Appeal numbers
UT/2018/14, 15

Partner Payment Notices – penalty for late payment – jurisdiction of FTT on appeal against penalty notice to entertain challenge to PPN – whether reasonable excuse – whether special circumstances – whether penalty notices invalid due to incorrect statement of date on which PPN due or due to failure to identify issuing officer – applicability of section 114(1) Taxes Management Act 1970.

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

DAVID BEADLE **Appellant**

- and –

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

Tribunal: The Hon Mr Justice Arnold and Judge Jonathan Cannan

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 12-13 March 2019

Keith Gordon and Ximena Montes Manzano, instructed by Jeffries Law LLP, for the Appellant

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

DECISION

Introduction

1. This is an appeal from two decisions of the First-Tier Tribunal (Tax): one by Judge Jonathan Richards dated 5 July 2017 [2017] UKFTT 544 (TC) and one by Judge Rupert Jones dated 17 November 2017 [2017] UKFTT 829 (TC). In the first decision Judge Richards held that the FTT did not have jurisdiction when considering an appeal against a penalty notice for non-payment of a Partner Payment Notice ("PPN") to entertain challenges to the underlying PPN. In the second decision Judge Jones held that the Appellant did not have a reasonable excuse for late payment of the PPN, nor were there special circumstances. He also rejected certain challenges to the validity of the penalty notice.

The facts

2. There is no dispute as to the facts, which can be summarised as follows.

3. The Appellant was a participant in a marketed tax avoidance scheme involving a partnership called Ingenious Film Partners LLP ("the Partnership") in the year ending 5 April 2005. The Partnership entered into arrangements (which were "DOTAS arrangements" for the purposes of section 219(5) Finance Act 2014 ("FA 2014")) by which it was claimed that a trading loss was realised for that year. The Appellant claimed to carry back his share of that loss to reduce his taxable income for the tax year 2001-02 and obtained relief by way of repayment of approximately £100k calculated by reference to tax originally paid for the 2001-02 tax year.

4. HMRC opened an enquiry into the Partnership's tax return for, among others, the tax year 2004-05. On 30 November 2012 HMRC issued the Partnership with a closure notice reducing the Partnership's trading loss to nil. There is an appeal against the closure notice.

5. On 3 October 2014 HMRC sent the Appellant a letter informing him that he would soon be receiving a PPN in relation to his involvement in the Partnership scheme in the 2004-05 tax year. The letter enclosed an information sheet entitled "CC/FS24 - Tax avoidance schemes - accelerated payments" which set out the consequences of non-payment of the PPN.

6. On 17 October 2014 HMRC issued the Appellant with the PPN. That notice required the Appellant to pay the sum of £100,054.80.

7. HMRC sent the Appellant a letter reminding him of the deadline for payment of the sum due pursuant to the PPN on 5 December 2014. This letter also stated that late payment would result in additional amounts being due.

8. By letter dated 5 January 2015 the Appellant made representations against the validity of the PPN on the basis that: (i) the amount of "understated tax" specified in the notice (which determined the amount due under the PPN) was

not due as a matter of law; and (ii) condition B in paragraph 3(3) of Schedule 32 to FA 2014 was not met. (The latter contention has not been pursued by the Appellant.)

9. By letter dated 14 May 2015 HMRC informed the Appellant that the representations were rejected and the PPN was confirmed. The Appellant did not make any application for judicial review of the decision to issue the PPN.

10. On 16 July 2015 a penalty notice was issued to the Appellant in respect of the non-payment of the PPN in the amount of £5,002.74 for the year ending 5 April 2005.

11. Shortly after receipt of the penalty notice the Appellant paid the sum demanded by the PPN in full.

12. By letter dated 23 August 2015 the Appellant appealed the penalty for late payment of the amount due under the PPN.

13. By letter dated 4 September 2015 HMRC responded to the Appellant's letter of appeal giving their view of the matter and offering him a review of the decision. The offer of a review was accepted by the Appellant by letter dated 15 September 2015. The review concluded that the Appellant had no reasonable excuse for non-payment of the PPN and upheld the penalty. The outcome of the review was communicated by HMRC to the Appellant by letter dated 18 March 2016.

14. On 4 April 2016 the Appellant appealed to the FTT against the penalty notice.

The statutory framework

15. FA 2014 permits HMRC to demand accelerated payment of tax in dispute in certain prescribed circumstances. The Accelerated Payments code is found in Part 4, Chapter 3 of the Act. Under that code, HMRC may issue Accelerated Payment Notices ("APNs") to taxpayers. Where the taxpayer was a member of a partnership, a parallel regime involving the issue of PPNs is engaged. For present purposes, there is no material distinction between APNs and PPNs.

16. Schedule 32 to FA 2014 provided at the relevant time and so far as relevant as follows:

> "**5 Representations about a partner payment notice**
>
> (1) This paragraph applies where a partner payment notice has been given to a relevant partner under paragraph 3 (and not withdrawn).
>
> (2) The relevant partner has 90 days beginning with the day that notice is given to send written representations to HMRC—
> (a) objecting to the notice on the grounds that Condition A, B or C in that paragraph was not met, or

(b) objecting to the amount specified in the notice under paragraph 4(1)(b),

(3) HMRC must consider any representations made in accordance with subparagraph (2).

(4) Having considered the representations, HMRC must—
(a) if representations were made under sub-paragraph (2)(a), determine whether—
(i) to confirm the partner payment notice (with or without amendment), or
(ii) to withdraw the partner payment notice, and
(b) if representations were made under sub-paragraph (2)(b) (and the notice is not withdrawn under paragraph (a)), determine whether a different amount ought to have been specified as the understated partner tax, and then—
(i) confirm the amount specified in the notice, or
(ii) amend the notice to specify a different amount,
and notify P accordingly.

6 Effect of partner payment notice

(1) This paragraph applies where a partner payment notice has been given to a relevant partner (and not withdrawn).

(2) The relevant partner must make a payment ("the accelerated partner payment") to HMRC of the amount specified in the notice in accordance with paragraph 4(1)(b).

(3) The accelerated partner payment is to be treated as a payment on account of the understated partner tax (see paragraph 4).

(4) The accelerated partner payment must be made before the end of the payment period.

(5) 'The payment period' means—
(a) if the relevant partner made no representations under paragraph 5, the period of 90 days beginning with the day on which the partner payment notice is given;
(b) if the relevant partner made such representations, whichever of the following ends later—
(i) the 90 day period mentioned in paragraph (a);
(ii) the period of 30 days beginning with the day on which the relevant partner is notified under paragraph 5 of HMRC's determination.

…

7 Penalty for failure to comply with partner payment notice

Section 226 (penalty for failure to make accelerated payment on time) applies to accelerated partner payments as if—

(a) references in that section to the accelerated payment were to the accelerated partner payment,
(b) references to P were to the relevant partner, and
(c) 'the payment period' had the meaning given by paragraph 6(5)."

17. Section 226 FA 2014 provides, so far as relevant:

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

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

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

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

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

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

…

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

18. Schedule 56 to the Finance Act 2009 ("FA 2009") provides, so far as relevant:

"**Special reduction**

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

(2) In sub-paragraph (1) 'special circumstances' does not include—
(a) ability to pay, or
(b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.

…

Assessment

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

(a) assess the penalty,

(b) notify P, and

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

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

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

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

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

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

…

Appeal

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

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

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

(2) Sub-paragraph (1) does not apply—

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

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

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

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

(a) affirm HMRC's decision, or

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

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

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

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

…

Reasonable excuse

16.(1) If P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for a failure to make a payment—

(a) liability to a penalty under any paragraph of this Schedule does not arise in relation to that failure, and

(b) the failure does not count as a default for the purposes of paragraphs 6, 8B, 8C, 8G and 8H.

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

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

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

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

19. Sections 30A and 31A of the Taxes Management Act 1970 ("TMA 1970") provide, so far as relevant:

"**30A Assessing procedure**

(1) Except as otherwise provided, all assessments to tax which are not self-assessments shall be made by an officer of the Board.

…

(3) Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.

…

31A Appeals: notice of appeal

(1) Notice of an appeal under section 31 of this Act must be given–

(a) in writing,
(b) within 30 days after the specified date,
(c) to the relevant officer of the Board.

…

(4) In relation to an appeal under section 31(1)(d) of this Act –
(a) the specified date is the date on which the notice of assessment was issued, and
(b) the relevant officer of the Board is the officer by whom the notice of assessment was given.

…"

20. Section 114(1) TMA 1970 provides:

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

The jurisdiction of the FTT

21. On his appeal to the FTT against the penalty notice, the Appellant wishes to contend that the underlying PPN was not lawfully issued by HMRC. He contends that the payment required by the PPN is excessive. It is not necessary for present purposes to consider the basis of that argument. Judge Richards was concerned in his decision with an application for disclosure. He held that the FTT had no jurisdiction to entertain the Appellant's contention. The Appellant submits that he was wrong.

22. In considering this issue, it is convenient to begin by setting out a number of propositions which are common ground.

23. First, the purpose of the APN/PPN regime is to deter people from entering into tax avoidance schemes, in particular by removing the cash flow benefit from the taxpayer and giving it to HMRC pending determination of the correct tax treatment of the scheme: see *R (on the application of) Rowe v Revenue and Customs Commissioners* [2015] EWHC 2293 (Admin), [2015] BTC 27 at [146]-[147] (Simler J) referred to with apparent approval on appeal [2017] EWCA Civ 2105, [2018] 1 WLR 3039 at [38] (Arden LJ, as she then was). Thus the philosophy underlying the APN/PPN regime is that taxpayers should "pay now, dispute later".

24. Secondly, the decision by HMRC to serve a PPN upon a taxpayer is a decision by a public body. As such, it is in principle amenable to challenge by the taxpayer on public law grounds by way of judicial review.

25. Thirdly, like any decision of a public body, the decision to serve a PPN upon a taxpayer must be presumed to be valid unless and until it is successfully challenged. In the event that it is successfully challenged, then it will in general be recognised as having had no legal effect. (It is not necessary for present purposes to explore possible exceptions to the latter statement.)

26. Fourthly, the FTT is a statutory tribunal. Accordingly, the extent of its jurisdiction is determined by statute and it has no inherent jurisdiction.

27. Fifthly, the FTT has no jurisdiction to grant judicial review.

28. Sixthly, Parliament has provided taxpayers with a right of appeal against the underlying tax assessment (and in the present case the Partnership has exercised that right as mentioned above). Parliament has also provided taxpayers with a right of appeal against both a decision that a penalty is payable and as to the amount of the penalty in FA 2009 Schedule 56 paragraph 13 (and the Appellant has exercised that right). Parliament has not provided taxpayers with any right of appeal against PPNs. All that Parliament has provided is the right to make representations under FA2014 Schedule 32 paragraph 5 (and the Appellant exercised that right). It follows that taxpayers should avail themselves of that right before bringing any application for judicial review: see *R (on the application of Archer) v Revenue and Customs Commissioners* [2018] EWHC 695 (Admin), [2018] 1 WLR 3095.

29. The question which divides the parties is the impact in this context of the exclusivity principle which derives from the speech of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 at 285:

> "…. it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities.
>
> My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis …"

30. Counsel for the Appellant relied upon three authorities as establishing that there is an exception (or, perhaps more accurately, limit) to the exclusivity principle where a public body brings enforcement action of some kind against a person in a court or tribunal (including a court or tribunal whose only jurisdiction is statutory) and that person seeks to defend himself or herself by means of a challenge either to the enforcement decision itself or to some antecedent decision of that public body on public law grounds unless the relevant statutory scheme excludes such a challenge.

31. The first authority is *Wandsworth LBC v Winder* [1985] 1 AC 461, where the defendant was a tenant of a council flat who was permitted to defend county court proceedings for possession and arrears of rent by challenging council resolutions to increase tenants' rents. Lord Fraser of Tullybelton said at 509-510:

> "It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff. Moreover he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour. Apart from the provisions of Order 53 and section 31 of the Supreme Court Act 1981, he would certainly be entitled to defend the action on the ground that the plaintiff's claim arises from a resolution which (on his view) is invalid: see for example *Cannock Chase District Council v. Kelly* [1978] 1 W.L.R. 1, which was decided … a few months before Order 53 came into force ... I find it impossible to accept that the right to challenge the decision of a local authority in course of defending an action for non-payment can have been swept away by Order 53, which was directed to introducing a procedural reform. As my noble and learned friend Lord Scarman said in *Reg. v. Inland Revenue Commissioners, Ex parte Federation of Self Employed and Small Businesses Ltd.* [1982] A.C. 617, 647G 'The new R.S.C., Ord. 53 is a procedural reform of great importance in the field of public law, but it does not - indeed, cannot - either extend or diminish the substantive law. Its function is limited to ensuring "ubi jus, ibi remedium."' … Nor, in my opinion, did section 31 of the Supreme Court Act 1981 … have the effect of limiting the rights of a defendant sub silentio. I would adopt the words of Viscount Simonds in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260, 286 as follows:
> 'It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words.'"

32. The second authority is *Boddington v British Transport Police* [1999] 2 AC 143, where the defendant was permitted to defend a prosecution in a Magistrates'

Court for smoking on a train by challenging railway byelaws prohibiting smoking (although his challenge failed on substantive grounds). It is sufficient for present purposes to refer to three passages in the speech of Lord Irvine of Lairg LC. The first is at 152:

> "The question of the extent to which public law defences may be deployed in criminal proceedings requires consideration of fundamental principle concerning the promotion of the rule of law and fairness to defendants to criminal charges in having a reasonable opportunity to defend themselves. However, sometimes the public interest in orderly administration means that the scope for challenging unlawful conduct by public bodies may have to be circumscribed.
>
> Where there is a tension between these competing interests and principles, the balance between them is ordinarily to be struck by Parliament. Thus whether a public law defence may be mounted to a criminal charge requires scrutiny of the particular statutory context in which the criminal offence is defined and of any other relevant statutory provisions. That approach is supported by authority of this House."

33. The second passage is at 157:

> "In my judgment, precisely similar reasoning [to that in *Wandsworth v Winder*] applies, a fortiori, where a private citizen is taxed not with private law claims which are unfounded because based upon some ultra vires decision, but with a criminal charge which is unfounded, because based upon an ultra vires byelaw or administrative decision. The decision of the Divisional Court in *Reg. v. Reading Crown Court, Ex parte Hutchinson* [1988] Q.B. 384 (and the principal authorities referred to in it, including the classic decision in *Kruse v. Johnson* [1898] 2 Q.B. 91) is in accord with this view. There it was held that a defendant to a charge brought under a byelaw is entitled to raise the question of the validity of that byelaw in criminal proceedings before magistrates or the Crown Court, by way of defence. There was nothing in the statutory basis of the jurisdiction of the justices which precluded their considering a challenge to the validity of a byelaw: pp. 391-393, *per* Lloyd L.J."

34. The third passage is at 160-161:

> "However, in every case it will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.
>
> The recent decision of this House in *Reg. v. Wicks* [1998] A.C. 92 is an example of a particular context in which an administrative act triggering

> consequences for the purposes of the criminal law was held not to be capable of challenge in criminal proceedings, but only by other proceedings. … Lord Hoffmann, in the leading speech, emphasised that the ability of a defendant to criminal proceedings to challenge the validity of an act done under statutory authority depended on the construction of the statute in question. …
>
> The decision of the Divisional Court in *Quietlynn Ltd v Plymouth City Council* [1988] 1 QB 114 is justified on similar grounds …
>
> The particular statutory schemes in question in *Reg. v. Wicks* [1998] A.C. 92 and in the *Quietlynn case* [1988] 1 Q.B. 114 did justify a construction which limited the rights of the defendant to call the legality of an administrative act into question. But in my judgment it was an important feature of both cases that they were concerned with administrative acts specifically directed at the defendants, where there had been clear and ample opportunity provided by the scheme of the relevant legislation for those defendants to challenge the legality of those acts, before being charged with an offence."

35. The third authority is *Pawlowski v Dunnington* [1999] STC 550, where the defendant taxpayer was permitted to defend proceedings brought by the Revenue in a county court to recover tax due under an assessment by raising a public law challenge to the assessment. Simon Brown LJ held that the instant case could not be distinguished from *Wandsworth v Winder* on the ground that, unlike in that case, there was no pre-existing private law relationship between the parties. He also observed at 559:

> "As for the undoubted practical disadvantages which flow from raising a public law challenge like this by way of defence instead of judicial review, this too is an argument which *Winder* amply demonstrates (in the passage already cited) to be unavailable to the appellant. Indeed it seems to me plain that the disadvantages in that case were altogether greater than any which exist here. The decision there affected many third parties (tenants and ratepayers) and its challenge put at risk the whole basis of the council's financial administration over a period of years. The present challenge concerns only a single taxpayer's liability although of course the point of principle is clearly one of great importance to the Revenue and would affect many cases."

36. Counsel for the Appellant also drew attention to three tax cases (*Essex v Inland Revenue Commissioners* [1980] STC 378, *R v Inland Revenue ex p Taylor (No 2)* [1990] STC 379 and *Kempton v Special Commissioners* [1992] STC 823) in which it had been held that taxpayers could challenge the validity of certain other types of notices when resisting penalty proceedings; but rightly he did not suggest that these cases added anything to the principle established by the three main authorities he relied on. He also acknowledged the recent decision of the Court of Appeal in *R (on the application of PML Accounting Ltd) v Revenue and Customs Commissioners* [2018] EWCA Civ 2231, [2019] STC 1, where it

was held that there was no right to make such a challenge to an information notice, but submitted that it was to be distinguished from the present case.

37. Before proceeding further, we should record that counsel for HMRC did not, for the purposes of this appeal, dispute that the fact that, procedurally, the appeal to the FTT was brought by the Appellant rather than by HMRC did not detract from the proposition that, since it was HMRC which had served the penalty notice, as a matter of substance not form, the Appellant was seeking to defend himself against that enforcement action.

38. Counsel for HMRC relied upon a series of four cases as establishing that the only route for challenging an APN or PPN was by judicial review. The first is *Walapu v Revenue and Customs Commissioners* [2016] EWHC 658 (Admin), [2016] STC 1682 where Green J (as he then was) said:

> "8. The new arrangements thus: pursue a legitimate objective; are targeted precisely upon the class of persons who engage in the activity sought to be suppressed; and incorporate a vigorous process whereby the APN is likely to correlate to the actual tax position. These factual conclusions go a long way to answering the Claimant's criticisms. However, some Grounds are more specific and concern an alleged omission of particular procedural rights within the legislative scheme. Specifically, the Claimant objects to the absence of a right of representation prior to the issuance of the APN and the absence of a right of appeal. Neither argument is, in my judgment, sustainable. Both the statutory framework and the internal procedures introduced by HMRC provide ample opportunity for addressees of APNs to make their views known comprehensively to the Revenue. There is nothing deficient or unfair in these arrangements which could, remotely, amount to a denial of a right of representation. As to the alleged deficiency of the right of appeal there is, again, nothing in the point. If a taxpayer is aggrieved by the issuance of the APN procedure he may seek judicial review of it, or, compel (via the procedure laid down in Section 28A(4) Taxes Management Act 1970 ….) HMRC to issue a closure notice within a specified period, upon which occurrence the normal rights of appeal are engaged.
>
> …
>
> 73. In [*Rowe* at [65]] Simler J is recording her acceptance of the argument that the right to make representation would include any arguments that touch upon the statutory ground but which may also be couched in recognisable public law grounds such as irrationality. The example she gives is irrational behaviour going to 'efficacy' (ie of the tax scheme) and to computation. She does however carefully differentiate such arguments from those going to the ultimate merits. An APN is, by its nature, a provisional decision which may be rescinded (and the moneys obtained repaid with interest) if the final decision favours the taxpayer. As the judge inferred, to permit the representation process to become in effect the test bed for the final result would run counter to the objective

of the Finance Act 2014 and to the retained appeal structure which follows on from the assessment."

39. The second case is *Rowe*, where Arden LJ said at [15]:

> "HMRC must consider the taxpayer's representations. HMRC must then either confirm (with or without amendments) or withdraw the notice (if the Conditions were not met). The officer will confirm or amend the amount of the payment. The taxpayer has no right of appeal if HMRC confirms the APN or confirms or amends the amount of the payment (section 222 of the FA 2014). If the taxpayer wishes to challenge the validity of the APN, he must proceed by way of judicial review."

40. The present issue was not raised in either of those cases, however, and therefore they are not authoritative with respect to it.

41. The third case is *Smethurst v Revenue and Customs Commissioners* [2017] EWHC 1385 (Ch). In that case the claimant brought a Part 8 claim challenging a decision by HMRC to issue a Follower Notice ("FN") under section 204 FA 2014 (a similar regime to the APN regime). Chief Master Marsh concluded that the claim should be struck out as an abuse of process by virtue of the exclusivity principle. As counsel for the Appellant pointed out, however, in that case the challenge to the FN was brought by way of claim, not by way of defence. Moreover, Chief Master Marsh observed at [51] that there would be "considerably greater flexibility where a public law issue is properly raised by way of a defence as in *Winder* and *Pawlowski*".

42. The fourth case is *Revenue and Customs Commissioners* v *Woodgate* (County Court at Middlesbrough, 3 May 2018). In that case the defendant applied to set aside judgment in default which HMRC had obtained in respect of the sums specified in one APN, two PPNs and 13 penalty notices. HHJ Mark Gargan held in a detailed reserved judgment that the application should be refused on the ground that the defendant did not have a realistic prospect of successfully defending the claim. In section 8 of the judgment, he held that there was no realistic prospect of the defendant being able to raise public law challenges to the APN and PPN. The core of his reasoning was as follows:

> "58. The starting point is that the APN/PPN regime has been designed by Parliament with the specific purpose of deterring or reducing the use of marketed tax avoidance schemes by taking away the residual cash flow benefit which would otherwise accrue even from taking part in schemes which were ultimately found not to create a tax advantage. As Arden LJ stated at §53 of her judgment in *Rowe*, Parliament has determined that the use of such schemes is anti-social behaviour, a matter which is *quintessentially a question for Parliament*. The validity of Parliament's objective, and the lawfulness of the scheme by which that object has been implemented, has been upheld in *Rowe* and *Walapu*. The recipient of an APN/PPN is obliged to pay HMRC the sum identified as the potential tax advantage by the later of (i) 90 days from the Notice being

given or (ii) within 30 days of the taxpayer receiving HMRC's decision having considered any representations made on receipt of the Notice.

59. If taxpayers were allowed to raise public law issues by way of a defence to actions seeking payment of the monies claimed under APNs/PPNs then there would be no incentive for taxpayers to bring a public law challenge once HMRC had considered their representations. Any claims for judicial review would have to be brought promptly and would be determined fairly quickly. In this case, the claimant continued to correspond with HMRC for some time before HMRC issued proceedings. If permission to defend were to be given, it would probably be about 9 to 12 months before the issues could be tried. Throughout that period the taxpayer would continue to enjoy the cash-flow advantages of the tax avoidance scheme, contrary to the central objective of the statutory regime. Therefore, in my judgment, there is a considerable disadvantage to HMRC and the public generally in allowing public law issues to be raised by way of a defence.

60. I then turn to the nature of the rights that the claimant is seeking to protect. Self-evidently there is no contractual relationship between HMRC and the defendant. On the other hand, as in *Pawlowski*, the defendant has a legitimate expectation that he will not be required to pay more in tax than Parliament has laid down. Nevertheless, I consider that this case should be distinguished from *Pawlowski*. In *Pawlowski* the court was being asked to determine whether a tax payment was due. In this case, any sums payable under the APN/PPNs are interim payments only. Any monies paid will be returned to the defendant (together with interest) if he establishes that his tax avoidance scheme is valid. The APN/PPN system does not establish what tax is due, it merely determines where those funds sit pending the determination of the validity of the scheme. *Rowe* and *Walapu* establish that it is legitimate for Parliament to legislate to ensure that the funds should sit with HMRC rather than the taxpayer. In my judgment, there is no reason why it is just or proportionate for the taxpayer to be allowed to raise public law issues in his defence in addition to being able (i) to make representations under the statutory scheme and (ii) to bring proceedings for judicial review."

43. As counsel for the Appellant submitted, this decision is not binding on this Tribunal, and that is not altered by the fact that Males J (as he then was) refused the defendant permission to appeal. Counsel for the Appellant acknowledged that the decision was persuasive, but submitted that it was wrong.

44. In our judgment Judge Richards was correct to hold in the present case that the FTT had no jurisdiction to entertain the Appellant's challenge to the PPN for the following reasons. First, we accept that the authorities establish the exception or limit to the exception to the exclusivity principle which we have stated in paragraph 30 above, but we do not accept counsel for the Appellant's argument that the availability of a defence to enforcement action on public law grounds can only be excluded by express statutory language. In our judgment,

the availability of such a defence can also be excluded by necessary implication from the statutory scheme. This is in effect what the Divisional Court and the House of Lords respectively concluded in *Quietlynn Ltd v Plymouth City Council* [1988] QB 114 and *R v Wicks* [1998] AC 93 as analysed by the House of Lords in *Boddington*; and see also *R & J Birkett v Revenue and Customs Commissioners* [2017] UKUT 89 (TCC) at [30] (Upper Tribunal).

45. Secondly, in the present case we consider that the statutory scheme concerning PPNs and penalty notices does by necessary implication exclude the possibility of a challenge by the taxpayer to a PPN on public law grounds in the context of an appeal to the FTT against a penalty notice. This is for two reasons. The first is the fact that Parliament has provided rights of appeal against the underlying tax assessment and against a penalty notice, but not against a PPN. In the case of a PPN, Parliament has only provided a right to make representations (within a specified time limit) which HMRC are required to consider. In our view, the absence of a right of appeal against PPNs is a clear indication that Parliament does not intend taxpayers to be able to challenge PPNs on appeal to the FTT. If taxpayers cannot do so directly, then it would be very odd to permit them to do so indirectly by way of an appeal against a penalty. The second reason, which reinforces the first, is that permitting such a challenge would be contrary to the design and purpose of the PPN regime, as to which we agree with the observations of Judge Gargan we have quoted above.

Reasonable excuse and special circumstances

46. The Appellant contends that he had a reasonable excuse for late payment of the sum required by the PPN within FA 2009 Schedule 56 paragraph 16, alternatively that there were special circumstances justifying a reduction in the penalty within FA 2009 Schedule 56 paragraphs 9 and 15(3), because he reasonably believed that the tax to which he was assessed was not payable and that the PPN was therefore unlawful. Judge Jones rejected these contentions on the substantive appeal against the penalty. The Appellant submits that he was wrong to do so.

47. Counsel for the Appellant pointed out that Judge Jones had not made any determination as to whether the Appellant had subjectively believed the arguments as to the unlawfulness of the PPN to be reasonable, and submitted that the matter should be remitted to the FTT for this to be determined.

48. We do not accept this submission. Judge Jones explained the reason why he did not make that determination in his decision as follows:

> "202. There is no need to conduct this exercise. Even if the appellant had a reasonable belief, subjectively, objectively or both, and based upon professional advice, that he was not liable to pay the understated partner tax liability, this could not form a reasonable excuse for the failure to pay the PPN within the payment period.
>
> 203. Applying the test in the *Clean Car Company*, a reasonable taxpayer in the appellant's position would make payment of the sum under the PPN

> within the payment period and make whatever challenges (whether statutory or extra statutory) to the underlying liability he or she chose to do in the mean-time. This would be the case, whatever his or her reasonable belief as to the merits of his substantive challenge. If such a challenge were successful then the appellant would receive a refund or repayment but this cannot reasonably excuse [not] making a payment [of] the sum due under the PPN that Parliament has required should be made in the interim.
>
> …
>
> 209. The appellant's reasoning, if accepted, would permit any taxpayer to circumvent the evident intention of Parliament as to who should hold the tax pending the final determination of the tax liability by allowing taxpayers to institute multiple proceedings in different fora. It would also result in the Tribunal entertaining collateral challenges to the underlying tax liability in penalty proceedings which cannot have been the Parliamentary intention. The statute requires that the taxpayer [pay the tax] in the interim while the underlying liability, if challenged, can be resolved. If the taxpayer is successful in their challenge to the liability they will receive the appropriate rebate from HMRC.
>
> …
>
> 210. For same reasons explored above in relation to reasonable excuse, the Tribunal considers that HMRC's view that the appellant's circumstances did not constitute special circumstances was not flawed. …"

49. Counsel for the Appellant submitted that this reasoning was contradicted by *R (on the application of Dunne) v Revenue and Customs Commissioners* [2015] EWHC 1204 (Admin), in which Elisabeth Laing J held at [25] as follows:

> " … If the judicial review were to fail then the liability to penalties would not be removed but there would be a statutory right of appeal to the First-tier Tribunal if HMRC were not satisfied that the existence of the judicial review proceedings was a reasonable excuse for not paying the penalties. The tax payers would have the opportunity first of all to make representations to HMRC and, if those failed, to appeal to the First-tier Tribunal in order to persuade the First-tier Tribunal that they had a reasonable excuse for not paying the penalties. It seems to me that whether or not the claimants accede to the PPN and pay the sum which is said to be due, pending the outcome of the judicial review, or do not pay it, in neither case is the judicial review rendered nugatory."

50. We do not accept this submission. All Elisabeth Laing J was saying in this passage was that it would be open to the taxpayers to appeal to the FTT on the question of reasonable excuse in the event of an unsuccessful application for judicial review. She did not say that the bringing of the unsuccessful judicial review would constitute a reasonable excuse. Still less did she say that the

taxpayers' contention that the PPN was unlawful would constitute a reasonable excuse in the absence of any application for judicial review.

51. Accordingly, we consider that Judge Jones' analysis was correct.

The validity of the PPN

52. The Appellant challenges the validity of the PPN on procedural grounds which were not accepted by Lewis J in *R (on the application of Broomfield) v Revenue and Customs Commissioners* [2018] EWHC 1966 (Admin), [2018] STC 1790. Counsel for the Appellant did not seek to persuade us that Lewis J was wrong, but reserved the right so to contend if the case proceeded further.

The validity of the penalty notice

53. The Appellant contends that the penalty notice dated 16 July 2015 was invalid because (i) it stated the incorrect date for payment of the PPN and (ii) it failed to identify the issuing officer. Judge Jones rejected these contentions. The Appellant submits that he was wrong to do so.

Incorrect date

54. As noted above, HMRC rejected the Appellant's representations by letter dated 14 May 2015. The letter stated that the PPN had to be paid within "[t]he period beginning 30 days beginning with the payment of this letter". The penalty notice stated that the PPN was due on 12 June 2015. The Appellant contends that 12 June 2015 was not the correct date, because the 30 day period ran from receipt of the letter dated 14 May 2015 by the Appellant.

55. Judge Jones held that, by virtue of section 115 TMA 1970 and section 7 of the Interpretation Act 1978, the letter of 14 May 2015 was presumed to have been received, and hence notification given to the Appellant in accordance with paragraph 6(5)(b)(ii) Schedule 32 FA 2014, on the day after posting, namely 15 May 2015. There was no evidence to displace that presumption. Accordingly, the due date for payment was 14 June 2015, and not 12 June 2015 as stated in the penalty notice. This error was cured, however, by section 114(1) TMA 1970.

56. Counsel for HMRC pointed out that the relevant statutory requirement in paragraph 11(1)(c) Schedule 56 FA 2009 was to "state in the notice the period in respect of which the penalty is assessed". She also pointed out that the penalty notice explained that the penalty was calculated as follows:

> "A payment of £100,054.80 was due on 12 June 2015.
>
> 1 day late – a penalty of 5% of £100,054.80 – Paragraph 7 of Schedule 32 and Section 226(2) of the Finance Act 2014.
>
> The date at which the penalty has been calculated is 10 July 2015, which is 28 days after the date the accelerated partner payment was due. …"

57. Counsel for HMRC submitted that "the period in respect of which" the penalty was assessed referred to the *period* which attracted the penalty in question. She did not accept that the period started from the date of receipt of the PPN (although the date would still be out by one day if the period started from the date of the notice); but she submitted that the penalty notice had in any event correctly identified the *period* by which payment of the sum required by the PPN was overdue as being at least one day (and less than five months) even if there was a minor inaccuracy in the identification of the *date* on which that period started.

58. In support of this submission, counsel for HMRC relied upon the decision of the Court of Appeal in *Donaldson v Revenue and Customs Commissioners* [2016] EWCA Civ 761, [2016] 1 WLR 4521 concerning the identically-worded requirement in paragraph 18(1)(c) Schedule 56 FA 2009. In that case the penalty notice imposed £900 in daily penalties and £300 for filing a tax return more than six months after the due date, but did not state the period in respect of which the penalties had been incurred. HMRC contended that "the period in respect of which" meant the tax year to which the assessment related. The Court of Appeal rejected that contention for reasons which Lord Dyson MR expressed as follows:

> "25. I do not accept [counsel for HMRC's] submission. It is true that in some contexts the phrase 'period in respect of which the penalty is assessed' is the relevant tax year. But in the context of a daily penalty, I consider that the most natural interpretation of the phrase is that it refers to the period over which the penalty has been incurred. It would have been surprising if Parliament had not intended that HMRC should notify P how a daily penalty has been calculated ie over what period he has incurred the penalty. He needs that information to enable him to decide whether to challenge the assessment of the penalty.
>
> 26. The next question is whether the notice of assessment in this case did state the period in respect of which the daily penalty was assessed. It undoubtedly did not state the start or the end dates of the period. It stated that Mr Donaldson was liable for the maximum penalty of £900 calculated at the rate of £10 per day for a maximum of 90 days. It also referred him to paragraph 4 of the Schedule. In my view, this was not sufficient to satisfy the requirements of paragraph 18(1)(c). The notice did not identify the three month period. Referring him to paragraph 4 of the Schedule (as the notice did) did not enable him to work out (still less by doing so did the notice state) to which three month period it was referring. As I have said at para 8 above, this seems to have been the view of the UT. The notice should have specified the three month period, at least by stating when it started. It should not be a cause for surprise that Parliament intended that the taxpayer should be told not only the amount of the daily penalty, but how it has been calculated ie the start and end date of the three month period"

59. In the alternative, counsel for HMRC submitted that Judge Jones had been correct to hold that, despite any mistake, the penalty notice was "in substance

and effect in conformity with or according to the intent and meaning of the Taxes Act" within section 114(1) TMA 1970. In support of this submission, she relied upon two recent Court of Appeal decisions.

60. The first is *Donaldson*, where the Court held that the defect was cured by section 114(1) for reasons which Lord Dyson MR expressed as follows:

> "28. [Counsel for Mr Donaldson] submits that the failure of the notice of assessment to state the period is not saved by section 114(1) because the notice did not state any period at all. In my view, that is not a sufficient answer to the section 114(1) argument. Section 114(1) is expressed in wide terms. It captures a notice 'affected by reason of a mistake, defect or *omission* therein' (emphasis added). Thus, the mere fact that the notice omitted to state the period cannot be determinative. An omission to state the period is saved by section 114(1) if the notice is 'in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts'. In *Pipe v Revenue and Customs Comrs* [2008] STC 1911, para 51, Henderson J said that a mistake may be too fundamental or gross to fall within the scope of the subsection. I agree. The same applies to omissions.
>
> 29. In my view, the failure to state the period in the notice of assessment in the present case falls within the scope of section 114(1). Although the period was not stated, it could be worked out without difficulty. The notice identified the tax year as 2010–11. Mr Donaldson had been told that, if he filed a paper return (as he did), the filing date was 31 October 2011. The SA Reminder document informed him that, since he had not filed his return by the filing date, he had incurred a penalty of £100. It also informed him that, if he did not file his return by 31 January 2012, he would be charged a £10 daily penalty for every day the return was outstanding. This information was reflected in the notice of assessment. Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty. He knew that the start date for the period of daily penalty was 1 February 2012 and the notice of assessment told him that the end date of the period was 90 days later. The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission. The effect of section 114(1) is that the omission does not affect the validity of the notice. …"

61. The second decision is *R (on the application of Archer) v Revenue and Customs Commissioners* [2017] EWCA Civ 1962, [2018] 1 WLR 5210. Having cited *Donaldson*, Lewison LJ commented at [36]:

> "Although this passage is worded in terms that might suggest that the question was whether Mr Donaldson *himself* was misled, the test under section 114 must be an objective one: see the *Pipe* case at para 51. However, in applying an objective test the reader of the closure notice must, I think, be taken to be equipped with the knowledge that Mr Archer and KPMG had, including knowledge of what had led to the

> enquiry and what HMRC's conclusions were. This is consistent with the *Bristol & West case* [2017] 1 WLR 2792, paras 26 and 38."

62. Lewison LJ went on to hold on the facts that HMRC's failure to amend Mr Archer's tax return to accord with their conclusions in closure notices was a matter of form, not substance, because Mr Archer could have been in no doubt about what he owed HMRC and could not have been confused or misled. Accordingly, the closure notices were validated by section 114(1).

63. We accept counsel for HMRC's submission that the penalty notice complied with paragraph 11(1)(c) Schedule 56 FA 2009. Even if it did not, we agree with Judge Jones that the mistake as to the date on which the period of lateness started is covered by section 114(1) TMA 1970. The penalty notice was perfectly clear and correct in stating that the Appellant was more than a day late in paying the sum required by the PPN, and therefore the applicable penalty was 5% of the sum due. A reasonable recipient would not have been confused or misled, and indeed there is no suggestion that the Appellant was himself confused or misled.

Unidentified officer

64. The penalty notice did not identify the officer who issued it: it simply identified the relevant HMRC team. The Appellant contends that it is therefore invalid. Judge Jones rejected this contention on the simple basis that there was no statutory requirement to identify the issuing officer. The Appellant contends that he was wrong to do so. It should be noted that he made no findings of fact in relation to HMRC's procedures for making assessments.

65. We were not referred to any authorities bearing on this issue. Counsel for the Appellant accepted that section 30A TMA 1970 did not expressly require the issuing officer to be identified. He pointed out, however, that section 31A(1)(a) TMA 1970 required notice of an appeal to be given to the relevant officer of the Board, and section 31A(4)(b) defined the relevant officer as the officer who gave the notice of assessment. He submitted that it was therefore implicit that the penalty notice had to identify the issuing officer, otherwise the Appellant would be unable to comply with the mandatory requirement of section 31A(1)(a).

66. We do not accept this argument. Where, as here, the notice does not identify an individual officer, but identifies a team of officers, then we consider that the Appellant can comply with section 31A(1)(a) by giving notice of his appeal to that team. By virtue of section 6(c) of the Interpretation Act 1978, the singular includes the plural unless the contrary intention appears, and no contrary intention appears from section 31A TMA 1970. In those circumstances, there is no good reason why a failure to identify the assessing officer should affect the validity of the assessment itself.

Conclusion

67. For the reasons given above, this appeal is dismissed.

MR JUSTICE ARNOLD AND JUDGE CANNAN

Release date: 1 April 2019