(3) reasonableness must be assessed in the light of the "experience, knowledge and other attributes" of the particular taxpayer, and I was unable to make the necessary findings about the Appellants, because of a lack of relevant evidence, see §§184ff; and

(4) although I disagreed with HMRC's understanding of the penalty mitigation provisions (see §§193ff), I agreed that the penalties should be mitigated by the same percentage, so they were 30% of the denied advantage.

The absence of the Appellants

7. None of the Appellants attended the hearing. Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") allows a

hearing to take place in the absence of the Appellants if the Tribunal is satisfied that they have been notified of the hearing (or that reasonable steps have been taken to notify them of the hearing), and it is in the interests of justice to proceed in their absence.

8. The Appellants had appointed New Dawn Tax Partnership ("NDTP") as their representative. Rule 11(4) of the Tribunal Rules provides that, once a party has appointed a representative, the Tribunal "must" provide the representative with "any document which is required to be provided to the represented party" and need not provide documents directly to the party. In reliance on that Rule, the Tribunals Service informed NDTP of the date of this hearing. The first part of Rule 33 was therefore satisfied.

9. I also considered whether it was in the interests of justice to proceed. Rule 2(2) says that:

> "Dealing with a case fairly and justly includes–
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

10. The relevant factors here were (a), (c) and (e).

(1) In relation to (a), adjourning for the Appellants to attend would have wasted the costs incurred by both parties, who had instructed Counsel and come prepared for the hearing. In particular, Mr Matthew Jenner, a partner in NDTP, had flown from Canada to attend the hearing.

(2) In relation to (c), once the Appellants appointed NDTP as their representative, they made no subsequent contact with the Tribunals Service but left their appeals in the hands of NDTP. Mr Jenner made it clear that the Appellants wanted the hearing to proceed.

(3) In relation to (e), an adjournment would have caused significant delay, and the hearing had already been relisted once.

11. I therefore decided that it was in the interests of justice to proceed with the hearing. Later in this decision I consider the Appellants' failure to give witness evidence. That is, however, a different issue: an appellant can attend a hearing but not give evidence; conversely, he may submit a witness statement but fail to attend.

The earlier hearing and the lead case direction

12. On 24 April 2017 Judge Richards held a preliminary hearing to determine the Appellants' application that HMRC should be barred from the proceedings because their case had no reasonable prospect of success. Judge Richards refused the application; his decision is published under reference *Benton v HMRC* [2017] UKFTT 396 (TC) ("*Benton 1*"). Both parties have developed their submissions since that preliminary hearing, and in coming to this decision I have considered all matters afresh.

13. Following *Benton 1,* and having considered submissions on behalf of the Appellants and other taxpayers who had participated in the Scheme, on 28 July 2017 Judge Richards made a lead case direction under Rule 18 of the Tribunal Rules. By that direction, the Appellants were designated as lead cases; other taxpayers listed on an attached schedule were designated as related cases within the meaning of Rule 18(2). The "common or related issues of fact or law" for the purposes of Rule 18 were:

> "whether, as a matter of law, in circumstances where a follower notice is issued before the deadline ('the Relevant Deadline') specified in s 204(a) of the Finance Act 2014 (when read together with s 205 and s 217 of that Act), HMRC are prevented from collecting a penalty under s 208 by reason of either (i) the follower notice failing to specify the date on which the relevant judicial ruling was made or (ii) the follower notice failing to specify the Relevant Deadline correctly or at all."

14. By a Note to the Rule 18 direction, Judge Richards invited the parties to agree whether the "common or related issues" could be extended, on the basis that the Lead cases and the related cases:

> "were in an identical position as regards the factual questions of 'reasonable excuse', 'special circumstances' and the reasonableness or otherwise of the decision not to take corrective action..."

15. HMRC's response was that they were "in principle…not opposed to this approach" but they noted that it would require the appellants to disavow arguments based on their own individual circumstances.

16. I asked both Counsel at the beginning of the hearing whether there had been any movement on this issue, and they confirmed that the position remained as set out in the Rule 18 direction made on 28 July 2017; there had been no agreement to extend the "common or related issues" to any other matter.

17. My decision on the Rule 18 issue is set out at §158. This is binding on the related cases, subject to any representations made under Rule 18(4) and any FTT direction given following any such representations. The rest of this judgment is not binding on the related cases.

The witness statements and amending the grounds of appeal

18. On 2 August 2017, Judge Richards issued Directions for the conduct of the Appellants' appeals. Direction 5 required the parties to provide each other "with a

statement whether or not witnesses are to be called, and if so, their names"; that Direction was to be complied with by 8 October 2017. At the end of the Directions Judge Richards said he had not directed the provision of witness statements "because of the relatively small amounts at stake and [his] perception of the case that the Appellants are putting forwards". He added:

> "if any party considers that advance notice of witness statements is desirable, that party should first seek to agree the position with the others, and then make an application (which should be a joint application if possible) for witness statements to be directed."

19. On 9 October 2017, NDTP responded to Direction 5 by saying that Appellants would give evidence, as would Mr Jenner. On the same day, HMRC said that they would not be calling witnesses, although "depending on the contents of the material (including witness statements) filed by the Appellants, witness evidence in reply may become necessary". On 9 November 2017 the Tribunals Service listed the hearing for 2 and 3 May 2018.

20. On 9 April 2018, NDTP applied to the Tribunal to admit two witness statements from Mr Jenner, with exhibits ("the Application"). By letter dated 13 April 2018 Judge Richards asked whether HMRC consented to the Application, and said that if HMRC objected, the Application would be decided at the hearing.

21. On 19 April 2018, HMRC objected, saying:

(1) the Appellants had the burden of proving whether it was "reasonable in all the circumstances" for them to have failed to take corrective action, see *Onillon v HMRC* [2018] UKFTT 33(TC) ("*Onillon*") at [170]. This required findings as to what "a prudent and reasonable hypothetical person would have done in his situation, in the light of all the facts and the legislative context", see *Onillon* at [175]. However, contrary to NDTP's email of 9 October 2017, it was now clear that none of the Appellants was giving witness evidence at the hearing, but only Mr Jenner; and

(2) it appeared that his evidence was intended to support an argument that it was "reasonable in all the circumstances not to take corrective action because of reliance on professional advice. If so, this was not in the Appellants' grounds of appeal, and thus "the Application essentially seeks to add a new ground of appeal".

22. HMRC said that they would withdraw their objection to the Application if the Appellants provided HMRC with their own witness statements (and any exhibits) by 26 April 2018 and agreed to give oral evidence at the hearing.

23. On 20 April 2018, NDTP responded, making it clear that the Appellants did not consent to the conditions, and relying on *Hargreaves v HMRC* [2014] UKUT 395 (TCC) where Nujee J said at [25]:

> "Subject to the powers of a court (or tribunal) to compel the giving of evidence, a party always has the right to decide whether, and if so what, evidence to call. The practical consequences of doing so depend

> however on the nature of the issues in the case, and in particular on where the burden of proof lies."

24. The hearing listed to take place on 2 and 3 May 2018 was however vacated on 1 May because Ms Montez-Manzano was unwell. It was relisted for July 2018.

The parties' submissions

25. At the relisted hearing, I asked if there had been any change to the parties' positions but was told they were the same. Ms Montez-Manzano and Ms Nathan therefore made submissions on:

(1) whether an amendment was required to the Appellants' grounds of appeal, and if so, whether I should give permission for that amendment to be made; and

(2) whether Mr Jenner's witness statements should be admitted.

26. Ms Montez-Manzano said that each Appellant's first ground of appeal stated that "it was reasonable in the circumstances for me not to have taken corrective action", and this was broad enough to include reliance on professional advice, so no amendment was required. Were she to be wrong in this, she further submitted that it was in accordance with the overriding objective for the amendment to be allowed, because:

(1) HMRC had been aware that reliance on professional advice was part of each Appellants' case since they wrote to HMRC at the end of the 90 day period following the issuance of the respective FNs. For example, Mr Benton explained that he was taking "some but not all of the corrective action" required by the FN because he had issued a claim against HMRC which is "supported by a strong QC opinion from a leading QC" and because of related advice from his "advisers";

(2) there would be no prejudice to HMRC, because the professional advice point was further developed in Mr Jenner's two witness statements. These had been provided to HMRC on 9 April 2018, some two weeks before Ms Nathan finalised her skeleton argument on 24 April 2018, and her skeleton argument fully considered this ground of appeal; and

(3) Mr Jenner was present in the Tribunal to give oral evidence and be cross-examined.

27. Ms Nathan submitted that, although the Appellants' earlier letters to HMRC referred to having taken advice, this did not form part of their grounds of appeal. The purpose of grounds of appeal was to set out the "battlegrounds" between the parties, and a new ground could not be introduced by inference. Moreover the new ground was "fatally flawed" because only the Appellants (and not Mr Jenner) were able to give evidence as to whether they had relied on professional advice, and no such evidence was being provided.

My decision

28. The grounds merely state that it was "reasonable in all the circumstances" not to take corrective action. There is no reference to reliance on professional advice. I

agree with Ms Nathan that it is not enough for an appellant simply to point to phrases used in earlier correspondence, for the reasons she gives. The grounds of appeal therefore require amendment.

29. However, I decided that it was fair and just to allow the amendment, because HMRC have been on notice of the Appellants' new ground since 9 April 2018 and HMRC's skeleton had dealt with the issue. I agreed with Ms Montez-Manzano that HMRC would not suffer prejudice if the amendment was allowed.

30. I also decided that it was fair and just to admit Mr Jenner's witness statements because:

(1) HMRC have been on notice since 9 October 2017 that he would give evidence in this appeal;

(2) Judge Richards did not direct the provision of witness statements, because he thought them unnecessary. Thus, this is not a case where a party had failed to follow the directions of the Tribunal;

(3) instead, the Appellants sought to agree Mr Jenner's witness statements with HMRC and then applied to the Tribunal for their admission, in accordance with the Note to Judge Richard's directions; and

(4) it is helpful to both parties and the Tribunal for Mr Jenner's witness evidence to be provided in the form of witness statements with exhibits.

31. As to Ms Nathan's submission that Mr Jenner's witness evidence cannot assist the Appellants, that is a matter to be decided as part of the substantive appeal.

The legislation and the evidence

32. The relevant legislation is set out in the Appendix. Where a particular provision is the subject of detailed consideration, it is also cited in the main body of this judgment.

33. The Tribunal was provided with helpful bundles of documents prepared by HMRC, supplemented by exhibits attached to Mr Jenner's witness statements and by other documents handed up in the course of the hearing. The documentation included:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) various emails between each Appellant and Mr Robert Astley, an employee of NDTP, and other emails copied to Mr Astley. Ms Montez-Manzano said that Mr Astley was no longer employed by NDTP and so had not been approached to give evidence in these appeals;

(3) three versions of the HMRC Guidance on FNs and APNs: the original version published on 17 July 2014; a second version published on 5 June 2015; and further version published on 23 July 2015;

(4) Particulars of Claim under Part 8 of the Civil Procedure Rules ("CPR") filed by Mr Barry Knibbs ("the *Knibbs* claim"); by Mr Joseph Dan Beiny ("the *Beiny* claim") and Mr Craig Hughes ("the *Hughes* claim");

(5) a permission to appeal application made by the Claimants in the *Knibbs* claim under reference HC/2014/001656;

(6) a NDTP document entitled "Update on PPNs and APNs and Follower Notices" ("the Update") dated 20 June 2015; and

(7) an HMRC note setting out how HMRC calculates FN penalties in cases such as those of the Appellants.

34. As already discussed, Mr Jenner provided two witness statements, gave evidence in chief led by Ms Montez-Manzano, was cross-examined by Ms Nathan and answered questions put by the Tribunal. I found him to be an honest and credible witness. For example, although the Update stated that NDTP's clients had been sent a legal opinion, Mr Jenner said that he had been unable to verify that any of the Appellants had received that opinion, and accepted that it had not in fact been sent to them.

35. As already noted, there was no witness evidence from the Appellants themselves. Ms Montez-Manzano position's was that "the conclusion on reliance is so obvious there was no need to hear from the Appellants directly". I asked if there was any further information as to their failure to give evidence, to which Ms Montez-Manzano said she did not know, but would seek to find out. On the final day of the hearing, she said she had taken instructions and there were two reasons for their non-attendance. The first of these was that NDTP, the Appellants' representative:

> "took the decision that, in light of all the documentary evidence and witness evidence that could be given by Mr Jenner on behalf of the appellants, there was no need for the appellants to attend and give direct evidence. They took the view that there was sufficient evidence for the Appellants to prove their case."

36. I return, later in this decision, to whether or not that is the position. The second reason given by Ms Montez-Manzano was that the Appellants and the related cases were:

> "very keen to obtain a listing for the hearing as soon as possible. It was decided that taking into account the availability of three possible witnesses of fact as well as everybody else, including the Tribunal's availability, would delay the listing even further. So it was done in the interests of expediency."

37. I asked whether Ms Montez-Manzano had any copies of communications with the Appellants, or with the Tribunal, to support that submission as to listing difficulties, but she had none. After the hearing I noted that NDTP's email to the Tribunal of 9 October 2017, referred to at §19, not only stated that the Appellants would be attending as witnesses, but also provided dates to avoid which included those of the Appellants. It is also clear from the Tribunal file that those dates were taken into account when the case was listed for a hearing on 2 and 3 May 2018. Thus,

the second reason given by Ms Montez-Manzano for the lack of any witness evidence from the Appellants is not made out.

Findings of fact

38. On the basis of the evidence before the Tribunal, I make the findings of fact set out in this part of my decision. There are further findings of fact about the wording of the FNs at §§135ff.

Working Wheels

39. The Scheme was marketed by a firm called NT Advisors 2009 LLP ("NTA") during 2006 and 2007[1]. Mr Jenner was a partner in NTA until 6 April 2015, when he resigned because of his personal bankruptcy; he became a partner again on 17 June 2017.

40. Participants in the Scheme became partners in a partnership which purported to be trading in used cars[2]; losses generated by the partnership were offset against participants' other income. Each Appellant participated in the Scheme, which was subsequently litigated as *Flanagan v HMRC* [2014] UKFTT 175 (TC) ("*Flanagan*"). Mr David Ewart QC, instructed by NTA, represented the appellants. The appeal failed: Judge Bishopp held at [86] that:

> "none of the appellants was trading in the proper sense of that word, but…were instead engaged in an arrangement designed only to give the illusion of trading, and…the appeals must be dismissed on that ground alone."

41. His judgment was issued on 20 February 2014, and on 17 September 2014 the Upper Tribunal ("UT") refused permission to appeal.

Cotter and De Silva

42. Meanwhile, on 6 November 2013, the Supreme Court had handed down its judgment in *R (oao Cotter) v HMRC* [2013] UKSC 69 ("*Cotter*"). Mr Jenner, as a partner in NTA, was involved in instructing counsel for Mr Cotter at the Supreme Court and in the lower courts.

43. While *Cotter* was progressing through the courts, other litigation was in process involving two taxpayers, Mr de Silva and Mr Dokelman. They had participated in a film partnership, had claimed to carry back some of the losses arising from that partnership, and HMRC had disallowed their claims. They took judicial review action against HMRC, and argued that *Cotter* had resolved the dispute in their favour. On 15 April 2014, the Upper Tribunal ("UT") issued its judgment, see *R (oao de Silva) v HMRC* [2014] UKUT 0170 (TCC). Sales J said at [16]:

> "The essence of the Claimants' case is that their claims to carry back the tax reliefs in issue are not to be regarded as claims made in a

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[1] This is the current name of the partnership. On the evidence provided, the firm was in existence in 2006 and the Tribunal infers that there was a change of name in 2009.

[2] There were other variants, including watches and cash receivables, see *Flanagan* at [2].

> personal tax return under section 8 of the TMA, but are properly to be regarded as stand alone claims for relief in respect of which HMRC are obliged to apply the challenge procedures contained in Schedule 1A to the TMA rather than the challenge procedures applicable in respect of a return made under section 8 of the TMA. The Claimants say that HMRC failed to operate the challenge procedures under Schedule 1A as they should have done, and are now out of time to do so. HMRC say that they were not obliged to use those procedures in order to rectify (as HMRC would say) the tax returns and claims for carry back relief made by the Claimants"

44. Sales J refused the claims. It is not necessary to set out here all the reasons for his decision, but at [47] he said:

> "In my view, it would be very odd to suppose that Parliament intended to produce an outcome that uncoupled the substantive position and the procedural position in this sort of case, so that although as a matter of substance (as here) a partner was only entitled to have partnership losses at the lower (post-amendment) rate brought into account in his favour, yet HMRC would be prevented from bringing those losses at the lower rate into account for the procedural reason that they had not launched an enquiry into the tax affairs of the partner within the relevant time limit applied to the earlier stage when a claim to carry back such losses was intimated to them, and instead would have to accept that the partner could rely on the higher (pre-amendment) losses…"

45. On 18 July 2014, the Court of Appeal gave permission to appeal against the decision in *de Silva.*

46. In late August 2014 NDTP was formed. As already stated, Mr Jenner was (and remains) a partner in NDTP; at that time he was also a partner in NTA. NDTP's analysis was that, following *Cotter,* HMRC could only enquire into carry back loss claims using TMA Sch 1A, and could not rely on enquiries opened under TMA s 9A. If HMRC failed to open a timeous Sch 1A enquiry, the losses were immune from challenge by HMRC, even though the FTT had ruled that the Scheme had not generated trading losses.

47. NTA sent an email or other communication to Scheme participants, saying that they should contact NDTP if they had a carry back claim, because that firm, in Mr Jenner's words, "may have something that you may like to consider". NDTP then entered into service agreements with Scheme users. I infer that the Scheme users who entered into these agreements were aware that the UT had refused permission to appeal in *Flanagan,* so they were unable to challenge Judge Bishopp's ruling.

48. NDTP also entered into agreements with users of other planning arrangements promoted both by NTA and other firms. In total NDTP was engaged by "hundreds of taxpayers", who sought to rely on Mr Jenner's *Cotter*-based argument to protect losses arising from planning arrangements ruled ineffective by courts and tribunals.

49. Mr Jenner set out his argument in the form of instructions to the solicitors' firm Bird & Bird, and that firm in turn instructed Mr Ewart QC to provide a legal opinion. That opinion, and the related instructions, were privileged and not provided to the Tribunal or HMRC.

50. The Appellants, together with others, filed claims under CPR Part 8, asking the High Court to require HMRC to give immediate effect to their loss carry back claims. Mr Benton[3] was one of the claimants in *Hughes*; Mr Jackson one of the claimants in *Knibbs*, and Mr Hudson one of the claimants in *Beiny*. The claims were drafted by NDTP and filed and served by Jeffries Essex LLP; Mr Ewart QC was instructed to act for the claimants. The Tribunal was provided with Particulars of Claim for each of these cases. Although none was dated or signed, and none had a Claim Number, it was common ground that the claims were filed and served at the High Court before any Appellant was required to take corrective action under his FN.

HMRC Guidance

51. Part 4 of Finance Act 2014 ("FA 2014") is headed "Follower Notices and Accelerated Payments", and contains the legislation under which HMRC issued the FNs and related penalties. It received Royal Assent on 17 July 2014. On the same date, HMRC published its Guidance about the FN and APN legislation; an amended version was published on 5 June 2015.

52. The following example was contained in both versions, as Example 5 and Example 7 respectively. During the hearing, it was referred to as "Example 7":

> "A person has been given a follower notice and not taken the corrective action by the due date. However, before the due date, they had engaged with HMRC and provided information in relation to why they thought the notice should not apply, and made full representations.
>
> HMRC did not agree with the representations and confirmed the notice.
>
> After the due date, but before any penalty assessment, the person gave HMRC full calculations regarding the amount of tax and provided all documents requested within the timescales.
>
> This is likely to constitute, in the circumstances, as much co-operation as the person could give, whilst maintaining their technical position in relation to the issue.
>
> HMRC would anticipate a maximum reduction in the penalty."

53. The phrase "the maximum reduction of the penalty" is a reference to FA 2014, s 210(4), which provides for a minimum penalty of 10% . Example 7 therefore stated

[3] I have come to these findings by relying on the schedules of names appended to each of the Particulars of Claim. I note, however, that Mr Jenner says in his first witness statement that Mr Benton was one of the claimants in the *Beiny* proceedings. I prefer to rely on the Particulars, and I find that Mr Jenner's witness statement was incorrect in this respect.

that a person who wanted to maintain a "technical position" which he had fully explained to HMRC would be "likely" to suffer the minimum penalty of 10%.

The NDTP Update

54. On 20 June 2015, NDTP produced a note called the "Update on PPNs and APNs and Follower Notices" ("the Update"). In the opening paragraphs, NDTP stated that the Update was only applicable to taxpayers who submitted a High Court claim against HMRC via NDTP. It continued:

> "HMRC have filed a defence [to the High Court claim] and we are awaiting a case management hearing at the High Court. A substantive hearing is now not expected until Q1 or Q2 of 2016…HMRC's defence to the question of whether a correct enquiry was issued was short to say the least. The whole defence is basically that 'they disagree'…in addition, an appeal is due to be heard by the Court of Appeal in the *De Silva* case in October 2015. This ought to help us know what HMRC's defence will be."

55. The main body of the Update concerned APNs. It referred to the "reasonable excuse" provisions relevant to APN penalties, and in that context said:

> "You will note from the legislation quoted above that a 'reasonable excuse' will not exist if you rely on someone else but fail to take reasonable care. In this respect we believe you need to be comfortable that the QC opinion seems proper and correct and that it is reasonable, for the man in the street, to accept such opinion and not pay the outstanding monies pending the conclusion of the High Court Claim. On that basis you need to ensure you are happy that the QC opinion is substantive and that the QC is reputable. You should therefore read again the QC opinion to ensure it covers your opinion and that the QC is reputable (by say checking his profile in the Appendix below and thinking whether you believe this experience is sufficient). You can also sensibly rely on the position HMRC took on taxpayers who stood behind Mr Cotter."

56. However, Mr Jenner's evidence was that he "had not found any emails that provide each Appellant with a copy of the [QC] opinion". Under cross-examination he confirmed that none of the Appellants had seen Mr Ewart's opinion, which concerned whether there was a basis for High Court claims to be made in reliance on the *Cotter* argument; it did not consider whether an FN recipient should take corrective action. I accept his evidence.

57. Although the extract from the Update set out above refers to an Appendix containing Mr Ewart's profile, no copy of that Appendix was provided as evidence, and I am therefore unable to make any findings about what it contained.

58. The Tribunal was, however, provided with Appendix B to the Update, headed "Position on Follower Notices", which advised that:

(1) corrective action should be taken in relation to any losses not carried back to prior years, because the High Court claims only covered carried back losses;

(2) where losses had been carried back, it "would be reasonable in the circumstances" not to take corrective action, because the High Court claims were supported by a strong QC opinion; they were made on the basis of grounds which were substantive, not fanciful, and because HMRC had not applied to have the claims struck out;

(3) even if HMRC did not accept that it was reasonable for Scheme participants not to take corrective action, the maximum penalty would be 10%. That advice was based on Example 7 from the HMRC Guidance, see §52; the Example was set out in full; and

(4) Scheme participants who decided not to take corrective action for their carry back losses should "request a template letter" from NDTP which "sets out the reasons why you are not taking corrective action…and will serve as a record of why you think that is a reasonable course of action".

The amendment to HMRC's Guidance and Rowe

59. On 23 July 2015, HMRC published a new version of their Guidance. Example 7 was no longer included. Mr Jenner accepted under cross-examination that NDTP did not revise its advice on penalties, for instance by publishing an amended Update.

60. On 31 July 2015, Simler J (as she then was) issued her decision in *Rowe v HMRC* [2015] EWHC 1511 (Admin) ("*Rowe*"); the case concerned Partner Payment Notices ("PPNs") issued to partners who had participated in a film scheme. One of the arguments put by Mr Southern QC on behalf of the claimants in *Rowe* was that:

> "…the only correct mode of enquiry (leaving aside discovery assessments) into carry back claims made outside a return (as the majority of these claims were) was an enquiry into the claim under Schedule 1A TMA, and no such enquiries were opened in these cases. He submits that this approach is supported by the decision of the Supreme Court in *HMRC v Cotter* [2013] UKSC 69…"

61. Simler J said that this argument had been rejected by Sales J in *de Silva* and she was required to follow that judgment as a matter of "judicial comity" unless she was "convinced that it is wrong". Having summarised the arguments, she concluded at [86]:

> "Far from being convinced that the judge was wrong, I am sure that he was right, and that the deemed s.9A enquiry into each relevant partner's self-assessment return identifying (as required) his share of the loss claimed, is both an appropriate and sufficient means of challenging the loss relief utilised by the partner, both by way of sideways relief or as a carry back claim to the earlier year."

The Appellants' legal and/or tax knowledge

62. The following evidence was before the Tribunal:

(1) Ms Montez-Manzano asked Mr Jenner whether Mr Jackson had "any legal or tax expertise", to which Mr Jenner responded:

> "I have asked him, and he has said no. I get confused between the Appellants, but I think he was a scrap-metal dealer."

(2) During cross-examination, Mr Jenner said he had had no discussions with any of the Appellants about whether or not they should take corrective action; the Appellants had held those discussions with Mr Astley, an NDTP employee. As noted at the beginning of this decision, by the time of this hearing Mr Astley no longer worked for NDTP and was not asked to provide witness evidence**.**

(3) Mr Jenner's second witness statement includes the statement that "all of the appellants, to the best of my knowledge, are lay taxpayers".

63. The statement in Mr Jenner's witness statement was not challenged in cross-examination, and Ms Montez-Manzano invited me to find as a fact that the Appellants were therefore "lay taxpayers". I accept that, *as far as Mr Jenner knows*, the Appellants have no legal or tax experience, but given his own limited knowledge, and his admitted inability to distinguish between the Appellants, that is not a reliable basis for me to find as a fact that they are lay taxpayers with no legal or tax experience, and I decline to do so.

Mr Benton

64. The Tribunal is unable to make any findings of fact about Mr Benton's age, work, experience, health or any other personal matter, because there was no evidence on any of these matters before the Tribunal. In relation to Mr Benton's legal and tax expertise, there was no reliable evidence. I am, however, able to find that in 2006-07 he participated in the Scheme and claimed a loss of £1,848,399 of which he carried back a total of £371,548 to the three previous years.

65. On 4 November 2009, HMRC opened an enquiry into Mr Benton's 2006-07 tax return**.** On 28 November 2014, HMRC sent him a precursor letter informing him that an APN and an FN were soon to be issued in relation to the Scheme. Those Notices were issued on 25 February 2015 along with a covering letter, which included the warning that "now that you have been sent a follower notice, there are serious consequences if you decide not to settle". The FN also stated that any representations must be received by 3 June 2015.

66. Mr Benton's representations were drafted by NDTP and sent to HMRC by Mr Benton on 12 May 2015. The letter said:

(1) Condition C of the statutory conditions for issuing an FN set out at FA 2014, s 204, was not met because it reads "HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements", and "HMRC" means "the Commissioners and the officers of HMRC acting together";

(2) Conditions A and B were also not met (but without any specificity as to the reasons);

(3) *Flanagan* was not a "relevant" judicial ruling because that is defined in FA 2014, s 205(3) as one which "relates to tax arrangements"; that in turn is defined in FA 2014, s 201(3) as being the position where (emphases added)

"having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements"; whereas the appellants in *Flanagan* "were merely entering into [arrangements] on the basis that they might be expected to obtain a tax advantage";

(4) *Flanagan* was also not a relevant judicial ruling because it was only an FTT decision;

(5) the FNs and APNs were contrary to Article 6 of the European Convention on Human Rights ("the ECHR") because they would cause him disproportionate hardship and because the threat of a 50% penalty is a barrier to justice; and

(6) the grounds put forward by appellants in separate judicial review proceedings taken by Pinsent Masons LLP ("Pinsents"), and reported in The Times on 6 February 2014, are to be read as incorporated in his grounds.

67. On 3 June 2015, NDTP sent Mr Benton a copy of the Particulars of Claim for *Hughes;* in the covering email, NDTP said Mr Ewart QC "was involved in the claim".

68. On 22 October 2015, HMRC informed Mr Benton they were not changing the FN as the result of his representations, and he was therefore required to take corrective action within 30 days. HMRC's response to the particular grounds in his letter of representation were that:

(1) Condition C was met because Mr Benton's assertion about the meaning of "HMRC" was incorrect;

(2) Condition A was met because HMRC had opened an enquiry under TMA s 9A into his return, and Condition B was met because the claimed losses arose from the Scheme;

(3) in *Flanagan* the appellants had been "candid" that the purpose of the Scheme was tax avoidance, and this is clear from the witness statements filed in that case;

(4) an FTT decision is a final ruling if it meets the definition in FA 2014, s 205(3); that is the position with *Flanagan;*

(5) Mr Benton's arguments about the ECHR were unfounded; and

(6) HMRC were not responding to points made by Pinsents, but only to grounds specified by Mr Benton.

69. On 29 October 2015, Mr Benton emailed a copy of HMRC's letter to Mr Andrew Bridge, an accountant at a firm called Barringtons, and copied his email to Mr Astley at NDTP. During cross-examination, Mr Jenner described Mr Bridge as "the taxpayer's general accountant who was "without any specialist knowledge". Ms Nathan did not challenge that description and I find it to be a fact. In the body of the email, Mr Benton asked Mr Bridge "please let me know if I am required to do anything further" and "you will see that I have copied Rob [Mr Astley]".

70. Later the same day, Mr Astley emailed Mr Benton and copied Mr Bridge. He attached the Update, and instructed Mr Benton (emphases in original):

> "Please see attached an important update note, which gives you full information on what options are available to you now and the potential repercussions arising from those different options. ***This should be read <u>in full</u> so that you can make an informed decision about your next step***."

71. Mr Astley told Mr Benton there were two options:

(1) take corrective action for the full amount of the losses within the 30 day deadline; or

(2) carry on contesting the FN in respect of the losses carried back.

72. He explained each of those two options in the context of Mr Benton's "MAPS" claim. Mr Jenner confirmed that this was a reference to the High Court claims based on the *Cotter* argument, and thought it was an acronym for "Mitigating Accelerated Payments".

73. Mr Astley's explanation reads:

> "If you wish to follow option 1 and take corrective action on the full amount of the [Working Wheels] losses please be aware that your on-going New Dawn 'MAPS' claim against HMRC will be nullified entirely, as you will be irrevocably retracting the [Working Wheels] carried back losses. This in turn will mean that you will have no prospect of recovering any tax in the event that 'MAPS' is ultimately successful. We can discuss this point further if you decide to take this option.
>
> If you follow option 2 because you do not want to irrevocably retract the carried back losses (and thereby preserve your MAPS claim) the downside is that HMRC can potentially levy a penalty of up to 50% of the deemed tax advantage (even though you didn't receive a penny of that in the form of a refund or credit). This is referenced at length in the note and we believe there will be a good chance of defending against that penalty because you would have in our opinion, a reasonable excuse for not irrevocably correcting the carried back [Working Wheels] losses.
>
> As the various options are rather complex do please call me on [xxx] when you have had a chance to digest the FN section of the update note."

74. Although Mr Astley ended his email by offering to discuss the options with Mr Benton by phone, there is no written record of any subsequent conversation between him and Mr Benton. However, on 19 November 2015, Mr Astley emailed Mr Benton again, with a copy to Mr Bridge, saying (emphasis in original):

> "Further to our call earlier today and Andy [Bridge]'s instructions on this matter, please find attached a letter I have drafted for you to send to HMRC which, in respect of the Follower Notice (FN), authorises

> HMRC to corrective action for the current year WW losses and informs them of the reason(s) why you are not taking corrective action in respect of the carried back [Working Wheels] losses…**Please check the letter for any obvious errors**."

75. From the opening words of this email I find as a fact that Mr Benton spoke to both Mr Bridge and Mr Astley, and Mr Bridge then instructed NDTP to provide the draft "reasons why" letter. The text of that draft was taken from the NDTP template, other than in relation to Mr Benton's name, address, UTR and certain details about the figures in his APN and FN. It includes the following reference to *Rowe:*

> "My advisers do not consider that the decision issued in *Rowe* [High Court]…changes the underlying claim. It is clear that the court did not address the matters related to my underlying claim against HMRC. The Court did not give judicial authority that a carry back claim was made in a return for the year the loss was sustained (which lawfully it cannot be when applying the *ratio* in *Cotter* to my facts). Further, the Court gave no judicial authority that there was a tax enquiry in progress in respect of the claim. Finally, *Rowe* applies to losses made by partnerships and [PPNs] both of which are not applicable to my facts."

76. The letter goes on to say that Mr Benton was taking corrective action in relation to £1,477,851 of the total losses, but not taking corrective action for £371,548, namely the amount carried back to previous years, because:

> "I am issuing a claim against HMRC, in the High Court, that if successful would confirm that the conditions necessary for a valid [FN] to be issued were not met in respect of the [carry back amount]…if the [FN] were ruled unlawful any corrective action, taken now, could not be unwound by me or HMRC (see section 208(10) of Finance Act 2014) and so such action is irrevocable. That is unacceptable when there is a substantive legal claim in progress."

77. The letter continued by saying that Mr Benton was aware that HMRC disagreed with his claim but said they "have provided no detailed analysis as to why". He also asked HMRC to reply to 25 detailed technical questions attached as an Appendix to his letter by giving "yes" or "no" answers to each question.

78. Under the heading "reasonable in all the circumstances", Mr Benton's letter stated that it was reasonable in all the circumstances for him not to take corrective action, because such action would be "irrevocable", and for a list of further reasons which essentially mirror those in the Update, see §58(2).

79. Mr Astley told Mr Benton to print out the whole letter, sign it, and scan it to a Mr Muir at HMRC. He provided Mr Benton with Mr Muir's email address and the following wording for covering email:

> "Please find attached my response to HMRC's letter dated 22 October 2015, which rejected the representations made by me pursuant to section 207(1) of Finance Act 2014 in respect of the Working Wheels scheme."

80. On the same day, Mr Benton:

(1) sent that letter to Mr Muir with a covering email using the wording suggested by Mr Astley; and

(2) took corrective action in relation to £1,477,851 of the total losses used in the year under enquiry, but did not take corrective action in relation to the £371,548 of losses carried back.

81. On 25 November 2015, Mr Taylor of HMRC's Counter-Avoidance team responded to Mr Benton's letter of 19 November, saying that HMRC would take forward its defence to the High Court claim, and refusing to answer the 25 questions attached to Mr Benton's letter.

82. On 2 December 2015, HMRC issued a closure notice, denying all the claimed losses. Mr Benton did not appeal the closure notice.

83. On 26 January 2016, HMRC issued Mr Benton with a precursor letter, warning that an FN penalty was about to be issued, and explaining that it would be reduced for co-operation. The explanation schedule attached to the letter said that the penalty would be based on the denied advantage, which was stated to be £135,759.07. The calculation of that figure was challenged by Ms Montes-Manzano, and Ms Nathan accepted it was probably too high. The parties said that they would seek to agree the correct figure after the hearing; I gave them permission to revert to the Tribunal if they were unable to do so.

84. On 1 February 2016, Mr Bridge called Ms Bacon of HMRC to discuss the penalty. She told Mr Bridge that it was too late for Mr Benton to take any action to reduce that penalty and indicated that a rate of 30% was likely. Later the same day, Mr Bridge wrote to Ms Bacon[4] saying that Mr Benton considered that a 30% penalty was "grossly unfair" and that he was being placed under "undue duress" by HMRC.

85. On 10 February 2016, Barrringtons faxed another letter to HMRC. This stated that Mr Benton's "reasons why" letter of 19 November 2015 set out his full arguments. It also quotes Example 7, and says that in the light of that Example, Mr Benton does not know why a penalty of 30% is being considered. Although faxed by Barringtons, the letter relies on NDTP's "reasons why" letter and the Example contained in the Update. I make no finding as to whether it was drafted by Mr Bridge or by Mr Astley, or whether they both contributed.

86. On 18 February 2016[5], HMRC issued Mr Benton with the FN penalty of £40,727.72, being 30% of the £135,759.07 of the denied advantage set out on the precursor letter. On 9 March 2016, Mr Benton appealed his penalty to the Tribunal.

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[4] Part of that letter was redacted for reasons not explained to the Tribunal, but the redaction was not challenged by either party.

[5] HMRC's Statement of Case gives an incorrect date for this penalty notice and for Mr Benton's appeal to the Tribunal; HMRC's skeleton argument gives the same incorrect date for the issuance of the penalty notice.

One of his grounds of appeal was that "HMRC failed to follow their own published guidance" and in particular that set out in Example 7.

Mr Jackson

87. The only direct evidence about Mr Jackson's personal situation comes from his email exchanges with Mr Astley, in which he signs himself as "Steven Jackson OBE - Founder and Chief Executive" of a business which operates from the "Recycling Lives Centre" in Preston; his email address also includes the word "recycling".

88. Ms Montez-Manzano invited me to infer that Mr Jackson was a scrap-metal dealer and a "lay client" with no financial or tax expertise in reliance on (a) Mr Jenner's statement, already cited, that: "I get confused between the appellants, but I think he was a scrap-metal dealer", and (b) Mr Jackson's email address.

89. However, I decline to make a finding of fact about Mr Jackson's financial or tax expertise on the basis of Mr Jenner's imperfect recollection, and/or Mr Jackson's email address. Mr Jenner's evidence on this point is weak, because he gets confused between the appellants. Mr Jackson's email address tells us nothing about his financial or tax expertise.

90. However, in reliance on Mr Jackson's emails I accept that he is the founder and chief executive of a business operating in Preston, and that he was awarded an OBE, but I make no findings about his age, experience, financial expertise, health or any other personal matter.

91. In 2007-08 Mr Jackson participated in the Scheme and claimed a loss of £458,833, all of which was carried back to 2006-07. On 4 November 2009, HMRC opened an enquiry into his 2007-08 tax return**.** On 28 November 2014, HMRC sent him a letter warning that he was to be sent an APN and an FN in relation to the Scheme**.**

92. On 1 December 2014, NDTP sent Mr Jackson copies of the Particulars of Claim for *Knibbs,* and told him that Mr Ewart QC "was involved in the claim".

93. On 17 December 2014 HMRC issued Mr Jackson with the FN and APN. The covering letter set out the same warning about the serious consequences of not settling the appeal as had been included in Mr Benton's letter. The FN stated that any representations must be received by 20 March 2015.

94. Mr Jackson's representations were drafted by NDTP and sent to HMRC on 11 March 2015. The letter replicated points (1) to (5) of that sent by Mr Benton's; it also included these further points:

> (1) HMRC were obliged to open an enquiry into Mr Jackson's carry back claims under TMA Sch 1A; this followed from "the binding Supreme Court *ratio* in *Cotter*"; and
>
> (2) Mr Jackson had filed a High Court claim; Mr Ewart QC had been instructed on that claim, and the particulars of that claim were to be read as

incorporated into these representations. Until that claim was determined, it would be "wrong and unlawful" for HMRC to find that Condition A was met.

95. On 27 August 2015, HMRC informed Mr Jackson that they were not making any change to the FN as the result of his representations and he was required to take corrective action within 30 days. To the extent that Mr Jackson's letter mirrored Mr Benton's, HMRC's response letter is essentially the same. In response to the first of the new points, HMRC said that *Cotter* did not change the position. They did not respond to the second point.

96. Mr Jackson received HMRC's response letter when he returned from holiday on 9 September 2015. He emailed Mr Astley, asking "have you had any other reports of the same? Please advise"**.** Mr Astley replied by return, confirming that HMRC had taken the same position with other clients, and continuing: "it might be worth having a chat with Steve Towler at RFM, as he knows all about this issue (having had other clients who are at the same stage as you are now". Mr Jenner said he assumed Mr Towler was a "general accountant" who acted for Mr Jackson and I find this to be a fact.

97. Mr Astley's email attached a copy of the Update; the main body of the email set out the same two options as put before Mr Benton, see §73; the first and third of the related explanatory paragraphs are substantially identical. The paragraph about option 2 – not taking corrective action in relation to carried back losses – is much shorter, and simply says:

> "there are risks associated with following option 2, as set out in the attached note, but option 2 does provide you with certainty that the MAPS claim will not be nullified (as you will not be complying with the FN to irrevocably 'give up' your losses)."

98. Mr Jackson responded the following day, saying:

> "I have spoken to Steve Towler and am mindful [minded?] to contest the position in addition to the APN…I'd like you to help me construct the appropriate letter to send to HMRC, so that in any event I do not damage or lose my MAPS claim status."

99. A call was then arranged between Mr Astley and Mr Jackson. The Tribunal had no written or oral evidence as to the content of those discussions. On 25 September 2015 Mr Astley emailed Mr Jackson, with a copy to Mr Towler. The email says (emphases in original):

> "Please find attached a letter to send to HMRC, which informs them of the reason(s) why you are *not* taking corrective action in respect of the carried back losses. ***Please check the letter for any obvious errors***."

100. The letter followed the NDTP template, and so contained identical paragraphs to those used by Mr Benton and set out at §§75ff, other than in relation to the amount of loss carried back for which corrective action was not being taken: this was £458,833. It attached the same Appendix B with its 25 questions.

101. Mr Astley's email also said that the letter included an electronic signature, so Mr Jackson could either "just forward it straight to HMRC. Or if you would prefer, you can print and sign manually next to the electronic signature before scanning a copy to HMRC". Mr Astley told Mr Jackson that the letter should be sent to Mr Muir at the email address he provided, but that it might be helpful also to fax a copy to HMRC's Bristol office using the fax number provided; he also set out wording which could be used in Mr Jackson's covering email. Mr Jackson responded some three hours later, saying that he would email and fax the letter to HMRC, which he did on the same day; his letter has only an electronic signature.

102. On 2 October 2015, Mrs Parkin of HMRC's Counter-Avoidance team responded, saying that HMRC would taking forward its defence to the High Court claim, and refusing to answer the 25 questions in Appendix B of Mr Jackson's letter.

103. On 21 January 2016, HMRC issued a closure notice in relation to their enquiry into Mr Jackson's 2007-08 SA return; Mr Jackson did not appeal that notice.

104. On 1 April 2016, HMRC issued Mr Jackson with the FN penalty of £50,881.32, being 30% of the denied advantage, which was stated to £169,404.40. Ms Nathan accepted during the hearing that the correct figure for the denied advantage was £169,404 (without the pence) and the related penalty had therefore been very slightly overstated: it should have been £50,881.20. On 16 April 2016, Mr Jackson appealed his penalty to the Tribunal; his appeal grounds included reliance on Example 7.

Mr Hudson

105. The Tribunal has no direct evidence about Mr Hudson's age, work, experience or health, and I decline to make findings about his financial and tax expertise based on Mr Jenner's imperfect recollections, as with the other Appellants.

106. The only personal matter known to the Tribunal is that Mr Hudson was married, and that his wife, Henia, also participated in the Scheme. The HMRC correspondence relating to Mrs Hudson arrived some weeks before that relating to Mr Hudson's own involvement, and Mr Hudson liaised with NDTP about that correspondence.

107. Mr Hudson's participation in the Scheme related to the 2006-07 tax year: he claimed losses of £465,174, of which £255,356 was carried back to the three previous tax years.

108. On 4 November 2009, HMRC opened an enquiry into Mr Hudson's 2006-07 tax return**.** On 28 November 2014, HMRC sent him a precursor letter warning that he was to be sent an APN and an FN in relation to the Scheme. On 1 December 2014, NDTP sent Mr Hudson copies of the Particulars of Claim for *Beiny*, and told him that Mr Ewart QC "was involved in the claim".

109. On 12 February 2015 HMRC issued Mr Hudson with the FN and APN. The covering letter included the warning about the serious consequences of not settling the appeal. The FN stated that any representations must be received by 16 May 2015. Mr

Hudson sent his representations to HMRC on 13 April 2015. These were drafted by NDTP and were substantially identical to those sent in by Mr Jackson.

110. On 25 September 2015, HMRC informed Mr Hudson that they were not making any change as the result of his representations. The letter largely repeated their response to Mr Jackson, and added that there was no legal requirement for HMRC to defer the issuance of FNs pending the outcome of the High Court claim.

111. On 1 October 2015, Mr Hudson sent HMRC's letter to Mr Astley by email, and said:

> "I have now received the above for me. You know that we dealt with Henia's a month or so ago…would you please look at the enclosures Robert, comment as necessary, and let me know how to proceed. A copy has been sent to Paul Berlyn."

112. Mr Berlyn of "abg group" was copied on the email. I have no further information about Mr Berlyn, but infer that he was Mr Hudson's general accountant.

113. Mr Astley responded, saying that as HMRC had upheld the FN:

> "we need to part-correct…for the non-carried back losses and continue contesting the FN for the carried back losses. I will therefore draw up the letter to part correct under the FN, which is what I think you wanted to do when we previously discussed the rejection letter coming through for you. That will need to be filed by 25 October at the latest…"

114. Mr Hudson acknowledged that email. On 22 October 2015 Mr Astley followed up, but received no response. On 23 October he emailed again, saying (emphasis in original):

> "I have not heard from you on this matter, so given the tight deadline I have made a few assumptions. Please find attached a letter I have drafted for you to send to HMRC. Following the same pattern as agreed for Henia, this letter authorises HMRC to take corrective action for your current year [Working Wheels] losses and informs them of the reason(s) for not taking corrective action in respect of the carried back [Working Wheels] losses. ***Please check the letter for any obvious errors***."

115. Mr Astley's email contained essentially the same advice about the electronic signature, sending the letter to HMRC and the same draft wording for the on-submission to HMRC as had been included in Mr Astley's email to Mr Jackson. On 26 October 2015, Mr Hudson emailed Mr Astley, saying:

> "thanks a lot for your help on Friday. The three page letter, with the four page Appendix A and Appendix B was forwarded by email and fax to Alexander Muir at HMRC on Friday."

116. The letter Mr Hudson sent to HMRC followed the NDTP template, and so contained identical paragraphs to those used by Mr Benton and Mr Jackson, see

§§75ff. It also contained Appendix A which stated that Mr Hudson was taking corrective action in relation to the losses claimed in 2006-07 but not those carried back to earlier years, and Appendix B with its list of questions. It has both an electronic signature and an actual signature. On the same day, Mr Hudson took corrective action in relation to losses of £209,818 used in the year under enquiry, but not in relation to the losses of £255,356 which had been carried back.

117. On 30 October 2015, Mrs Parkin of HMRC's Counter-Avoidance team responded to Mr Jackson's letter, saying that HMRC would taking forward its defence to the High Court claim, and refusing to answer the 25 questions in Appendix B.

118. On 28 January 2016, HMRC issued Mr Hudson with a closure notice in relation to their enquiry into the 2007-08 tax year. The notice stated that Mr Hudson had further tax to pay of £79,736.59. Ms Nathan accepted at the hearing that this figure had wrongly included NICs, and the correct figure should have been £75,661.20. Mr Hudson appealed the closure notice, but as no copy of that notice was provided to the Tribunal, I make no findings as to his grounds of appeal.

119. On 22 April 2016, HMRC issued Mr Hudson with the FN penalty of £25,766.40, being 30% of the denied advantage, which was stated to be £85,887.91. Ms Nathan accepted during the hearing that the correct figure was £81,812.60 after removing the NICs and that the related penalty had therefore been overstated: it should have been £24,543.78[6].

120. In deciding that the penalty should be set at 30%, HMRC used the same approach as in relation to Mr Benton's penalty. On 4 May 2016, Mr Hudson appealed his penalty to the Tribunal. Like the other Appellants, he relied on Example 7 as one of his grounds of appeal.

Further case law developments

121. On 2 February 2016, the Court of Appeal refused the appellants' appeal in *de Silva;* their decision is published as [2016] EWCA Civ 40. Gloster LJ, giving the only judgment with which Arden and Simon LJJ both agreed, said at [48] that the appellants' arguments left her with "a sense of total unreality" and their reliance on *Cotter* was entirely misplaced.

122. On 30 November 2016, Saffman J in the High Court decided, in *Wickersham v HMRC* [2016] EWHC 2956, that there was no basis for treating individual loss claims any differently from those of the partners considered in *de Silva.* On 15 November 2017, the Supreme Court decided *de Silva* in favour of HMRC.

123. On 7 February 2018, Warren J struck out the claims made in *Knibbs* under reference [2018] EWHC 136. It appears from the submissions and from Mr Jenner's

[6] Ms Nathan also said that the NICs were £4,075.39, but this would give an amended figure of £81,812.52 (instead of £81,812.60) and a penalty of £24,543. 76 (instead of £24,543.78**)**. I have relied on the figures for the denied advantage and related penalty, which Ms Montes-Manzano accepted were correct.

first witness statement that both *Hughes* and *Beiny* had by this stage been consolidated into *Knibbs,* but the evidence was not entirely clear and it is in any event not necessary for me to make a finding on that point. On 23 July 2018, after the hearing of the Appellants' appeal but before the publication of this decision, the Court of Appeal granted permission to appeal in *Knibbs*. The grounds of appeal were drafted by Mr Ewart QC; they invite the Court to find, *inter alia,* that *de Silva* was wrongly decided and that HMRC must open enquiries into earlier years' returns by using TMA Sch 1A.

The grounds of appeal

124. The grounds of appeal notified to the Tribunal by the Appellants when they filed their Notices of Appeal were that:

(1) it was reasonable in all the circumstances for the Appellants not to have taken corrective action;

(2) the threat of a 50% penalty was a breach of the Appellant's human rights;

(3) the Appellant had a "reasonable excuse", and "special circumstances" applied;

(4) if penalties were due, HMRC should have given a larger deduction for co-operation when calculating the penalties; and

(5) HMRC had failed to follow its own guidance on penalties, and Example 7 applied.

125. However, issues 2, 3 and 5 were subsequently abandoned. A further ground of appeal was added during *Benton 1,* namely that the FNs contained defects and were invalid. I deal first with that ground, and then turn to the first and fourth grounds of appeal set out above.

Whether the penalties should be set aside because of errors in the FNs

126. The first part of the Appellants' case was that the FNs contained fundamental errors and thus were not FNs at all: as a result they could not give rise to penalties.

The Tribunal's jurisdiction

127. FA 2014, s 204 sets out the Conditions which must exist for a valid FN to be issued:

(1) Condition A: that there is either an open enquiry into a person's SA return, or the person has appealed against an HMRC decision and that appeal has not yet been determined;

(2) Condition B: that "the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ('the asserted advantage') results from particular tax arrangements ('the chosen arrangements')";

(3) Condition C: that "HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements";

(4) Condition D : that no previous follower notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements, judicial ruling and tax period; and

(5) the time limit in s 204(6) has been complied with.

128. FA 2014, s 208 gives HMRC the power to issue a penalty for failing to take the corrective action required by an FN, and s 214 is headed "Appeal against a s 208 penalty". The grounds on which an appeal may be made are at subsection (3), which begins:

> "The grounds on which an appeal…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…"

129. It is clear from those provisions that a person can appeal to the FTT against a penalty if the s 204 requirements for the issuance of a valid FN have not been met, because:

(1) paragraph (a) of s 214(3) explicitly links to Conditions A, B and D;

(2) paragraph (b) links to Condition C, because if there was no "relevant judicial ruling" HMRC would have been wrong to come to the opinion that there was such a ruling; and

(3) paragraph (c) links to the timing requirement in s 204(6).

130. An FN which fails to meet one of the statutory requirements in s 204 must be invalid, but no statutory provision gives the FTT jurisdiction to make a declaration to that effect, or to set aside the FN. Instead, its jurisdiction is limited to cancelling the penalty, thereby removing HMRC's method of enforcing the FN.

131. In addition to the FTT's powers to set aside a penalty because the requirements in s 204 for a valid FN have not been met, s 214(3)(d) gives the FTT the power to set aside a penalty if "it was reasonable in all the circumstances" for the recipient "not to have taken the necessary corrective action…in respect of the denied advantage". If the FTT cancels the penalty for that reason, s 214(10) provides that cancellation of the penalty "does not affect the validity of the follower notice". This is the only specific provision giving the FTT power to cancel a penalty which is not directly linked to the validity conditions in s 208, and Parliament has expressly stated that the exercise of that power does not invalidate the FN. This reinforces my view that the FTT has no jurisdiction to declare an FN invalid, or to set it aside, but only to cancel the related penalty.

132. Section 214(3)(a) to (d) therefore prescribe specific grounds on which an FN penalty can be appealed. However, they are not the only grounds on which an appeal

can be made, because they follow the opening words of that subsection, which read (my emphasis):

> "The grounds on which an appeal…may be made include in particular".

133. The FTT therefore has the power to set aside penalties for reasons other than those specified by paragraphs (a) to (d). However, that does not mean that the FTT's penalty jurisdiction is at large, giving it an entirely free hand as to when it can cancel or change a penalty. In the authoritative work, *Bennion on Statutory Interpretation,* the Chapter headed "examples and particularisation" states that when a statute provides examples, or says "in particular", the examples are "illustrative, not exhaustive". It also says:

> "If an Act contains an example this is a strong indication of how Parliament intended it to work. The inclusion of an example may also colour the interpretation of the proposition of which it is illustrative."

134. Thus, when the FTT exercises the general power in the opening words of s 214(3), it must take into account the indications given in paragraphs (a) to (d) as to how Parliament intended that general power to be used.

Findings of fact about the wording of the FNs

135. All the FNs issued to the Appellants stated that the conditions set out in FA 2014, s 204 had been met, namely that:

(1) there was an enquiry in progress into the Appellant's SA tax return (Condition A);

(2) the "asserted advantage" resulted from the chosen arrangements (Condition B);

(3) HMRC were of the opinion that *Flanagan* was a final judicial ruling relevant to the chosen arrangements (Condition C); and

(4) no previous follower notice had been given (Condition D).

136. In relation to Condition C, the FNs continued by saying that *Flanagan* had been decided by the FTT on 20 February 2014 and "the FTT's decision has not been appealed and is therefore final". On the following page this is repeated: "*Flanagan* is a final ruling within the meaning of section 205(4)...since no appeal has been made against the ruling".

137. The FNs also summarise FA 2014, s 207 under the heading "what to do if you disagree with this follower notice". Section 207 is the provision which sets out the grounds on which a person can make representations to HMRC against an FN. One of those grounds is that the FN was issued more than 12 months after the "relevant judicial ruling" has become "final". The FNs said that the recipients could rely on that ground if the FNs had been issued after 16 July 2016.

The issues

138. The parties agreed that the FNs met Conditions A to D and that they were issued within the time limit set by s 204(6). However, Ms Montez-Manzano submitted that the FNs contained errors, making them invalid, and those errors could not be cured by reference to TMA 1970, s 114. As a result, the penalties were also invalid.

139. Ms Nathan's response was that the FTT had no jurisdiction to consider Ms Montez-Manzano's submissions, because challenges to the validity of an FN could only be made by way of judicial review at the High Court. Were she to be wrong in that submission, so that the FTT had the relevant jurisdiction, she said that any errors in the FNs could be cured by TMA s 114.

140. Both Counsel cited numerous authorities, all of which have I have considered. However, I found that it was unnecessary to refer to those authorities in order to decide this issue. As explained at §§127ff, it is clear from the statute 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.

141. The issues I must decide are therefore:

(1) whether there are errors in the FNs; and if so,

(2) whether, as a result of one or more of those errors, the penalties should be set aside under the general power contained in the opening words of s 214(3).

The first alleged error: the date on which Flanagan *became final*

142. FA 2014, s 205(4) reads:

> "A judicial ruling is a 'final ruling' if it is–
>
> (a) a ruling of the Supreme Court, or
>
> (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."

143. As already noted, the FNs say that "the FTT's decision has not been appealed and is therefore final" and "*Flanagan* is a final ruling within the meaning of section 205(4)...since no appeal has been made against the ruling". Ms Montez-Manzano said that these statements were incorrect. The ruling did not become final because no appeal had been made; permission to appeal had been sought in *Flanagan.*

The judgment became final when the UT refused permission to appeal, in accordance with 205(4)(ii).

144. FA 2014, s 206 is headed "Content of a follower notice" and subparagraph (b) says that a FN "must…explain why HMRC considers that the ruling meets the requirements of section 205(3). Ms Montez-Manzano submitted that the FNs did not contain that explanation, which was mandatory ("must…explain"). This was a "fundamental" error, invalidating the FNs.

145. Ms Nathan accepted that the FNs could have referred to the UT's refusal of permission to appeal, but said this had no practical effect and the penalty should not be set aside. The absence of a reference to the UT's refusal of permission of appeal did not mislead the Appellants, who were well aware that *Flanagan* had become final long before they received the FNs.

146. Again, I begin with the statute. Section 206(b) says that the FN must "explain why HMRC considers that the ruling meets the requirements of section 205(3)". Section 205(3) defines a "relevant" ruling; it does not define a "final" ruling; that definition follows in s 205(4).

147. Thus, the FN must explain why a ruling is "relevant", namely that it "relates to tax arrangements"; that it would deny the asserted advantage if applied to the chosen arrangements, and that it is a final ruling. The FNs explain in detail why *Flanagan* applies to the arrangements entered into by the Appellants, and they also state that the ruling is final because no appeal was made.

148. It is of course true that no appeal was made. The statements to that effect in the FN are not wrong. A fuller explanation would have referred to the refusal of permission to appeal, but there is no explicit statutory requirement that the FN refer to the specific subparagraph of s 204(4) under which the ruling became final.

149. I therefore find that there has been no breach of the mandatory requirement in s 206(b) to explain why *Flanagan* was a relevant ruling. Even were I to be wrong in that conclusion, so that the FN should have included a reference to the UT's refusal of permission to appeal, I would not have cancelled the penalty.

150. That is because, although Parliament gave the FTT the power to set aside penalties for reasons other than the particularised examples in FA 2014, s 214(3), the FTT's use of that general power must be informed by those examples, namely:

(1) HMRC's failure to meet conditions A to D – the necessary conditions before an FN can be issued;

(2) HMRC's failure to meet the statutory time limit; and

(3) a requirement for "all the circumstances" of the appellant to be considered in assessing whether it is "reasonable" to impose the penalty.

151. Given the nature and extent of those examples, Parliament cannot have intended that the FTT should use its general power to set aside a penalty because an FN said

"the FTT's decision has not been appealed and is therefore final" instead of "the UT refused permission to appeal the FTT's decision and it is therefore final". If that was a flaw in the wording, it was not "fundamental" but extremely minor. And, as Ms Nathan said, the failure to refer to the UT's refusal of permission had no practical consequences. It did not mislead the Appellants and it would not have misled the reasonable person reading the FN.

The second alleged error: failure to give the date on which the UT refused permission

152. Ms Montez-Manzano also submitted that the FNs should have provided the Appellants with the date on which the UT refused permission to appeal. This was, she said "an essential piece of information to be included in a Notice".

153. Ms Nathan responded by saying that if Parliament had wanted follower notices to specify the date on which a judicial authority becomes final, they would have said so expressly, but there is no such requirement.

154. Again, I agree with Ms Nathan. There is no statutory requirement for an FN to state the date on which a ruling became final. Its absence did not affect the Appellants in any way. Given the statutory context of the general power in s 214(3), I would exceed the ambit of my jurisdiction were I to use that power to set aside the penalties on the grounds that the FNs did not include the date *Flanagan* became final.

The third alleged error: failure to refer to the correct date

155. As already noted, s 207(1)(c) provides that representations can be made if the FN was not given within the period specified in s 204(6). Since *Flanagan* became a final ruling when the UT refused permission to appeal on 17 September 2015, the specified period was twelve months from that date. However, the FNs said that representations could be made if their issue date was after 16 July 2016.

156. Ms Montez-Manzano said, and Ms Nathan accepted, that the FNs should instead have referred to 16 September 2016, not 16 July 2016. In other words, HMRC had a longer period to issue the FNs before a recipient could make representations on the basis that the FNs were out of time.

157. The FNs at issue in these appeals were all sent out before 16 July 2016, so were self-evidently also sent out before 16 September 2016: Mr Benton's and Mr Hudson's were issued on 25 February 2015 and Mr Jackson's on 17 December 2014. As a result none of the Appellants were able to make representations on the basis that the time limit for issuing the FN had expired. Had the correct, longer, time limit been included in the letter, the Appellants' position would have been identical. The incorrect date had no impact on the Appellants, and certainly cannot provide a valid basis for setting aside the penalty in reliance on the Tribunal's general power in s 214(3).

The Lead Case direction

158. As set out earlier in this judgment, the "common or related issues of fact or law" for the purposes of Rule 18 were:

> "whether, as a matter of law, in circumstances where a follower notice is issued before the deadline ('the Relevant Deadline') specified in s 204(a) of the Finance Act 2014 (when read together with s 205 and s 217 of that Act), HMRC are prevented from collecting a penalty under s 208 by reason of either (i) the follower notice failing to specify the date on which the relevant judicial ruling was made or (ii) the follower notice failing to specify the Relevant Deadline correctly or at all."

159. I have decided not to cancel the penalties on the basis of either (i) or (ii). It follows that HMRC succeed on the Rule 18 issue.

The computational mistakes

160. I noted at the beginning of this decision that HMRC have accepted that the FNs contained computational mistakes. However, the Appellants made no reference to computational mistakes in their grounds of appeal. Ms Montez-Manzano's skeleton argument identified by way of a footnote that there was a "discrepancy" in relation to Mr Benton between (a) the denied advantage specified by HMRC, and (b) that computed in his "reasons why" letter of 19 November 2015. However, she did not submit that his penalty should be cancelled because it was based on an incorrectly calculated denied advantage. I have therefore not been asked to decide whether the penalties should be set aside because of computational errors.

161. The only point which remained unresolved at the end of the hearing was the calculation of Mr Benton's denied advantage, about which I gave permission for the parties to revert to the Tribunal if they are unable to agree[7].

162. For the avoidance of doubt, that permission does not extend to allowing the Appellants to introduce, after the hearing, a new ground of appeal to the effect that the FNs should be set aside because of computational errors. It only allows the parties to revert to the Tribunal if they are unable to agree the calculation of Mr Benton's denied advantage.

Reasonable in all the circumstances

163. The FTT can set aside a penalty if "it was reasonable in all the circumstances for [the Appellant] not to have taken the necessary corrective action". It was common ground that the Appellants had the burden of establishing that this was the position.

Ms Montez-Manzano's submissions on behalf of the Appellants

164. Ms Montez-Manzano submitted that the Tribunal had sufficient evidence to find the relevant circumstances, whether directly or by inference, and also to find that the Appellants had acted reasonably in those circumstances. In particular, she invited me to find that:

[7] At the end of the hearing I said that I would issue a short direction asking the parties to set out their position on the amount of Mr Benton's denied advantage, but on reflection decided it was easier to deal with it as part of this decision, with the parties reverting to the Tribunal if they cannot agree on the amount.

(1) the Appellants had relied on NDTP's advice; this could be inferred from the following:

(a) the "reasons why" letters had been drafted by NDTP and subsequently sent by the Appellants to HMRC; and

(b) the Appellants did not take corrective action in relation to the carried back losses; that course of action was one of the two options in the email from Mr Astley;

(2) NDTP's view of the law was that *Cotter* applied to protect the losses carried forward; that view had been formulated by Mr Jenner, who was an experienced and qualified tax specialist; it was also endorsed by Mr Ewart QC;

(3) it was reasonable for the Appellants to follow the professional advice from a properly qualified tax adviser, unless it was "obviously wrong", which was not the position here; and

(4) if the Appellants had taken corrective action, they would have irrevocably abandoned the carried back losses, even were a court later to decide that NDTP was correct.

165. Ms Montez-Manzano relied on a number of cases where the FTT decided that reliance on professional advice provided a taxpayer with a "reasonable excuse", including *Gedir v HMRC* [2016] UKFTT 188 (TC) and *Barrett v HMRC* [2015] UKFTT 329 (TC) ("*Barrett*").

166. She also submitted that the relevant circumstances in these appeals could be established without witness evidence from the Appellants. She relied on *Anderson v HMRC* [2018] UKUT 159 ("*Anderson*"), where one of the issues was whether an individual HMRC officer – who did not give evidence – held a reasonable belief that there was an insufficiency of tax. The FTT found that there was sufficient evidence to make that finding, and its decision was upheld by the UT. Ms Montez-Manzano added that *Anderson* was not an isolated case: the FTT frequently made decisions without witness evidence in oral hearings, as well as in default paper cases.

Ms Nathan's submissions on behalf of HMRC

167. Ms Nathan's position was that the statutory requirement which the Appellants had to satisfy was "distinct from a 'reasonable excuse' test". The Tribunal had to decide whether it was reasonable in all the circumstances for the Appellants not to take corrective action, and in order to carry out that exercise, the Tribunal needed all the relevant facts.

168. She submitted that by deciding not to give evidence, the Appellants had deliberately not provided relevant evidence about "all the circumstances", and it followed that their submissions must therefore fail. She said there was:

> "a total lack of any evidence as to whether [the Appellants] simply adopted the advice to fight the High Court claim unquestioningly, closing their eyes to the Upper Tribunal decision, or whether they gave it some thought. We have no idea of knowing what was the quality of the reliance...there is nothing before [the Tribunal], that tells you what

> the Appellants were thinking, whether they relied on [Mr Jenner's] advice, the extent to which they applied any independent thought, whether they formed an informed decision or whether they simply shut their eyes in order not to have to take corrective action and hand over the benefit of the losses that had been denied to them by *Flanagan*."

169. She added that the Appellants had also received "some sort of advice from other people", being their general accountants, so it was not possible to establish how much reliance was placed on those individuals, or the quality of any such reliance, and how much reliance had been placed on NDTP.

170. In any event, in her submission, the NDTP position was not reasonable. By the time the "reasons why" letters were sent to HMRC, there had been two relevant judgments:

(1) Sales J had said in *de Silva* that it would be "very odd to suppose that Parliament intended to produce an outcome that uncoupled the substantive position and the procedural position in this sort of case" allowing a person to claim, on the basis of procedural arguments, tax relief on "losses" which did not exist; and

(2) in *Rowe* Simler J was "convinced" Sales J was correct, and agreed that an HMRC enquiry under TMA s 9A was both "an appropriate and sufficient means of challenging the loss relief".

171. Ms Nathan said that the reasonable person in the position of the Appellants would have accepted those court judgments, and not sought to rely on advice to the contrary as the basis for failing to take corrective action.

The statutory test: not the same as "reasonable excuse"

172. I agree with Ms Nathan that there is a difference between "reasonable excuse" and "reasonable in all the circumstances". When the FTT examines a "reasonable excuse" defence, it considers the reason given by the taxpayer for his failure to comply. For example, a taxpayer may say that he was unable to meet a statutory deadline because he was unwell. The FTT must then, as the UT says in *Perrin v HMRC* [2018] UKUT 156 ("*Perrin*") at [70]:

> "determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence."

173. Thus, the FTT must find out the facts which are relevant to the reasonable excuse defence. To use the same example, these facts might include: the nature and extent of the illness; its timing; whether it was sudden or gradual in onset; the nature and extent of the medical treatment given; and whether the person was nevertheless able to run his business, and/or carry out other activities, despite being unwell. The UT in *Perrin* puts it this way at [71] (my emphasis):

> "In deciding <u>whether the excuse put forward is</u>, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the

> particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times..."

174. The task of the FTT when considering FN penalties is similar, but not identical. It is to decide whether it was "reasonable in all the circumstances" for a person to fail to take corrective action. This has two elements:

(1) the FTT must establish, not the facts which relate to a particular excuse put forward by an appellant, but "all the circumstances" relevant to his failure to take corrective action. Ms Nathan called these facts "the building blocks for the edifice"; and

(2) the FTT must then decide whether, in all those circumstances, the taxpayer's behaviour was reasonable. The approach required here is the same as when assessing reasonable excuse, namely to "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", see *Perrin* at [81(3)].

175. I move on to considering these two requirements – "all the circumstances" and "reasonable" – in the context of these appeals.

Facts which constitute circumstances

176. From my findings of fact earlier in this judgment, the following circumstances were relevant to the Appellants' decisions not to take corrective action.

(1) They all participated in the Scheme.

(2) In deciding to participate, they took advice from NTA, in which Mr Jenner was a partner.

(3) The FTT in *Flanagan* found that the losses claimed by participants in the Scheme were not genuine losses because the participants were "engaged in an arrangement designed only to give the illusion of trading".

(4) On 6 November 2013, the Supreme Court had handed down its judgment in *Cotter*. Mr Jenner was involved in providing advice to Mr Cotter.

(5) On 15 April 2014 Sales J decided in *de Silva* at that the appellants in that case could not rely on *Cotter* to claim that losses carried back could still be protected, even though the losses themselves – like those in *Flanagan* – had been ruled not to exist, saying it "would be very odd to suppose that Parliament intended to produce an outcome that uncoupled the substantive position and the procedural position in this sort of case".

(6) Some four months later, in August 2014, Mr Jenner became a partner in NDTP. On 17 September 2014, the UT refused permission to appeal in *Flanagan.*

(7) NTA referred the Appellants to NDTP; the Appellants knew when they contracted with NDTP that permission to appeal had been refused in *Flanagan.*

(8) NDTP drafted instructions for Mr Ewart QC, seeking an opinion to support Mr Jenner's view that *Cotter* protects the carry back losses claimed by participants in the Scheme.

(9) The Appellants instructed NDTP to make Part 8 Claims in reliance on NDTP's advice that *Cotter* could be relied on to protect the carried back losses.

(10) When the Appellants received their Particulars of Claim they were told only that Mr Ewart QC was "involved in the claim".

(11) On 31 July 2015, before any of the Appellants decided not to take corrective action, the High Court issued its judgment in *Rowe.* Simler J said that she was "convinced" that Sales J was correct to rule against the appellants in *de Silva,* and that the procedural argument based on *Cotter* was wrong.

(12) NDTP drafted the letters of representation sent in by the Appellants on receipt of the FNs.

(13) All the Appellants had accountants, and all the Appellants contacted those accountants as well as NDTP when they received HMRC's refusal of their representations.

(14) When told that HMRC had refused the Appellants' representations, Mr Astley provided them with a copy of the Update. The Update referred to Example 7, which had by then been removed from the HMRC Guidance. The Update also told the Appellants that the approach taken in the High Court claims was supported by "a strong QC opinion" and instructed the Appellants to reread that opinion to ensure they were happy that it was "substantive" and that it "covered" the Appellants' own opinions, although no copy of that opinion had in fact been provided to the Appellants.

(15) The Appellants all used the NDTP template letter to explain the reasons why they were not taking corrective action. None made any changes to any of the paragraphs in that letter relating to that issue. Each attached the NDTP list of 25 detailed technical questions to their "reasons why" letters.

(16) The template "reasons why" letter says that the Appellants do not consider that *Rowe* was determinative of their High Court claims.

(17) The Appellants each used Mr Astley's words when sending these "reasons why" letters to HMRC, and followed his detailed instructions about despatch.

(18) Mr Benton and Mr Jackson did not appeal the closure notices; Mr Hudson did appeal, but the grounds of that appeal were not before the Tribunal.

(19) The Appellants continued to believe, at least until the date they filed their grounds of appeal with the Tribunal, that the HMRC Guidance contained Example 7.

177. The following circumstances are specific to the individual Appellants:

(1) Mr Benton discussed whether he should take corrective action with his general accountant, Mr Bridge, and Mr Bridge instructed NDTP to send Mr Benton a copy of the template "reasons why" letter. It was also Mr Bridge who

called HMRC on 1 February 2016, when Mr Benton received the precursor letter to the issuance of penalties, and his firm sent the letter of 10 February 2016 which sought to challenge the penalty, although the material relied on was provided by NDTP.

(2) When Mr Jackson received HMRC's letter refusing to accept his representations, he first contacted his accountant, Mr Towler, and having had that discussion, decided not to take corrective action.

(3) Mr Hudson had previously liaised with NDTP in relation to his wife's FN carry back claim. He was however unresponsive to NDTP's emails about his own corrective action, responding only when he was sent his own template draft "reasons why" letter. Mr Astley's covering letter says that he had "made a few assumptions" as to what Mr Hudson wanted to do, and Mr Hudson accepted those assumptions.

178. In *Onillon* at [172] Judge Jones accepted HMRC's submission that "the purpose of Part 4 Chapter 2 FA14 is to discourage taxpayers from pursuing their dispute in avoidance cases once their scheme has been shown to fail in another party's litigation". I agree with that summary of the statutory purpose of the FN provisions. Judge Jones continued at [173]:

> "A position which, viewed in context, frustrates the purpose of the legislation is unlikely to be viewed as reasonable in all the circumstances. For example, it is not enough for a taxpayer to simply decide to see how the litigation plays out and not take corrective action. Any decision not to take corrective action should be a properly informed choice."

179. I also agree that the purpose of the statutory provisions is a "circumstance" which must be considered when assessing whether the Appellants' actions were reasonable.

Relevant circumstances which are unknown

180. The following circumstances are relevant to the Appellants' decisions not to take corrective action, but it has not been possible to make any related findings of fact.

(1) Whether they read the following material sent to them by NDTP (which I have called "the NDTP material" in the rest of this judgment):

(a) the grounds for the High Court Claims;

(b) the letters of representation;

(c) the parts of the Update Note relevant to FNs;

(d) the statement in the Update Note that *Rowe* had no relevance to their position; and

(e) the template "reasons why" letter, including the list of 25 detailed technical questions.

(2) If they read all the NDTP material, whether they understood it.

(3) If they did not understand any or all of the NDTP material, whether they took further advice from NDTP, from their own general accountant, or from a lawyer or accountant unconnected with the Scheme, and if so, the nature and extent of that advice, and whether they then understood the NDTP material.

(4) If they did not understand the NDTP material but did not ask for it to be explained, why this was.

(5) The extent to which each Appellant relied on his general accountant, and the basis for that reliance.

(6) What they understood by the references to a "strong QC opinion" and whether they thought that opinion concerned whether it was reasonable to take corrective action, or whether they understood that it related to the High Court claims.

(7) Given that the Update told them "to ensure you are happy that the QC opinion is substantive and that the QC is reputable" and to "read again the QC opinion to ensure it covers your opinion", why they did not ask to see that opinion and the related instructions.

(8) Given that the Update also said that "an appeal is due to be heard by the Court of Appeal in the *de Silva* case in October 2015", whether they were aware of the UT decision in *de Silva*, and if so, whether they understood that it concerned loss carrybacks and that the appellants in that appeal were relying on *Cotter*.

(9) Given the references to *Rowe* in the Appellants' letters to HMRC, whether they knew that:

(a) *Rowe* concerned loss carrybacks;

(b) the appellants in *Rowe* were relying on *Cotter*, and

(c) the judgment in *Rowe* had been endorsed by Simler J in *de Silva*.

(10) Whether they had decided that their refusal to take corrective action did not frustrate the purpose of the legislation, and if so, the basis for their view.

All the relevant circumstances?

181. I find that the Appellants cannot meet the statutory test of showing that it was reasonable "in all the circumstances" not to take corrective action, because it has not been possible to establish all the circumstances relevant to their decisions not to take corrective action.

182. The missing facts are not of peripheral relevance, but are of fundamental importance. I agree entirely with Ms Nathan's words, which I have set out at §168. It has not been possible to establish whether the Appellants had made "an informed decision, or whether they simply shut their eyes in order not to have to take corrective action and hand over the benefit of the losses that had been denied to them by *Flanagan*".

183. Contrary to Ms Montez-Manzano's submissions, this is not a case where it is possible to rely only on documents to make the necessary findings of fact; it is not similar to *Anderson*. Neither is it similar to a "default paper" case. That procedure only applies, under the Practice Statement issued by the Chamber President on 29 April 2013, to low value penalty cases about reasonable excuse or delivery of documents. Moreover, appellants in default paper cases almost invariably submit written evidence explaining their actions.

Reasonable?

184. The second necessary step is for the Tribunal to assess whether the Appellants acted "reasonably" in all the circumstances. The case law describes this process as follows (emphases added):

> (1) the FTT must assess whether the taxpayer's actions were "what a prudent and reasonable hypothetical person would have done in his situation in light of all the facts and the legislative context", see *Onillon* at [175].
>
> (2) The reasonableness of an action "..is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different", see *Barratt* at [161].
>
> (3) the issue before the FTT is "whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times", see *Perrin* at [71].
>
> (4) The FTT must "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", see *Perrin* at [81(3)].

185. I have only been able to make the following very limited findings of fact about the experience, knowledge and other relevant attributes of the Appellants:

> (1) They earned significant amounts during the years in question: Mr Benton claimed a loss of £1,477,851, of which he carried back £371,548; Mr Jackson claimed a loss of £458,833, all of which was carried back; Mr Hudson claimed losses of £209,818, of which £81,812 was carried back.
>
> (2) Mr Jackson is the founder and chief executive of a business operating in Preston, and he was awarded an OBE.
>
> (3) Mr Hudson was married, and his wife, Henia, also participated in the Scheme.

186. I was unable to make findings about the Appellants' age, work, experience, health, legal or tax expertise, or about any personal matter, other than the limited facts set out above. It follows that has not been possible to establish how "the reasonable person in the position of each Appellant" would have acted.

Decision on "reasonable in all the circumstances"

187. I therefore find that the Appellants have not met their burden of proving that their actions were "reasonable in all the circumstances" because:

(1) they have not provided sufficient evidence to allow me to identify "all the circumstances" relevant to their decisions not to take corrective action; and

(2) it has also not been possible to make sufficient findings about their personal circumstances, so I have been unable to assess whether their actions were reasonable.

188. It follows that I refuse this ground of appeal.

189. Before I came to this conclusion, I considered whether that outcome was fair to the Appellants, or whether I should recall the parties and direct the provision of witness evidence. In deciding that it was fair and just to decide this appeal on the basis set out above, I took into account the following factors:

(1) in their letter of 19 April 2018 HMRC warned NDTP of the difficulties the Appellants would be likely to encounter in seeking to meet their burden of proof, were they to continue to refuse to provide witness evidence, so the Appellants were on notice of the issue;

(2) after NDTP received that letter, the Appellants had plenty of time before the start of this hearing to make an application to admit witness statements; HMRC had explicitly stated that they would not object to such an application;

(3) the Appellants could have simply attended the hearing to give oral evidence, because Judge Richards had not directed the provision of witness statements; and

(4) throughout the hearing, the Appellants' position remained that sufficient evidence had been provided and their witness evidence was unnecessary. Ms Montez-Manzano did not suggest at any point that the Appellants had changed their position, for instance by asking for the case to be adjourned or for witness evidence to be admitted on the third day of the hearing (which took place after a five day interval).

190. I add for completeness that during the hearing I drew the parties' attention to *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, subsequently approved by the Court of Appeal in *Society of Lloyd's v Jaffray* [2002] EWCA Civ 1101 at [407], where Brooke LJ said:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

191. There is no doubt that the Appellants "might be expected to have material evidence to give" on the issues in dispute. However, having considered the matter further, I decided there was no need for me to consider whether to make an "adverse inference". The issue before the Tribunal is whether the Appellants have failed to meet the statutory test because they have not provided evidence of "all the circumstances". No adverse inference finding is required.

Whether the penalty should be upheld, varied or set aside

192. I now turn to the quantum of the penalty. I begin with the statute, and then consider HMRC's approach to the relevant provisions, both generally and as applied to the Appellants, before setting out my conclusions.

The statute

193. FA 2014, s 210(1)(c) allows HMRC to reduce a penalty from the 50% starting point if the person "has co-operated with HMRC". Section 210(3) both defines and limits what is meant by "co-operation" (my emphasis):

> "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."

194. Of these, factor (a) is self-explanatory: a person receives a discount for co-operation if he has "provided reasonable assistance to HMRC in quantifying the advantage". I had two difficulties with the other factors.

195. The first difficulty was whether these factors were cumulative, so each of the factors had to be satisfied for full mitigation to be granted. I decided that was not correct, because a person cannot both satisfy factor (b) by counteracting the denied

advantage *himself*, and also satisfy factor (c), which is to "provide HMRC with information to enable *HMRC* to take the corrective action". Factor (d) appears to relate to those who have open appeals rather than open enquiries, because in those cases, the only corrective action which can be taken is for the taxpayer to "enter into an agreement" with HMRC so as to counteract the denied advantage by way of a contract settlement: it is too late to amend the SA return which is no longer under enquiry. Factor (e) – allow HMRC to access tax records to ensure the denied advantage is fully counteracted – could be combined with factors (c) or (d), but not with factor (b), because in that scenario the taxpayer has himself counteracted the advantage.

196. Thus, my analysis of s 210(3) is that it sets out two types of co-operation:

(1) providing reasonable assistance to HMRC in quantifying the tax advantage (factor (a)); and

(2) counteracting the denied advantage, either by:

(b) amending the relevant SA return(s);

(c) providing the information to HMRC so they can take the relevant corrective action; or

(d) by coming to an agreement with HMRC to give up the denied advantage.

Where the corrective action is being taken by HMRC, the taxpayer will also "co-operate" if he "allows HMRC to access the relevant tax records to ensure that full reversal of the denied advantage" (factor (e)).

197. My second difficulty was that an FN only arises in the first place if a person has *not* counteracted the denied advantage or taken the relevant steps to allow HMRC to counteract it, so it was difficult to see how a person could earn mitigation under factors (b) to (e). As factor (b) was relevant to the Appellants, I asked HMRC if they were able to explain their understanding of that factor. On the final day of the hearing, Ms Nathan handed up a note ("the Penalty Note") setting out HMRC's policy; Ms Montez-Manzano did not object to that evidence being provided. The Penalty Note said that:

(1) A penalty is payable if counteraction does not take place by the date set out in the FN. However, if an FN recipient subsequently counteracts the advantage, HMRC will reduce the penalty under factor (b) to take account of that later compliance, provided the advantage is counteracted before issuance of the closure notice. That is because, after the issuance of the closure notice, it is too late for counteraction.

(2) The amount of the reduction is calculated based on a sliding scale which reflects the time period after the deadline, so that "the shorter the time between the end of the specified period and the taking of corrective action, the greater the allowance would be". For example, if corrective action is taken just after the deadline in the FN, HMRC will give full mitigation under factor (b). The FN recipient would, of course, still be subject to the minimum 10% penalty, and

so be in a worse position that if he had taken the same corrective action by the specified deadline.

198. After the hearing, I reviewed the Notes on Clauses for FA 2014, which provide relevant guidance on Parliament's intention, see *R (oao Westminster City Council) v National Asylum Support Service* [2002] UKHL 38). The relevant Note confirmed that the purpose of factor (b) is to allow the penalty to be reduced if corrective action is taken after the date given on the FN, although it makes no reference to the mitigation period ending with the issuance of the closure notice.

199. Although neither the Penalty Note or the Notes on Clauses refer to factors (c) to (e), it seems to me that the same issues arise. They all require the taxpayer to work with HMRC so that there is full counteraction of the tax advantage. If that had happened before the deadline in the FN, no penalty would have been due. It follows that the mitigation being given by factors (b) through to (e) applies where the taxpayer takes corrective action after the deadline, or enables HMRC to take corrective action.

200. Other statutory provisions relevant to mitigation are:

(1) Section 201(2), which requires that HMRC must consider the "timing, nature and extent" of the taxpayer's co-operation when deciding the amount of mitigation;

(2) Section 214(8), which provides that the FTT can only either affirm HMRC's decision, or substitute "another decision which HMRC had power to make". It follows that the FTT can only reduce a penalty if the taxpayer has "co-operated" within the meaning of s 210(3), because that is the only basis on which HMRC can mitigate; and

(3) Section 210(4), which states that the minimum penalty is 10%. HMRC therefore does not have power to impose a lower penalty. The FTT is bound by the same provision, because it can only make a decision which HMRC had the power to make.

HMRC's application of those provisions generally

201. The penalty notices sent to the Appellants included a penalty explanation schedule ("the Schedule"), which sets out HMRC's general approach when weighing the factors taken from FA 2014, s 210(3). Although the factors themselves are binding on the FTT, because they are taken directly from the statute, HMRC's weighting is not. The Schedule is as follows:

		Max %
(a)	provided reasonable assistance to HMRC in quantifying the advantage	20
(b)	counteracted the denied advantage	50
(c)	provided HMRC with information enabling corrective action to be taken by HMRC	10
(d)	provided HMRC with information enabling them to enter into an	10

	agreement with [the person] for the purpose of counteracting the denied advantage	
(e)	allowed HMRC to access tax records to ensure the denied advantage is fully counteracted	10
		100

202. HMRC applied these percentages in the following way:

(1) the statutory maximum penalty was 50% and the statutory minimum was 10%, leaving 40% which could be subject to mitigation.

(2) The above percentages were applied to that 40%.

(3) By way of example, a person who satisfied only factor (a) would be entitled to mitigation of 20% x 40%, namely 8%, leaving a penalty in charge of 32% plus the minimum 10%, so a total of 42% compared to the maximum of 50%.

203. The Penalty Note explained that HMRC weighted factor (b) at 50% because "the purpose of the legislation is to resolve enquiries and drive settlement of schemes that are considered to fail", and it was therefore appropriate to place the heaviest weighting against that factor. HMRC's table then gives a 10% weighting to each of factors (c) to (e), making a total of 100%.

204. However, that weighting assumes a person is able to satisfy all of factors (a) through to (e). I have already explained why I consider that this is incorrect. I therefore decline to follow HMRC's weighting of the statutory factors.

Penalties and mitigation as applied to the Appellants

205. Mr Benton and Mr Hudson both took some corrective action for the year which was under enquiry, but refused to take corrective action for the amounts related to their carry back loss claims. Mr Jackson had carried back all the Scheme losses, and took no corrective action.

206. The penalty on each Appellant was based on the amount which remained outstanding, so Mr Jackson's penalty was based on all the losses claimed, and the penalty for the other two Appellants was based on the denied advantage arising from their carry back claims.

207. As already noted earlier in this decision, Ms Nathan accepted that, in each case, the denied advantage had been wrongly calculated. Based on the correct figure, 30% of the denied advantage would be £50,881.20 for Mr Jackson (not £50,881.32) and £24,543.78 for Mr Hudson (not £25,766.40). The parties asked the Tribunal to determine the correct percentage mitigation which would apply to Mr Benton, and they would seek to agree the correct calculation of the denied advantage after the hearing.

208. HMRC had provided each Appellant with an identical Schedule stating that penalty mitigation had been calculated on the following basis:

		Max %	Given
(a)	provided reasonable assistance to HMRC in quantifying the advantage	20	20
(b)	counteracted the denied advantage	50	0
(c)	provided HMRC with information enabling corrective action to be taken by HMRC	10	10
(d)	provided HMRC with information enabling them to enter into an agreement with P for the purpose of counteracting the denied advantage	10	10
(e)	allowed HMRC to access tax records to ensure the denied advantage is fully counteracted	10	10
		100	50

209. Thus, HMRC had mitigated the penalties by 50% of the 40% available, making 20%. The remaining 20% was added to the minimum 10% penalty, so the total penalty charged was 30% of the denied advantage.

210. The Schedule gave further explanations:

(1) In relation to factor (a), it stated "you have already given us enough information with your tax return and during the compliance check to enable us to work out the amount of the tax advantage".

(2) In relation to factor (b), it stated "you did not take corrective action in full by the deadline for doing so. However, you took corrective action in part and in time. This penalty is calculated by reference to the part of the denied advantage for which you did not take corrective action. We consider that you have not given us any co-operation in counteracting that part of the denied advantage".

(3) In relation to the remaining three elements, the Schedule stated "we did not need you to do anything for this item".

211. It was noteworthy that the Schedule stated, in relation to factors (c) through to (e), that HMRC "did not need you to do anything for this item". That may indicate that HMRC, too, have decided that the factors cannot be read cumulatively, despite the way they are set out in their Schedule. But the effect of their weighting approach is to award the Appellants 12% mitigation (10% x 3 x 40%) for correction factors (c) to (e), even though factors (c) and (d) are alternatives to factor (b), and factor (e) was not met: the Appellants did not allow HMRC "to access tax records to ensure the denied advantage is fully counteracted".

212. As I have explained, it seems to me that co-operation has two elements – quantification and counteraction. Since a maximum reduction of 40% is available, it seems reasonable to give 20% for each element, and apply mitigation in the light of the "timing, nature and extent" of a person's co-operation in relation to each element.

213. HMRC accepted that the Appellants had all "provided reasonable assistance to HMRC in quantifying the tax advantage", and that they did so as soon as they were challenged, in a pro-active and collaborative manner, and to a reasonable extent. This was why HMRC gave the maximum reduction for factor (a). I agree: under my revised approach, the Appellants would also obtain the maximum reduction for the "quantification" element of their penalties, being 20%.

214. However, they did not take the relevant corrective action (factor (b)); they did not provide HMRC with information allowing HMRC to take corrective action (factor (c)) or provide HMRC with tax records for that purpose (factor (e)). Factor (d) cannot apply, because the enquiries remained open at the time the penalty was charged. Since none of factors (b) to (e) have been satisfied, the Appellants' penalties cannot be mitigated for the "counteraction" element of co-operation. There is no scope in the statute for me to award a penalty reduction for any other reason.

215. The Appellants are therefore entitled to a 20% reduction for quantification, and nil for counteraction. As a result, their penalty is reduced from 50% to 30%: the same figure as charged by HMRC, but by a different process.

Overall decision, related cases and appeal rights

216. For the reasons set out above, I refuse the Appellants' appeals and uphold the penalties at 30% of the denied advantage, being £50,881.20 for Mr Jackson and £24,543.78 for Mr Hudson. The parties are asked to agree the correct calculation of the penalty on Mr Benton on the basis that it is 30% of the denied advantage, but if they are unable to do so, they may apply to the Tribunal for that issue to be determined. Any such application must be made within 30 days of the date of issue of this decision.

217. Subject to Rule 18(4) of the Tribunal Rules, this decision is binding on the related cases in so far as it relates to the common or related issue set out by Judge Richards, see §13, but not otherwise.

218. My thanks to both Counsel for their helpful submissions.

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

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 27 SEPTEMBER 2018

APPENDIX: EXTRACTS FROM LEGISLATION

TAXES MANAGEMENT ACT 1970

9ZA Amendment of personal or trustee return by taxpayer

(1) A person may amend his return under section 8 or 8A of this Act by notice to an officer of the Board.

(2) An amendment may not be made more than twelve months after the filing date.

(3) In this section "the filing date", in respect of a return for a year of assessment (Year 1), means

(a) 31st January of Year 2, or

(b) if the notice under section 8 or 8A is given after 31st October of Year 2, the last day of the period of three months beginning with the date of the notice.

9B Amendment of return by taxpayer during enquiry

(1) This section applies if a return is amended under section 9ZA of this Act (amendment of personal or trustee return by taxpayer), or in accordance with Chapter 2 of Part 4 of the Finance Act 2014 (amendment of return after follower notice), at a time when an enquiry is in progress into the return.

(2) The amendment does not restrict the scope of the enquiry but may be taken into account (together with any matters arising) in the enquiry.

(3) So far as the amendment affects the amount stated in the self-assessment included in the return as the amount of tax payable, it does not take effect while the enquiry is in progress and--

(a) if the officer states in the closure notice that he has taken the amendment into account and that--

(i) the amendment has been taken into account in formulating the amendments contained in the notice, or

(ii) his conclusion is that the amendment is incorrect,

the amendment shall not take effect;

(b) otherwise, the amendment takes effect when the closure notice is issued.

(4) For the purposes of this section the period during which an enquiry is in progress is the whole of the period--

(a) beginning with the day on which notice of enquiry is given, and

(b) ending with the day on which the enquiry is completed.

FINANCE ACT 2014, PART 4

199 Overview of Part 4

In this Part--

(a) sections 200 to 203 set out the main defined terms used in the Part,

(b) Chapter 2 makes provision for follower notices and for penalties if account is not taken of judicial rulings which lay down principles or give reasoning relevant to tax cases,

(c) Chapter 3 makes--

(i) provision for accelerated payments to be made on account of tax…

201 "Tax advantage" and "tax arrangements"

(1) This section applies for the purposes of this Part.

(2) "Tax advantage" includes--

(a) relief or increased relief from tax,

(b) repayment or increased repayment of tax,

(c) avoidance or reduction of a charge to tax or an assessment to tax,

(d) avoidance of a possible assessment to tax,

(e) deferral of a payment of tax or advancement of a repayment of tax, and

(f) avoidance of an obligation to deduct or account for tax.

(3) Arrangements are "tax arrangements" if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.

(4) "Arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable).

Chapter 2

Follower Notices

Giving of follower notices

204 Circumstances in which a follower notice may be given

(1) HMRC may give a notice (a "follower notice") to a person ("P") if Conditions A to D are met.

(2) Condition A is that--

(a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or

(b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax, but that appeal has not yet been--

(i) determined by the tribunal or court to which it is addressed, or

(ii) abandoned or otherwise disposed of.

(3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular tax arrangements ("the chosen arrangements").

(4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements.

(5) Condition D is that no previous follower notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements, judicial ruling and tax period.

(6) A follower notice may not be given after the end of the period of 12 months beginning with the later of--

(a) the day on which the judicial ruling mentioned in Condition C is made, and

(b) the day the return or claim to which subsection (2)(a) refers was received by HMRC or (as the case may be) the day the tax appeal to which subsection (2)(b) refers was made.

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

(1) This section applies for the purposes of this Chapter.

(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) the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage, and

(c) it is a final ruling.

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

(a) a ruling of the Supreme Court, or

(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.

206 Content of a follower notice

A follower notice must--

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

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

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

207 Representations about a follower notice

(1) Where a follower notice is given under section 204, P has 90 days beginning with the day that notice is given to send written representations to HMRC objecting to the notice on the grounds that--

(a) Condition A, B or D in section 204 was not met,

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

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

(2) HMRC must consider any representations made in accordance with subsection (1).

(3) Having considered the representations, HMRC must determine whether to--

(a) confirm the follower notice (with or without amendment), or

(b) withdraw the follower notice,

and notify P accordingly.

Penalties

208 Penalty if corrective action not taken in response to follower notice

(1) This section applies where a follower notice is given to P (and not withdrawn).

(2) P is liable to pay a penalty if the necessary corrective action is not taken in respect of the denied advantage (if any) before the specified time.

(3) In this Chapter "the denied advantage" means so much of the asserted advantage (see section 204(3)) as is denied by the application of the principles laid down, or reasoning given, in the judicial ruling identified in the follower notice under section 206(a).

(4) The necessary corrective action is taken in respect of the denied advantage if (and only if) P takes the steps set out in subsections (5) and (6).

(5) The first step is that--

(a) in the case of a follower notice given by virtue of section 204(2)(a), P amends a return or claim to counteract the denied advantage; …

(6) The second step is that P notifies HMRC--

(a) that P has taken the first step, and

(b) of the denied advantage and (where different) the additional amount which has or will become due and payable in respect of tax by reason of the first step being taken.

(7) In determining the additional amount which has or will become due and payable in respect of tax for the purposes of subsection (6)(b), it is to be assumed that, where P takes the necessary action as mentioned in subsection (5)(b), the agreement is then entered into.

(8) In this Chapter--

"the specified time" means--

(a) if no representations objecting to the follower notice were made by P in accordance with subsection (1) of section 207, the end of the 90 day post-notice period;

(b) if such representations were made and the notice is confirmed under that section (with or without amendment), the later of--

(i) the end of the 90 day post-notice period, and

(ii) the end of the 30 day post-representations period;

"the 90 day post-notice period" means the period of 90 days beginning with the day on which the follower notice is given;

"the 30 day post-representations period" means the period of 30 days beginning with the day on which P is notified of HMRC's determination under section 207.

(9) No enactment limiting the time during which amendments may be made to returns or claims operates to prevent P taking the first step mentioned in subsection (5)(a) before the tax enquiry is closed (whether or not before the specified time).

209 Amount of a section 208 penalty

(1) The penalty under section 208 is 50% of the value of the denied advantage.

(2) Schedule 30 contains provision about how the denied advantage is valued for the purposes of calculating penalties under this section.

(3) Where P before the specified time--

(a) amends a return or claim to counteract part of the denied advantage only, or

(b) takes all necessary action to enter into an agreement with HMRC (in writing) for the purposes of relinquishing part of the denied advantage only,

in subsections (1) and (2) the references to the denied advantage are to be read as references to the remainder of the denied advantage.

210 Reduction of a section 208 penalty for co-operation

(1) Where--

(a) P is liable to pay a penalty under section 208 of the amount specified in section 209(1),

(b) the penalty has not yet been assessed, and

(c) P has co-operated with HMRC,

HMRC may reduce the amount of that penalty to reflect the quality of that co-operation.

(2) In relation to co-operation, "quality" includes timing, nature and extent.

(3) 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.

(4) But nothing in this section permits HMRC to reduce a penalty to less than 10% of the value of the denied advantage.

211 Assessment of a section 208 penalty

(1) Where a person is liable for a penalty under section 208, HMRC may assess the penalty.

(2) Where HMRC assess the penalty, HMRC must--

(a) notify the person who is liable for the penalty, and

(b) state in the notice a tax period in respect of which the penalty is assessed.

(3) A penalty under section 208 must be paid before the end of the period of 30 days beginning with the day on which the person is notified of the penalty under subsection (2).

(4) An assessment--

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

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

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

(5) No penalty under section 208 may be notified under subsection (2) later than--

(a) in the case of a follower notice given by virtue of section 204(2)(a) (tax enquiry in progress), the end of the period of 90 days beginning with the day the tax enquiry is completed, and

(b) in the case of a follower notice given by virtue of section 204(2)(b) (tax appeal pending), the end of the period of 90 days beginning with the earliest of--

(i) the day on which P takes the necessary corrective action (within the meaning of section 208(4)),

(ii) the day on which a ruling is made on the tax appeal by P, or any further appeal in that case, which is a final ruling (see section 205(4)), and

(iii) the day on which that appeal, or any further appeal, is abandoned or otherwise disposed of before it is determined by the court or tribunal to which it is addressed.

(6) In this section a reference to an assessment to tax, in relation to inheritance tax, is to a determination.

213 Alteration of assessment of a section 208 penalty

(1) After notification of an assessment has been given to a person under section 211(2), the assessment may not be altered except in accordance with this section or on appeal.

(2) A supplementary assessment may be made in respect of a penalty if an earlier assessment operated by reference to an underestimate of the value of the denied advantage.

(3) An assessment or supplementary assessment may be revised as necessary if it operated by reference to an overestimate of the denied advantage; and, where more than the resulting assessed penalty has already been paid by the person to HMRC, the excess must be repaid.

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.

(4) An appeal under this section must be made within the period of 30 days beginning with the day on which notification of the penalty is given under section 211.

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

(6) Subsection (5) does not apply--

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

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

(7) In this section a reference to an assessment to tax, in relation to inheritance tax, is to a determination.

(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.

(10) The cancellation under subsection (8) of HMRC's decision on the ground specified in subsection (3)(d) does not affect the validity of the follower notice, or of any accelerated payment notice or partner payment notice under Chapter 3 related to the follower notice.

(11) In this section "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of subsection (5)).

217 Transitional provision

(1) In the case of judicial rulings made before the day on which this Act is passed, this Chapter has effect as if for section 204(6) there were substituted--

"(6) A follower notice may not be given after--

(a) the end of the period of 24 months beginning with the day on which this Act is passed, or

(b) the end of the period of 12 months beginning with the day the return or claim to which subsection (2)(a) refers was received by HMRC or (as the case may be) with the day the tax appeal to which subsection (2)(b) refers was made,

whichever is later."

(2) Accordingly, the reference in section 216(10) to the period of 12 months includes a reference to the period of 24 months mentioned in the version of section 204(6) set out in subsection (1) above.