[2020] UKUT 0175 (TCC)

Appeal number: UT/2018/0117

INCOME TAX – penalty for non-payment of accelerated payment notice – is tax demanded under a Regulation 80 PAYE determination "disputed tax" within APN provisions – yes – did taxpayer have a reasonable excuse for non-payment of penalty – no – circumstances in which belief that APN was procedurally invalid could constitute reasonable excuse – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

SHEILING PROPERTIES LIMITED **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE TROWER
JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London WC2 on 6 February 2020 and following further written submissions received on 29 May 2020

Ben Elliott, instructed by Blackstar Defence Limited, for the Appellant

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

DECISION

Introduction

1. Sheiling Properties Limited ("Sheiling") appeals against the decision of the First-tier Tribunal ("FTT") reported at [2018] UKFTT 0247 (TC) (the "Decision"). Sheiling appealed to the FTT against penalties imposed by HMRC in respect of non-payment by Sheiling of certain accelerated payment notices ("APNs") issued pursuant to section 219 of the Finance Act 2014 ("FA 2014"). The APNs required advance payment of tax under the Pay As You Earn ("PAYE") Regulations and in respect of national insurance contributions. The FTT determined a number of preliminary issues, concluding that (unless the APNs were subsequently determined to be unlawful in related judicial review proceedings) Sheiling was liable for the penalties as charged.

2. With the permission of the FTT, Sheiling appeals against the Decision on the ground that the FTT erred in law in concluding that an APN could be issued in respect of tax arising from a PAYE determination. With the permission of the Upper Tribunal, Sheiling also appeals on the ground that the FTT erred in its interpretation of the "reasonable excuse" defence against the penalties, and in concluding on the facts that Sheiling did not have such a reasonable excuse.

Background

3. The relevant facts can be summarised as follows.

4. In the tax year ending 5 April 2012, Sheiling participated in arrangements which were notified to HMRC under the Disclosure of Tax Avoidance Scheme ("DOTAS") regime and allocated a scheme reference number. Under the arrangements Sheiling made payments to two directors of the company in return for those directors incurring obligations to subscribe for partly paid shares in the company.

5. On 17 February 2016 HMRC issued a determination (the "Regulation 80 Determination") under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003 (the "PAYE Regulations"), determining that Sheiling owed tax under those regulations in respect of the payments to the directors. It also issued decisions under section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 requiring payment of national insurance contributions in respect of the payments.

6. On 25 February 2016 Sheiling appealed to HMRC against the determination and decisions. HMRC agreed to an application to postpone the taxes due.

7. On 19 July 2016 HMRC sent two APNs to Sheiling. The first (the "PAYE APN") required advance payment of PAYE income tax of £118,000. The second (the "NIC APN") required advance payment of primary and secondary national insurance contributions of £67,452.

8. On 19 September 2016 HMRC received representations from Sheiling objecting to the issue of the APNs, arguing that the conditions for their issue set out in FA 2014 had not been met. The following month, HMRC confirmed that the APNs would not be altered and that the amounts demanded were due by 9 November 2016.

9. Sheiling did not pay the amounts demanded by 9 November 2016, and had not paid them by the time of the hearing before the FTT in March 2018.

10. In November 2016, Sheiling and a number of other taxpayers who had received similar APNs issued a claim for judicial review challenging the validity of the APNs issued to them. The judicial review proceedings were stayed pending the determination of similar claims in other proceedings for judicial review.

11. On 22 December 2016 HMRC issued Sheiling with two penalty notices in respect of the non-payment of the APNs.

12. On 12 January 2017 Sheiling appealed to HMRC against the penalties, stating its ground of appeal as being its participation in the judicial review claim. HMRC rejected that appeal, and offered Sheiling a review of that decision. Sheiling took up that offer, and the review upheld the penalties. HMRC considered that Sheiling did not have a reasonable excuse for the failure to pay the amounts demanded on time, and that no "special reduction" of the penalty was justified. Following the provision by Sheiling of further information and arguments, HMRC confirmed that their decision remained unchanged.

13. Sheiling appealed to the FTT against the two penalty notices issued on 22 December 2016.

14. On 30 May 2017 HMRC issued Sheiling with further late payment penalties in relation to the two APNs. Again, Sheiling appealed to HMRC, HMRC rejected the appeal, a review was offered and undertaken, and HMRC upheld the penalties.

15. Sheiling appealed against all the penalties to the FTT.

The grounds of appeal

16. There are two grounds to the appeal from the decision of the FTT, as follows:

(1) The FTT erred in law in interpreting the term "disputed tax" in section 55(8C) of the Taxes Management Act 1970 ("TMA 1970" or "TMA") as including tax arising from a determination under Regulation 80 of the PAYE Regulations.

(2) The FTT erred in law in its interpretation and application of the "reasonable excuse" defence in the penalty legislation.

17. Since the first ground is a pure question of statutory construction, we begin by setting out the relevant legislation.

Legislation

18. We discuss below the purpose of the regime introduced by FA 2014 relating to APNs. The provision permitting HMRC to issue such a notice is section 219 FA 2014, which, so far as relevant, provides as follows:

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

19. Where, as in this case, the APNs are issued after the recipient has made substantive appeals to HMRC, section 221 FA 2014 sets out certain information which must be specified in the APNs. The relevant provisions are as follows:

> **221 Content of notice given pending an appeal**
>
> (1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(b) (notice given pending an appeal).
>
> (2) The notice must—
>
> (a) specify the paragraph or paragraphs of section 219(4) by virtue of which the notice is given,
>
> (b) specify the disputed tax (if any),
>
> …
>
> (3) "The disputed tax" means so much of the amount of the charge to tax arising in consequence of—
>
> (a) the amendment or assessment to tax appealed against, or

> (b) where the appeal is against a conclusion stated by a closure notice, that conclusion,
>
> as a designated HMRC officer determines, to the best of the officer's information and belief, as the amount required to ensure the counteraction of what that officer so determines as the denied advantage.
>
> …
>
> (6) In this section a reference to an assessment to tax, in relation to inheritance tax, is to a determination.

20. Section 222 FA 2014 entitles the recipient of an APN to make representations to HMRC objecting to the APN on the grounds that Conditions A to C set out in section 219 are not satisfied, or that the amount of the demanded payment is incorrect. HMRC are obliged to consider any such representations and then to confirm or withdraw the APN or determine whether a different amount ought to have been specified. However, there is no statutory right of appeal to the FTT against a decision by HMRC to issue an APN, although there is a right of appeal in respect of a related penalty for non-payment of the APN.

21. Tax payable by virtue of an assessment is normally due within 30 days of the assessment: section 59B (6) TMA 1970. However, where the person assessed has made an appeal to the FTT, he may ask HMRC to agree that tax due will be postponed until the appeal is determined: section 55 TMA. Since any postponement would plainly frustrate the purpose of the APN regime (which is designed to accelerate payments rather than delay them), FA 2014 modified the normal rules relating to postponement where an APN is issued. As in force at the relevant time, the modified provisions of section 55 were as follows:

> (8B) Subsections (8C) and (8D) apply where a person has been given an accelerated payment notice or partner payment notice under Chapter 3 of Part 4 of the FA 2014 and that notice has not been withdrawn.
>
> (8C) Nothing in this section enables the postponement of the payment of (as the case may be)—
>
> …
>
> (b) the disputed tax specified in the notice under section 221(2)(b) of that Act, . . .
>
> (8D) Accordingly, if the payment of an amount of tax within subsection (8C)(b) is postponed by virtue of this section immediately before the accelerated payment notice is given, it ceases to be so postponed with effect from the time that notice is given, and the tax is due and payable—
>
> (a) if no representations were made under section 222 of that Act in respect of the notice, on or before the last day of the period of 90 days beginning with the day the notice or partner payment notice is given, and
>
> (b) if representations were so made, on or before whichever is later of—

(i) the last day of the 90 day period mentioned in paragraph (a), and

(ii) the last day of the period of 30 days beginning with the day on which HMRC's determination in respect of those representations is notified under section 222 of that Act.

22. As a result of section 55 (8D), therefore, tax which had been postponed prior to the issue of an APN becomes, as the parties put it, "unpostponed".

23. In relation to the PAYE APN which is the subject of the first ground of appeal, HMRC say that the "disputed tax" which has become unpostponed is the tax specified in the Regulation 80 Determination. So far as relevant, Regulation 80 of the PAYE Regulations states as follows:

80 Determination of unpaid tax and appeal against determination

(1) This regulation applies if it appears to HMRC that there may be tax payable for a tax year under regulation 67G, as adjusted by regulation 67H(2) where appropriate, or 68 by an employer which has neither been—

(a) paid to HMRC, nor

(b) certified by HMRC under regulation 75A, 76, 77, 78 or 79.

(1A) In paragraph (1), the reference to tax payable for a tax year under regulation 67G includes a reference to any amount the employer was liable to deduct from employees during the tax year whether or not that amount was included in any return under regulation 67B (real time returns of information about relevant payments) or 67D (exceptions to regulation 67B).

(2) HMRC may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.

…

(5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if—

(a) the determination were an assessment, and

(b) the amount of tax determined were income tax charged on the employer,

and those Parts of that Act apply accordingly with any necessary modifications.

24. Turning to penalties, the generally applicable penalty regime is set out in Schedule 56 of Finance Act 2009 ("Schedule 56"). This provides that if tax which is due is not paid before the specified "penalty date", a penalty arises. Successive penalties may arise as non-payment continues. While there was a dispute between the parties as to the penalty date for the PAYE APN before the FTT, that point is no longer pursued by Sheiling.

25. Paragraph 13 of Schedule 56 sets out a right of appeal against penalties charged under Schedule 56 as follows:

13 Appeal

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

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

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

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….

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

16 Reasonable excuse

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

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

(a) an insufficiency of funds is not a reasonable excuse unless attributable to 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.

The PAYE APN

Sheiling's construction

28. As explained above, where HMRC have agreed that tax may be postponed, section 55(8C) TMA 1970 has the effect that when an APN is issued any postponement ceases in relation to (in this appeal) the "disputed tax" specified in the section 221 notice. Sheiling's case is that tax arising from a determination under Regulation 80 of the PAYE Regulations can never be "disputed tax". As a consequence, that tax remains postponed, no penalty date arises, and no penalty can be imposed.

29. The argument rests on two propositions. The first is the way in which "the disputed tax" is defined in section 221(3) (set out at paragraph 19 above). The definition requires that an HMRC designated officer determines the amount of tax

required to counteract the tax advantage which (say HMRC) should be denied. However, that determination is confined to "the disputed tax". In the present case, that is "tax arising in consequence of…the…assessment to tax appealed against". A Regulation 80 determination is not an "assessment", and nothing in the APN code extends the definition of disputed tax to cover such determinations, so the disputed tax in relation to the PAYE APN is nil.

30. The second proposition relates to Regulation 80(5), set out at paragraph 23 above. This states that a Regulation 80 determination is subject to various parts of the TMA 1970 "as if the determination were an assessment". Sheiling acknowledges that one of the parts of the TMA so specified (Part V) includes section 55, and therefore Section 55(8C) to (8D), but it asserts that the deeming effect of Regulation 80(5) is strictly limited. The draftsman has not amended the definition of "disputed tax" in section 221, which provides the original and primary definition of that term. So, tax arising under a PAYE determination rather than an assessment cannot be included in an APN in the first place. Because the deeming effect of Regulation 80(5) is confined to the relevant parts of the TMA and does not extend to section 221 FA 2014, the disputed tax in relation to the PAYE APN remains nil.

HMRC's construction

31. HMRC's construction of the statutory provisions is as follows.

32. In this case, the relevant condition for the issue of an APN is that Sheiling has made a "tax appeal" in relation to a "relevant tax", but that appeal has not yet been determined. Tax collected under PAYE is a "relevant tax" (as defined by sections 200 and 229 FA 2014) because PAYE is a mechanism for collecting income tax in respect of an employee's earnings, and income tax is within the definition of relevant tax. A "tax appeal" is defined at section 203 FA 2014 as including an appeal made under section 31 TMA 1970 by virtue of the PAYE Regulations, which include Regulation 80(5).

33. As a result of Regulation 80(5) a Regulation 80 determination is treated as an assessment for the purposes of section 31 TMA (which is contained in Part IV TMA). It falls within the reference in Section 31(1)(d) TMA to "any assessment to tax that is not a self-assessment". As a result, a Regulation 80 determination can be appealed under section 31(1)(d).

34. Such an appeal falls within the definition of an "appeal" which applies for the purposes of the later provisions of Part V TMA (to which Regulation 80(5) makes the determination subject) by virtue of section 48 TMA. Part V includes the modified provisions on postponement contained in section 55. Therefore, it is an appeal to which section 55 applies.

35. An appeal against a Regulation 80 determination is therefore a "tax appeal" for the purposes of the APN legislation (sections 203 and 218 FA 2014) in relation to a "relevant tax" (income tax), such that Condition A of section 219 is satisfied.

36. As a result of the deeming in Regulation 80(5), an appeal against the determination under section 31(1)(d) TMA falls within section 221(3)(a) FA 2014: it is an appeal against a determination which has been deemed to be an assessment, so that the tax charge in relation to the appeal is "the disputed tax".

37. Such disputed tax is unpostponed by Section 55(8C) to (8E) TMA.

38. So, Sheiling's failure to pay the APN has properly generated the disputed penalties.

The FTT's decision

39. This issue was considered by the FTT and determined as a preliminary issue at [60] to [63] of the Decision.

40. The FTT accepted the argument of Mr Elliott (who also appeared for the taxpayer below) that Regulation 80(5) was not a general deeming provision. Observing that it did, however, provide that Part V TMA (which includes section 55(8D)) must be applied as if the Regulation 80 determination were an assessment, the FTT rejected the taxpayer's argument as follows:

> 62. Section 55(8D) provides for "disputed tax" to be "unpostponed". Because, s55(8D) must be applied as if the Regulation 80 determination were an "assessment", when the statutory definition of "disputed tax" in s221(2)(b) of FA 2014 is applied for the purposes of s55(8D), that definition must also be read as if a Regulation 80 determination were an assessment. Mr Elliott's answer to this line of reasoning was that Regulation 80(5) is not expressed to apply for the purposes of s221(2)(b), but that approach involves reading the statutory provisions as if they were a computer program or a line of algebra. As I have noted, statutory provisions need to be construed in a purposive manner and, in Regulation 80(5), Parliament has shown a clear purpose that, when s55(8D) is being applied, it should be applied as if a Regulation 80 determination were an "assessment". Therefore, any question of whether tax is "unpostponed" has to be determined on the footing that a Regulation 80 determination is an assessment. Understood in those terms, Parliament's intention is clear.

Discussion

41. While Mr Elliott planted an impressive number of trees, to which Ms Nathan responded in kind, once we navigate through those trees the wood is clear. We have no hesitation in preferring HMRC's construction of the provisions.

42. The parties in fact agree that (1) Regulation 80(5) deems PAYE determinations to be tax assessments for the relevant parts of the TMA 1970, (2) Regulation 80(5) is not a deeming provision for all purposes, and (3) there is no provision stating expressly that in section 221 "disputed tax" includes tax arising from a PAYE determination.

43. The question of construction therefore boils down to this: does point (3) mean that the taxpayer succeeds in its first ground of appeal?

44. Mr Elliott's argument seeks to interpret "assessment" in section 221(3)(a) in isolation. Having isolated that word, he then asserts that the draftsman has failed to bring income tax levied through a Regulation 80 determination within the scope of the APN charge because there is no reference in Regulation 80(5) to FA 2014 and no reference in section 221 to Regulation 80(5) which operates to extend the meaning of that word for the purposes of section 221.

45. We begin by observing that the relevant question in relation to section 221(3) is broader than that posited by the taxpayer. It is whether income tax sought by a Regulation 80 determination and appealed by the recipient is a *"charge to tax arising in consequence of…[an] assessment to tax appealed against"*.

46. We reach the clear conclusion that it is by the following process of statutory construction.

47. PAYE is not a tax, but a collection mechanism for income tax which collects from the employer tax which would otherwise fall due in due course from the employee: see the Income Tax (Earnings and Pensions) Act 2003 section 682(1). Income tax is a relevant tax for the purposes of the APN code: sections 200 and 219(2) FA 2014. Tax sought under a Regulation 80 determination is therefore "tax" within section 221(3).

48. Condition A of section 219 applies where (on the facts in this case) the taxpayer has made a "tax appeal". That term is defined by section 203(a) FA 2014 to mean an appeal under section 31 TMA 1970 "including an appeal under that section by virtue of regulations under Part 11 of ITEPA 2003 (PAYE)". The PAYE Regulations are such regulations. So, an appeal by the employer against a Regulation 80 determination is a "tax appeal" for APN purposes, and, it follows, the amount appealed against is "tax appealed against" within section 221(3).

49. Does the tax so appealed against arise in consequence of an assessment? Regulation 80 applies to a determination by HMRC that, as in this case, a certain amount of tax is due under PAYE from an employer. Regulation 80(5) states as follows:

> (5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if—
>
> (a) the determination were an assessment, and
>
> (b) the amount of tax determined were income tax charged on the employer,
>
> and those Parts of that Act apply accordingly with any necessary modifications.

50. In our view, the clear effect of Regulation 80(5) is to treat the determination as an assessment for the purposes of section 221(3), so that the tax charged under it is

treated as arising "in consequence of …[an] assessment to tax appealed against". The Parts of the TMA 1970 to which Regulation 80(5) applies include within them section 31 TMA, with the result that the determination is treated as an assessment which can be appealed under section 31(1)(d). They also include section 55(8B) to (8D), which disapplies the normal postponement rules in relation to the disputed tax specified in an APN.

51. Regulation 80(5) and section 221 do not refer to each other because they do not need to. The machinery for the assessment, appeal, collection and recovery of tax is contained within those parts of the TMA to which Regulation 80(5) is expressed to apply. It is not contained within some purpose-built code set out in FA 2014. So, when Regulation 80(5) makes a Regulation 80 determination subject to that machinery as if it were an assessment, and as if the tax determined in it were income tax charged on the employer, that is sufficient in drafting terms to bring the tax charged under the determination within section 221(3). That means in turn that when the draftsman of section 55(8C) disapplies postponement in respect of "the disputed tax specified in the notice under section 221(2)(b)", the operation of that provision extends to the tax in a PAYE determination which has been appealed against, which is to be treated for the purposes of the assessment, appeal and collection provisions (being contained in the TMA 1970) as an assessment to tax appealed against.

52. Mr Elliott argued in support of his construction of the provisions that it was entirely logical for the draftsman to have deliberately excluded tax charged under Regulation 80 from the scope of the APN provisions. That was because PAYE resulted in one person (the employer) picking up the tax liability of another person (the employee), and it would be unduly harsh in such a situation to require advance payment of the tax.

53. We see nothing in this feature of the PAYE system which would suggest that a PAYE determination should fall outside the APN regime. It is in the nature of collection mechanisms that they often oblige a person to account for another person's tax. In terms of policy, we do, on the other hand, consider that it would be a surprising result if tax charged through a PAYE determination could not be the subject of an APN. Given that arrangements designed to avoid tax charges on employment income are likely in practice to be one of the targets of the APN process (see, for an example, *John Dickinson v HMRC* [2018] EWCA Civ 2798), it seems unlikely that Parliament would have intended that acceleration via an APN could not be imposed on the employer.

54. A further argument made by Mr Elliott was that the construction proposed by HMRC, and endorsed by the FTT, must be wrong because it would result in different definitions of "disputed tax" in section 55(8C) to (8D) TMA 1970 and section 221 FA 2014. That argument is entirely circular because it assumes that the deeming effect of Regulation 80(5) does not extend to FA 2014, which we have found to be incorrect. Indeed, Mr Elliott's construction would itself lead to the peculiar result that a Regulation 80 determination could be the subject of an appeal (because he accepts that Regulation 80(5) applies to that extent), but that appeal would not relate to any disputed tax for the purposes of FA 2014 or Section 55(8C) to (8D).

55. Finally, Mr Elliott submitted that where Parliament intends that the APN provisions should apply to decisions other than assessments, it says so expressly. NIC decisions are specifically brought within the APN regime by the NIC legislation, and section 221(6) FA 2014 expressly treats references to inheritance tax determinations as assessments. The FTT rejected this point at [63] of the Decision, and it was right to do so. Inheritance tax and NICs are taxes with their own distinctive architecture and terminology. Parliament chose to include PAYE determinations (which seek to collect income tax) within the APN code in the way we have described above, and the use of a different drafting approach, in light of Regulation 80(5), was the draftsman's choice.

56. The FTT reached the right conclusion on this issue. Although it did not do so on the basis of the detailed analysis we have set out above, its essential reasoning, which rested on the effect of Regulation 80(5), was correct.

Reasonable Excuse

57. The statutory defence in respect of a penalty contained in paragraph 16 of Schedule 56 is set out at paragraph 27 above. The FTT found that Sheiling did not have a reasonable excuse for non-payment of the APNs. The second ground of appeal is that the FTT erred in law in its interpretation of the reasonable excuse defence and in its application of the defence to the facts.

The FTT's findings as to the reasons for non-payment

58. The FTT considered the reasons why Sheiling did not pay the amounts demanded under the APNs at [25] to [32] of the Decision. Sheiling had taken professional advice from Blackstar Group, a firm of tax advisers, in connection with the APNs. Blackstar gave advice to a number of their clients who had been involved with tax planning similar to that implemented by Sheiling. Blackstar's recommended route was that Sheiling should seek judicial review of HMRC's decision to issue the APNs. Mr Houchen, a director of Sheiling who gave evidence before the FTT, reached the view on the basis of that and other professional advice that there was "a good prospect" that the APNs had been issued unlawfully. He held that belief at the time the APNs fell due for payment. At the time of the hearing, he understood that the Court of Appeal decision in *R (Vital Nut) v HMRC and R (Rowe and others) v HMRC* [2017] EWCA Civ 2105 "undermines (to some extent but not completely) the strength of its position that the APNs are invalid". He relied on his advisers' views and could not explain their underlying reasons. Mr Houchen also gave evidence as to the severe financial damage it would cause to the company if it paid the APNs. The FTT set out its conclusions as follows:

> 32. Mr Houchen was pressed in cross-examination on the precise reasons why the Company has not paid the accelerated payment to date. From Mr Houchen's evidence, I have concluded as follows:
>
> (1) The financial consequences to the Company of paying the accelerated payments would have been extremely serious. As noted at [30], the Company's very viability could have been under threat. The

> Company naturally wanted not to suffer those serious financial consequences.
>
> (2) Given the professional advice that the Company had received, it had a genuine belief that there were good grounds for considering the APNs had not been issued lawfully.
>
> (3) It therefore considered that it was justified in not paying the accelerated payments demanded while the debate as to the lawfulness of the APNs was resolved in judicial review proceedings.
>
> (4) Professional advice that the Company has received following the decision of the Court of Appeal in *Rowe* and *Vital Nut* caused it to question the strength of its argument that the APNs were unlawfully issued. While it still considers that it has good arguments, it believes that its arguments are somewhat less strong than it formerly believed. For that reason, it has started discussions with HMRC with a view to arranging a "time to pay agreement" in relation to the accelerated payments that HMRC are demanding.

The FTT's decision on reasonable excuse

59. Mr Elliott stated to the FTT that the reasonable excuse on which Sheiling sought to rely for non-payment of the APNs was its belief that the APNs were invalid: [50].

60. The FTT stated that whether a reasonable excuse existed was a question of degree having regard to all the circumstances, and then set out its approach to the question as follows:

> 52. I also respectfully agree with the way that Judge Hellier approached the taxpayer's argument, in *Francis Chapman v HMRC* [2017] UKFTT 800 (TC), that a belief in the likely success of judicial review proceedings, amounted to a reasonable excuse for non-payment of an accelerated payment demanded pursuant to an APN. Like Judge Hellier, I do not consider that there is any rule of law that prevents such a belief from amounting to a reasonable excuse. Neither FA 2014 nor Schedule 56 set out any such limitation. Nor can any such rule of law be inferred from various statements that the courts have made in judicial review proceedings on the lawfulness of particular APNs (for example the judgment of Simler J at first instance in *Rowe* that Judge Hellier referred to in his decision).
>
> 53. However, even though there is no rule of law that precludes the excuse that the Company is putting forward from being a "reasonable excuse", I consider that the reasonableness or otherwise of that excuse has to take into account the effect of the statutory regime on APNs that Parliament has enacted. As Simler J noted at [30] of her decision at first instance in *Rowe*, the APN regime was enacted to ensure that, where a tax avoidance scheme is involved, HMRC, and not the taxpayer, hold the tax in dispute while the efficacy or otherwise of the avoidance scheme is determined. To achieve that legislative purpose, Parliament has enacted a regime that permits HMRC to demand accelerated payment of amounts of tax that are in dispute following implementation of an avoidance scheme. Of course, Parliament

> enacted various safeguards to protect the interests of taxpayers, including the right to make representations under s222 of FA 2014. However, in assessing whether it is reasonable for the Company to withhold payment of an accelerated payment, I must take into account that Parliament has legislated specifically to permit HMRC to demand accelerated payment and has done so to combat what it regards as the "mischief" of tax avoidance schemes. Given the regime that Parliament has enacted, I respectfully agree with Judge Hellier's observation at [72] of his decision in *Chapman* that in deciding how to respond to an APN, a reasonable taxpayer would not lightly assume that HMRC have acted unlawfully in issuing an APN. On the contrary, given the statutory background, the taxpayer would need to demonstrate that, viewed objectively, there is a high degree of confidence that the APNs are invalid. Judge Hellier gave some examples of the kind of factors that might to such a high degree of confidence (for example, if it is clear that a decimal point has been put in the wrong place on the APN). Judge Hellier's examples are not, of course, binding on me and cannot set out an exhaustive list of when it will, or will not, be reasonable for a taxpayer to refuse to pay an accelerated payment because it believes the APN to be invalid. However, his examples neatly illustrate the point that a high degree of confidence in the invalidity of the APNs that is objectively justified is likely to be necessary.

61. The FTT having found that Sheiling had, at all material times, a genuine belief that it had a good case for arguing that the APNs were issued unlawfully, it then considered whether objectively the company's case was a strong one. The judge concluded, at [57], that he was "not satisfied that it had a sufficiently high degree of certainty, that was objectively justified, to give it a reasonable excuse for not paying the sums that HMRC demanded".

62. At [58], the FTT set out another reason why it considered that Sheiling did not have a reasonable excuse. It concluded that "the predominant reason" why the company did not pay the APNs was because of its concern as to the severe financial consequences of doing so. Insufficiency of funds could be a reasonable excuse only if the insufficiency was attributable to events outside Sheiling's control, and it had not satisfied the tribunal that this was the case.

Grounds of appeal and Respondent's Notice

63. Sheiling appealed against the FTT's conclusion on the following grounds:

(1) The FTT erred in holding that a reasonable excuse could only be established in this context if, viewed objectively, there was a high degree of confidence that the APNs were invalid.

(2) In the alternative, the FTT erred in its application of *R (Vital Nut) v HMRC* [2016] EWHC 1797 (Admin) and [2017] EWCA Civ 2105 in holding that Sheiling did not have an objectively strong case that the APNs were invalid.

(3) The FTT erred in its application of paragraph 16(2)(a) of Schedule 56 in identifying the insufficiency of funds as the "predominant reason" or excuse

why Sheiling did not pay the APNs and in holding that, on that basis, it did not have a reasonable excuse.

64. In their response to Sheiling's notice of appeal, as well as agreeing with the FTT's decision, HMRC submitted that the FTT ought to have held that a belief that an APN is invalid, or that a judicial review challenge to its validity was likely to succeed, could never amount to a reasonable excuse for non-payment of an APN.

65. Following the hearing before us, the Court of Appeal released its decision in *David Beadle v HMRC* [2020] EWCA Civ 652 ("*Beadle*"). That decision concerns two issues, one of which is the reasonable excuse exception in a penalty appeal where the taxpayer challenges the lawfulness of the tax calculation underlying an accelerated payment notice (in that case a Partner Payment Notice or PPN). We directed that the parties should be given the opportunity to make any representations which they wished in relation to the relevance or otherwise of that decision to the second issue in this appeal. We have taken those representations into account in reaching our decision.

Discussion

66. There is no statutory definition of what can constitute a reasonable excuse for the purposes of paragraph 56 of Schedule 16, save to the extent of the specific restrictions dealt with in paragraph 16(2). Useful guidance to the FTT was given by the Upper Tribunal in *Christine Perrin v HMRC* [2018] UKUT 156 (TCC). Following a comprehensive review of the authorities, that guidance was summarised as follows, at [81] of the decision:

> 81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?"
>
> (4) Fourth, having decided when any reasonable excuse ceased, decide whether the taxpayer remedied the failure without unreasonable delay after that time (unless, exceptionally, the failure was remedied before the reasonable excuse ceased). In doing so, the FTT should again

> decide the matter objectively, but taking 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.

67. We respectfully agree with that guidance. In practice, most of the considerable volume of "reasonable excuse" cases before the FTT involve variations on a limited number of themes: typically, disputes about HMRC correspondence, difficulties with online filing, reliance on advisers, an incomplete awareness of statutory obligations, and health or financial problems. In such situations, while its application to the facts may not always be easy, the approach summarised in *Perrin* needs no gloss.

68. However, the situation in the current appeal raises a particular question. Leaving aside for the moment the separate challenge to the FTT's finding in relation to insufficiency of funds, how should objective reasonableness be assessed in relation to a belief by the taxpayer that an APN he has received has not been validly issued? More particularly, to what extent does the legislative policy underpinning the APN regime affect that assessment?

69. It must be noted at the outset that (real or perceived) "invalidity" can arise in two situations. The first is where the taxpayer believes that the tax payment accelerated by the notice is not owed by him, either because he does not owe it at all or because it has been wrongly calculated. We call that "substantive invalidity". The second is where the taxpayer believes that, regardless of whether he owes the tax, the APN has not been issued in compliance with one or more of the statutory conditions imposed by FA 2014. We call that "procedural invalidity".

70. The distinction matters because a belief in the substantive invalidity of the APN cannot be a reasonable excuse. That is established by the Court of Appeal's decision in *Beadle*. Although that case concerned a Partner Payment Notice, where the detailed provisions differ slightly, the relevant principles are the same. Originally, Mr Beadle challenged both the substantive validity and the procedural validity of the PPN, but the latter argument was not pursued before the Upper Tribunal: see paragraph 26 of the Court of Appeal decision. Two issues were before the Court of Appeal in relation to penalty notices served by HMRC on Mr Beadle for non-payment of the PPN. The first was whether the FTT had been correct to hold that it did not have jurisdiction in a penalty appeal to entertain a challenge to the substantive invalidity of the PPN. The second was whether, in a separate decision, the FTT had been correct to hold that Mr Beadle had neither a reasonable excuse for late payment of the sum required by the PPN, nor were there "special circumstances" justifying a reduction in the penalty.

71. In relation to the first question, the Court of Appeal agreed with the FTT and the Upper Tribunal that the FTT had no jurisdiction to entertain a public law challenge to the validity (which on the facts was the substantive validity) of a PPN in the course of an appeal against a penalty notice.

72. In relation to reasonable excuse, it is worth setting out the decision in full, as follows:

57. I can deal with this ground more shortly. In my judgment the FTT was correct to hold that the invalidity or alleged invalidity of PPNs are not matters that could properly be considered in the context of a reasonable excuse defence to penalties for non-compliance with PPNs or in the context of a claim for a reduction of penalty by reason of "special circumstances"; and the UT was accordingly correct to uphold that decision.

58. Like the UT I do not accept that the FTT wrongly failed to make a determination as to whether Mr Beadle subjectively believed the arguments as to the unlawfulness of the PPN to be reasonable. The reasons Judge Jones gave for not making that determination are set out by the UT and for convenience I set them out here 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. …"

59. I can see no error of law in that approach. To the contrary, I agree with it. Nor does that reasoning reflect any misunderstanding of the decision in R (on 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 taxpayers would have the opportunity first of all to make representations to HMRC and, if those fail, 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."
>
> 60. Mr Gordon submits that had the judge considered that the invalidity of a PPN could not be the basis of a penalty appeal, she would have said so in this passage. Furthermore it is implicit in her judgement that such a challenge can be made in the FTT as otherwise, the penalty appeal procedure would not have been a reason to refuse interim relief sought before the High Court. He submits accordingly that the FTT was wrong to decide Mr Beadle's appeal without regard to his genuine belief about the unlawfulness of the calculation underlying the PPN.
>
> 61. Again I do not accept this submission and agree with the UT that Elisabeth Laing J was not suggesting that the bringing of an unsuccessful judicial review would constitute a reasonable excuse for not paying penalties or that the taxpayer's contention that the PPN was unlawful would constitute a reasonable excuse in the absence of any application for judicial review. Rather, what she said was simply that it would be open to taxpayers to appeal to the FTT on the question of reasonable excuse in the event of an unsuccessful application for judicial review.
>
> 62. In these circumstances, in my judgment, the FTT made no error of law in holding that Mr Beadle had no reasonable excuse and that the circumstances did not constitute special circumstances in this case.

73. So, a belief that an APN is substantively invalid, however genuine the belief and regardless of any advice which may reinforce that view, cannot form the basis of a reasonable excuse for non-payment of that APN. All that can be drawn from *Dunne* is that if a taxpayer brings judicial review proceedings to challenge an APN, and those proceedings are unsuccessful, then it is open to the taxpayer to appeal against a penalty for non-payment on the ground of reasonable excuse.

74. HMRC submitted that *Beadle* was authority that reasonable excuse could never be a defence in respect of any alleged invalidity of a PPN, whether procedural or substantive. We disagree. It is clear on the facts that the Court was dealing only with an excuse founded on substantive invalidity. In the absence of binding authority, we begin by considering whether, in principle, a belief as to procedural invalidity is capable of forming a reasonable excuse. In doing so, we are looking at the objective element of the test, and not the subjective element of the taxpayer's actual belief. We then consider whether the FTT erred in this case in finding on the facts that a reasonable excuse on such a basis was not made out.

75. In considering the question of whether a belief that an APN is procedurally invalid is in principle capable of being a reasonable excuse, there are at least two arguments in favour of the view that it cannot.

76. First, while that question is not determined by the ratio of *Beadle*, the underlying reasoning which led the Court to uphold the FTT and Upper Tribunal could be said to apply with some force to any belief in invalidity, whatever the nature of that invalidity. That reasoning, as explained by both FTT decisions in *Beadle*, takes as its starting point the Parliamentary intent expressed in the APN/PPN legislation. As the Court of Appeal explained in reaching its decision on the first issue in *Beadle*, the regime "has as its express purpose deterring marketed tax avoidance schemes by removing the cash flow benefit which would otherwise accrue to taxpayers while such schemes are contested and irrespective of the validity of such schemes": [49]. That "pay now, argue later" purpose is subverted if a penalty appeal can become a "back door" appeal against an APN. The deliberate omission of a statutory appeal right against the APN itself is both rational and explicable given that an APN does not determine the tax ultimately due but is "an interim decision determining where the disputed tax should sit": [50]. The Court of Appeal's decision on reasonable excuse is framed in terms of a payment notice's "invalidity or alleged invalidity". While the facts before it related to substantive invalidity, what persuasive reason is there for not applying the Court's underlying rationale and reasoning to procedural invalidity?

77. Second, it is arguable that a penalty appeal before the FTT is the wrong forum in which to consider the alleged procedural invalidity of an APN as much as its alleged substantive invalidity. The authorities establish that the scheme of the APN code contemplates three avenues of challenge by a taxpayer to a tax payment accelerated by an APN, namely the making of representations to HMRC under section 222 FA 2014, a challenge outside the FTT by way of judicial review, and a right of appeal against the tax liability to the FTT in the normal course. Where, as in this case, the taxpayer has challenged the APN by way of judicial review, did Parliament intend that the FTT should have to assess objectively the strength of the taxpayer's arguments, before the judicial review has been heard, in order to determine the objective reasonableness of the taxpayer's excuse for non-payment on the APN?

78. These arguments have given us pause for thought. However, we have concluded on balance that it would be unduly restrictive to determine that a belief as to procedural invalidity could never be a reasonable excuse in respect of a penalty for non-payment of the APN. In our opinion, there is a difference between substantive invalidity and procedural invalidity, because in relation to procedural invalidity the policy considerations considered in *Beadle* and in other cases cannot simply be assumed to apply in undiluted form. Where the taxpayer's belief is essentially that what purports to be on its face an APN is not an APN at all, because it does not satisfy the statutory conditions, the policy considerations driving the APN code are necessarily less persuasive in determining the objective reasonableness of that belief.

79. Our conclusion is also consistent with the observation of Elisabeth Laing J in *Dunne*, referred to in *Beadle*.

80. However, the objection that a penalty appeal before the FTT is the wrong forum in which to debate the procedural validity of an APN remains a substantial concern. Where the taxpayer who alleges that the APN is invalid (for whatever reason) has not begun judicial review proceedings, he should do so. Where judicial review

proceedings have begun, in our view it cannot be desirable for the hearing of those proceedings to have been preceded, and to a degree prejudged, by a "mini-trial" before a specialist tax tribunal of the objective strength, and effective merits, of the taxpayer's case.

81. We consider, therefore, that in assessing the objective reasonableness of a belief which a taxpayer had been found to hold that the APN issued to him is procedurally invalid, the FTT's assessment should take into account the following points:

(1) In line with *Perrin*, it should consider all the surrounding facts and circumstances, including the foundation for the taxpayer's belief, any advice on which he has relied, and whether that advice is specific to his APN.

(2) It should identify precisely what the taxpayer does believe; is it that the APN is obviously procedurally invalid, or merely that it is arguable (however strongly) that it is?

(3) It should take into account the reason for the alleged procedural invalidity. We observe that in *Francis Chapman*, to which the FTT referred in this case in forming its view, the FTT referred at [72] to "an obvious or gross error" in the notice, such as where the decimal point had slipped in the statement of the amount to be paid. One can postulate other similar errors. One would hope that in practice such errors would be corrected through the process of representations. In any event, the assessment of objective reasonableness in such a situation will be much more straightforward than one where the determination of validity turns on detailed legal arguments and the outcome of a judicial review.

(4) In view of the concerns we have set out above, it would not be desirable or appropriate for the FTT to conduct a "mini-trial" of the arguments which a taxpayer asserts mean that his judicial review into procedural invalidity will or is likely to be successful.

(5) It must be borne in mind that substantive invalidity cannot form the basis for a reasonable excuse. While the dividing line between substantive and procedural invalidity is clear in principle, there may be instances where the taxpayer's excuse is really the former dressed up as the latter.

82. We turn to Sheiling's grounds of appeal against the FTT's decision in relation to reasonable excuse. The first ground is that the FTT erred in holding that Sheiling could only establish a reasonable excuse if, viewed objectively, there was a high degree of confidence that the APNs were invalid.

83. For the reasons we have given, we consider that the FTT was correct to conclude, at [52], that it was not impossible for a belief in the likely success of the judicial review proceedings to amount to a reasonable excuse. We also consider that it was correct, at [53], to take into account in assessing objective reasonableness the clear parliamentary intent of the APN regime. However, we consider that the FTT's approach of requiring the taxpayer "to demonstrate that, viewed objectively, there is a high degree of confidence that the APNs are invalid" is not the best way to make that assessment. We do not favour some separate test of objective reasonableness in

relation to a belief in the procedural invalidity of an APN; in our view the better approach is to apply *Perrin*, but taking into account the considerations we identify above. Further, a focus on the objective degree of confidence in the belief, where the basis of that belief turns on legal arguments which will be heard in full in the judicial review proceedings, is likely to lead to the disadvantages and problems we have described in relation to forum.

84. The second ground of appeal is that, in the alternative, the FTT erred in concluding that it was not satisfied that objectively the company had a strong case in its judicial review proceedings. As we have explained, this is a debate which the FTT should resist the temptation to be drawn into. Indeed, if the alleged ground of procedural invalidity requires detailed submissions by the parties on competing legal arguments, it is by definition not a gross or obvious error, and, as such, is considerably less likely to be objectively reasonable in this context. We do not accept that the FTT's assessment in this respect was one which no reasonable tribunal could have reached, but, more importantly, there was no need in any event for a "mini-trial" of Sheiling's judicial review case in order to assess its objective reasonableness as an excuse for not paying the APNs.

85. In relation to the first and second grounds of appeal, we are satisfied that the conclusion reached by the FTT was clearly one which was open to it on the facts found. Although we have determined that the FTT should not have approached its decision by assessing whether objectively there was a high degree of confidence in the taxpayer's judicial review claim, its evaluative conclusion should not be disturbed, because it was justified in reaching that conclusion taking into account the points which we set out at paragraph 81 above. Importantly, Mr Houchen's belief at the relevant time was not that the APNs were without doubt invalid, as he would likely have believed in the case of an obvious or gross error of the type contemplated by Judge Hellier in *Francis Chapman*. Rather, it was that there was a "good prospect" that the judicial review proceedings would show the APNs to have been issued unlawfully, although he was not certain that they were unlawful: [27] and [28]. In relation to such a belief, in principle it is reasonable to conclude that a reasonable and responsible taxpayer would be likely to pay the APNs and argue his case in the judicial review.

86. The third ground is that the FTT erred in finding that insufficiency of funds was the predominant reason for non-payment of the APNs, and that in the circumstances this was not a reasonable excuse. At [58], this was expressed to be "another reason" for the FTT's decision. We consider that this was an inference drawn from findings of primary fact which the tribunal was entitled to make. We accept Mr Elliott's submission that the reason for non-payment is not necessarily the same as the taxpayer's excuse for non-payment. However, it is for the FTT to find as a fact, at the first stage of the *Perrin* approach, what the taxpayer believed was its excuse for non-payment. The conclusion at [58] must be read against the FTT's findings of fact at [32] in relation to "the precise reasons" why Sheiling did not pay the APNs. As we read that conclusion, it is a finding of fact that Sheiling's excuse for non-payment was not only what it had offered as its excuse (belief in the invalidity of the APN) but was also its concern as to the financial consequences of payment. Further, the FTT found

that of those two reasons or excuses for non-payment the latter was predominant. Those were findings which it was for the FTT to make on the basis of the evidence before it, and they were not irrational or perverse so as to give rise to an error of law.

87. We therefore dismiss the appeal in relation to reasonable excuse.

Disposition

88. On both the PAYE issue and the reasonable excuse issue, the appeal is dismissed.

MR JUSTICE TROWER
JUDGE THOMAS SCOTT

RELEASE DATE: 8 June 2020