Neutral Citation: **[2023] UKUT 00269 (TCC)**

Case Number: UT/2022/000068

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building
Fetter Lane
London EC4A 1NL

INCOME TAX AND NATIONAL INSURANCE – APNs – penalties – appeal dismissed

Heard on: 11 and 12 July 2023
Judgment date: 9 November 2023

Before

MRS JUSTICE BACON
JUDGE GREG SINFIELD

Between

EXCLUSIVE PROMOTIONS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Conrad McDonnell and Samuel Brodsky, counsel, instructed by Reynolds Porter Chamberlain LLP

For the Respondents: John Brinsmead-Stockham KC, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. In 2016, the Respondents (**HMRC**) issued two Accelerated Payment Notices (**APNs**) to Exclusive Promotions Limited (**EPL**), under Chapter 3 of Part 4 of the Finance Act 2014 (**FA 2014**) and Schedule 2 to the National Insurance Contributions Act 2015.[1] The effect of the APNs was that EPL became liable to pay the disputed tax and National Insurance contributions (**NICs**), even though there was an appeal by EPL against the tax and NIC determinations which had yet to be determined.

2. EPL challenged the APNs by issuing a judicial review claim in the High Court. It did not pay the tax and NICs under the APNs by the due date and, in 2017 and 2018, HMRC imposed six penalties on EPL for its failure to pay on time. Two of the penalties were subsequently withdrawn leaving a liability to pay a total of £6,339.52.

3. EPL appealed the penalties, first to HMRC and then, when HMRC confirmed the penalties, to the First-tier Tribunal (the **FTT**). In the FTT, EPL's appeal was heard with that of another person, Mr Mark Fox. During the FTT hearing, HMRC withdrew some of their decisions which left Mr Fox facing a liability in respect of two penalties of less than £200 in total. Although the FTT dismissed Mr Fox's appeal in relation to the two penalties, he has, understandably, decided not to join EPL in an appeal to the Upper Tribunal (**UT**).

4. Before the FTT, EPL challenged the penalties on three grounds, namely that:

   (1) the time limit for paying the APNs had not started to run because HMRC had never made a determination as required by s. 222 FA 2014 (**s. 222**);

   (2) a genuine belief by a director of EPL that the judicial review would succeed, because the APNs contained a procedural error by failing to consider EPL's representations about the decision-making process of the designated HMRC officer, was a reasonable excuse for the late payment of the tax and NICs; and/or

   (3) the interim relief agreed between EPL and HMRC provided a reasonable excuse for the late payment even after a judicial review challenge to APNs by other claimants had failed.

5. In a decision released on 1 March 2022, [2022] UKFTT 103 (TC) (the **Decision**), the FTT decided against EPL on all three grounds and dismissed its appeal. In summary, the FTT decided that:

   (1) HMRC did make a determination, albeit a flawed one, in their letter of 22 February 2017 and so the time limit began to run from that date;

   (2) a genuine belief that a judicial review would succeed cannot form an objectively reasonable excuse for the purposes of an APN penalty, and in any event the director of EPL did not have any understanding of the merits of the judicial review claim, let alone the specific designated officer points; and

[1] It is common ground between the parties that the relevant provisions of FA 2014 and the National Insurance Contributions Act 2015 are materially the same. This decision therefore only refers to the provisions of FA 2014.

(3) there was no evidence that the director of EPL believed that the effect of the interim relief order meant that EPL was no longer liable to pay by the due date, or that he would escape penalties were EPL to fail to pay and subsequently lose the judicial review; and such a belief would not have been objectively reasonable in any event.

6. With the permission of the FTT, EPL now appeals to the UT on essentially the same three grounds, which we group into two principal issues as follows:

(1) Was there a determination for the purposes of s. 222?

(2) Did EPL have a reasonable excuse for the late payment of the APNs?

7. EPL was represented by Mr McDonnell with Mr Brodsky; Mr Brinsmead-Stockham KC appeared for HMRC. We are grateful to all counsel and those instructing them for the obvious care with which this case was prepared and presented.

LEGISLATIVE FRAMEWORK

8. Section 219 FA 2014 is headed "Circumstances in which an accelerated payment notice may be given" and includes the following provisions:

> "(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 –
>
> (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
>
> (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been –
>
> (i) determined by the tribunal or court to which it is addressed, or
>
> (ii) abandoned or otherwise disposed of.
>
> (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ('the asserted advantage') results from particular arrangements ('the chosen arrangements').
>
> (4) Condition C is that one or more of the following requirements are met
>
> (a) …
>
> (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,
>
> …"

9. The APNs in this case were issued pursuant to s. 219(2)(b) FA 2014 because EPL had already made an appeal to HMRC in relation to the relevant tax determinations.

10. Section 221 FA 2014 sets out what an APN issued pending an appeal, as in this case, must contain. It states:

> "(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),
>
> (c) explain the effect of section 222 and of the amendments made by sections 224 and 225 so far as relating to the relevant tax in relation to which the accelerated payment notice is given,
>
> …
>
> (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.
>
> (4) 'The denied advantage' has the same meaning as in section 220(5)."

11. Section 220(5) FA 2014 defines the "denied advantage", for the purposes of a notice given under s. 219(4)(b), as "so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise".

12. Section 222 FA 2014 provides the statutory mechanism for a taxpayer to challenge an APN. It provides:

> "(1) This section applies where an accelerated payment notice has been given under section 219 (and not withdrawn).
>
> (2) P 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 section 219 was not met,
>
> (b) objecting to the amount specified in the notice under … section 221(2)(b),
>
> …
>
> (3) HMRC must consider any representations made in accordance with subsection (2).
>
> (4) Having considered the representations, HMRC must –

(a) if representations were made under subsection (2)(a), determine whether –

(i) to confirm the accelerated payment notice (with or without amendment), or

(ii) to withdraw the accelerated payment notice,

(b) if representations were made under subsection (2)(b) (and the notice is not withdrawn under paragraph (a)), determine whether a different amount (or no amount) ought to have been specified under … section 221(2)(b), and then –

(i) confirm the amount specified in the notice,

(ii) amend the notice to specify a different amount, or

(iii) remove from the notice the provision made under … section 221(2)(b)

…"

13. Where an APN has been issued pending an appeal, and representations have been made under s. 222, the deadline for payment of the "disputed tax" amount specified in the notice is set out in s. 55(8D) of the Taxes Management Act 1970 (**TMA**), as inserted by s. 224 FA 2014, as being the later of the last day of the 90-day period beginning with the day the APN was given, and the last day of the 30-day period beginning with the day on which HMRC's determination in respect of the representations is notified under s. 222.

14. Where a person fails to pay the amount specified in an APN by the due date under s. 55(8D) TMA, the penalty provisions contained in Schedule 56 to the Finance Act 2009 (**FA 2009**) apply. In this case, if HMRC's s. 222(4) determination was valid (which EPL does not accept), EPL contends that it is nevertheless not liable for any penalty because it had a reasonable excuse within paragraph 16 of Schedule 56 for its failure to pay. At the time the penalties were issued, paragraph 16 provided:

"(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

…

(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."

FACTUAL BACKGROUND

15. There was no challenge by either party to the facts found by the FTT, which are principally to be found at Decision §§67–111 and §§213–214. The relevant background facts may be summarised as follows.

16. EPL carried on a call-centre business. Mr Nigel Jones, one of two directors and shareholders of EPL, was its controlling mind. In 2012–13 EPL participated in a tax avoidance scheme known as the Partly Paid Share Scheme (**PPS Scheme**) designed to reduce its liability to tax and NICs. The PPS Scheme was registered with HMRC and given a Disclosure of Tax Avoidance Schemes (**DOTAS**) reference number. EPL disclosed its use of the PPS Scheme in its company tax return for its accounting period ended 30 April 2013 by including the DOTAS number.

17. On 18 April 2016, HMRC issued EPL and its directors with PAYE/NICs determinations to counteract the use of the PPS Scheme. On 12 May 2016 EPL's advisers notified an appeal against the PAYE/NICs determinations to HMRC. On 27 June 2016, HMRC advised EPL that they would shortly issue APNs; those APNs were then issued on 24 August 2016. They stated that if payment was not made within 31 days after the due date for payment, EPL would be liable to penalties.

18. Meanwhile, at some point in or around July 2016, EPL agreed to be the lead claimant in a judicial review claim brought by users of the PPS Scheme, which challenged the APNs issued to users of the scheme. EPL's claim was filed on 23 September 2016. It asked the court to quash the APNs, declare them incompatible with the Human Rights Act and grant interim relief. Mr Jones did not see a draft of the claim before it was filed. The FTT found that although he genuinely believed that the claim would succeed, his belief was based on trust in the expertise of his advisers, and not on any understanding of the merits of the claim: Decision §94.

19. EPL's advisers sent a letter of representations to HMRC in relation to both APNs on 23 November 2016. Under the heading "Specific grounds of objection", the letter contended that the APNs did not meet Conditions A, B or C of s. 219 FA 2014, and that the amounts specified in the APNs were incorrect. These were described by EPL as its representations made pursuant to s. 222, referring to s. 222(2)(a) in relation to the objections that Conditions A, B and C were not met, and s. 222(2)(b) in relation to the objection that the amount specified was incorrect.

20. After setting out EPL's objections on those grounds, the letter stated "In addition to the above specific statutory grounds, we also ask you to consider the following representations". There followed a heading "General Grounds", with representations made under the following subheadings:

(1) "The date for payment and representations was incorrect"

(2) "Human Rights (Hardship)" and "Human Rights (Other)" and

(3) "Issuing the APN is inconsistent with HMRC's stated practice".

21. Under a further heading "Judicial Review", the letter of representations stated that EPL had instructed solicitors to commence judicial review proceedings, and described the basis of the challenge to the APNs. The letter said that the APNs had been issued ultra vires, because it was a statutory requirement that the amount of the understated tax be that which "a designated

HMRC officer determines, to the best of that officer's information and belief", but the APNs did not provide sufficient details relating to the designated officer and how the designated officer had made their determination. The letter also contended that HMRC had acted unreasonably, in breach of natural justice and in breach of the principle of legitimate expectations.

22. HMRC replied to the letter of representations on 22 February 2017. In their letter, HMRC said that they were "only required by legislation to consider the representations made within your letter against the conditions set out in section 222(2)". HMRC went on to respond to EPL's representations in relation to Conditions A, B and C of s. 219 FA 2014, and EPL's contentions that the amount specified in the APNs was incorrect. In relation to EPL's other representations, HMRC's letter said that "these points do not constitute representations against those conditions and I am not required to and decline to respond". HMRC did nevertheless comment on some (but not all) of the points raised. While HMRC commented in general terms that the judicial review proceedings did not require HMRC to delay their review of the representations made under s. 222, HMRC did not specifically respond to the allegation that the APNs were made ultra vires because of the lack of information provided regarding the designated officer and the decision-making process of that designated officer.

23. In relation to EPL's application to the High Court for interim relief, HMRC said:

> "Until we inform your legal representatives otherwise, HMRC will not enforce payment of the accelerated payment or of any associated penalties until the Court has dealt with your application for an interim relief order.
>
> However, the accelerated payment remains due by 30 March 2017 and you will be liable to penalties if you do not pay in full and on time. This is consistent with the terms of the interim relief order for which you and other claimants have applied."

24. EPL did not pay by 30 March 2017, and on 19 May 2017 HMRC issued EPL with penalties. EPL appealed the penalties to HMRC, which refused the appeal. That decision was later upheld by HMRC on review and EPL appealed to the FTT on 30 October 2017.

25. On 17 May 2017, EPL's judicial review claim was stayed behind an appeal to the Court of Appeal against the decision of Simler J in *R (Rowe) v HMRC* [2015] EWHC 2293 (Admin), which was another judicial review challenge to APNs. In a letter dated 28 November 2017, HMRC accepted that EPL should have interim relief pending the outcome of its claim on the following terms:

> "1. The Defendants shall not take steps to enforce any sum due and payable by the Claimant under its APNs or associated penalties until the High Court has refused permission to proceed or, if permission to proceed is given, has given judgment on the claim.
>
> 2. Nothing in paragraph 1 shall affect the Defendants' entitlement to:
>
> 2.1 issue further APNs to the Claimant
>
> 2.2 determine any written representations by the Claimant in respect of any APN it has received (including any further APN)

> 2.3 issue any notice of penalty to the Claimant in respect of its failure to pay the accelerated payment required of it by any APN (including any further APN)."

26. On 12 December 2017 the Court of Appeal dismissed the taxpayers' appeals in *R (Rowe) v HMRC* and *R (Vital Nut) v HMRC* [2017] EWCA Civ 2105.

27. On 20 April 2018, HMRC issued EPL with two further penalties for failure to pay the amounts specified in the APNs. EPL again appealed the penalties to HMRC, which refused the appeal. Again, a statutory review by HMRC upheld the decision to issue the penalties, and EPL appealed to the FTT on 9 August 2018.

28. On 29 August 2018, EPL filed a notice of discontinuance bringing its judicial review claim to an end. The FTT found that Mr Jones had no understanding of the progress of the claim, the legal issues decided by *Rowe*, or why EPL's claim was discontinued: Decision §§109–111.

29. On 21 January 2019, EPL entered into an agreement with HMRC to pay the amounts specified in the APNs by instalments.

EPL'S CHALLENGE TO THE PENALTIES

30. HMRC issued two APNs to EPL. Following EPL's letter of representations, pursuant to s. 55(8D) TMA EPL was required to pay the APNs by the later of 90 days from receipt of the notice and 30 days after HMRC's determination was notified to it. HMRC appears to have extended that deadline, in its 22 February 2017 letter, to 30 March 2017. EPL did not pay the APNs by that date, and HMRC therefore imposed penalties under Schedule 56 FA 2009. EPL disputed the penalties on two main grounds:

> (1) The first ground was that the amounts specified in the APNs had never become payable under s. 55(8D)(b) TMA, because HMRC's letter of 22 February 2017 was not a determination for the purposes of s. 222(4). It was common ground that if HMRC's letter was not such a determination, then the payment period for the APNs had never started to run and EPL was not liable to any penalty for failure to pay the APNs.
>
> (2) The second ground, which only arises if EPL was (contrary to its first contention) liable to pay the amounts specified in the APNs by no later than 30 March 2017, is that EPL had a reasonable excuse for its failure to pay on time. EPL advanced two reasons why its failure to pay should be regarded as reasonable. The first was that EPL had a genuine belief that its judicial review claim would succeed. The second was that the interim relief agreement by HMRC made it reasonable for EPL to assume that it had no liability to pay the APNs until after the judicial review claim had failed or had been discontinued. If either or both of these reasons provided a reasonable excuse for the late payment, then EPL would be relieved from liability to pay any penalty.

31. As set out above, the same grounds are advanced by EPL in this appeal.

WAS THERE A DETERMINATION FOR THE PURPOSES OF SECTION 222 FA 2014?

The FTT's reasoning

32. In relation to the first issue, EPL contended that HMRC's letter of 22 February 2017 was not a determination for the purposes of s. 222(4), because HMRC did not deal with all the issues raised by EPL in its letter of 23 November 2016.

33. The FTT considered *R (Mrs Shirley Archer) v HMRC* [2019] EWCA Civ 1021, in which Henderson LJ observed at §17 that:

> "… the practical importance of the section 222 procedure should encourage the court to adopt a broad and non-technical approach to the permitted grounds of objection, with the object of ensuring as far as reasonably possible that all objections relating to the applicability of Conditions A, B or C, or to the amount of the understated tax, should be capable of resolution under the section."

34. That comment was made in the context of a discussion of whether the representations procedure in s. 222 is the primary remedy for a taxpayer dissatisfied with an APN, which should normally be exhausted before any judicial review proceedings are set in motion. At §§93–4 Henderson LJ held that it is, and that HMRC had:

> "… a duty to give serious and careful consideration to the representations which are made, supplemented if necessary by HMRC's acknowledged duty to deal in good faith with proper representations made to them by taxpayers, whether or not falling strictly within the scope of the APN."

35. As to the scope of the objections which may be raised under s. 222, Henderson LJ reiterated (at §95) that a broad and non-technical construction should be given to s. 222 "with the aim of enabling all objections to the application of the three conditions, or to the amount of the accelerated payment, to be covered if at all possible by the representations".

36. The FTT agreed with EPL that HMRC had a duty to consider and respond to EPL's objections that the APNs were ultra vires because of the lack of information regarding the way in which the designated officer made their decision. Those points were, the FTT considered, challenges to the "amount" of the APNs, giving the term "amount" the broad and non-technical construction required by *Mrs Archer*. The FTT found that HMRC's letter of 22 February 2017 did not contain a response to all the points in EPL's letter, and held that it was therefore flawed but nevertheless a "determination" under s. 222(4): Decision §§181–2.

37. The FTT observed that HMRC's failure to take into account matters which should have been taken into account meant the determination might be vitiated by unreasonableness, in which case the APNs would be set aside: Decision §183. We consider that the FTT erred on this point. The determination logically followed the issue of the APNs, and whether it was valid or not had no impact on the legal status of the APNs. In our view, if HMRC's letter was not a valid determination then the only consequence would be that the obligation to pay the APNs continued to be suspended by s. 223(5) FA 2014, and the payment period would not start to run again until there was a valid determination.

38. The FTT's view that the next step would be an investigation as to whether HMRC's determination might be vitiated by unreasonableness led the FTT to consider whether it had a judicial review jurisdiction or supervisory jurisdiction of a similar nature. The FTT discussed

the UT's decision in *Birkett v HMRC* [2017] UKUT 89 (TCC) and the Court of Appeal's decision in *Beadle v HMRC* [2020] EWCA Civ 562. It concluded that it did not have jurisdiction to consider a public law challenge to the APNs, and therefore did not have jurisdiction to consider the ultra vires objections to the APNs contained in EPL's 23 November 2016 letter: Decision §§184–191.

39. In the alternative, if it did have such jurisdiction, the FTT held that even if HMRC had considered all the representations made by EPL, the determination would inevitably have been the same and the penalties would have been upheld: Decision §§192–3.

Discussion

40. EPL's case on this issue is straightforward. It contends that if representations are made on multiple points in the same letter of representations, then s. 222(4) obliges HMRC to consider all those representations, at least in so far as they are valid representations (adopting the broad and non-technical approach referred to in *Mrs Archer*). Mr McDonnell submitted that there can be no s. 222(4) determination until HMRC have done that. If HMRC purport to confirm the APN having only considered some of the statutory representations, then that confirmation cannot amount to the required statutory determination pursuant to s. 222(4), because there are outstanding representations which HMRC have not determined. Alternatively, if the determination is flawed, whether because it is *Wednesbury* unreasonable or because relevant considerations have not been taken into account, it is void as a determination and is therefore not a determination within the meaning of s. 222(4). Mr McDonnell's essential point was that a "determination" in s. 222(4) must refer only to lawful determinations. If there is not a valid and lawful determination, then on his submission the 30-day payment period under s. 55(8D) TMA cannot start to run.

41. HMRC's position is that the FTT was correct to hold both that HMRC's letter of 22 February 2017 was a "determination" for the purposes of s. 222(4), and that the FTT had no jurisdiction to consider public law challenges to the validity of that determination. Mr Brinsmead-Stockham submitted that HMRC's letter satisfied the formal statutory requirements of s. 222(4) by determining that the APNs would be confirmed without amendment and notifying EPL of that fact. He also contended that the clear effect of *Beadle* was that the FTT did not have jurisdiction, in an APN penalty appeal, to consider public law arguments as to the validity of the APNs.

42. The judgment in *Beadle* is indeed in our view the correct starting point. The case concerned an appeal against a penalty notice for non-payment of a Partner Payment Notice (**PPN**), but the court noted that for its purposes there was no material distinction between APNs and PPNs. The provisions on representations and penalties for PPNs are, in particular, in all material respects the same as those set out above for APNs. Mr Beadle, in that case, made representations challenging the validity of the PPN issued to him, including on grounds that the amount of the "understated tax" specified in the PPN was not due as a matter of law. His representations were rejected by HMRC; Mr Beadle did not pay the PPN within 30 days of notification of that determination; HMRC therefore issued a penalty for late payment. Mr Beadle appealed contending, among other things, that the amount payable under the PPN should have been zero, such that the penalty should also have been zero.

43. In the Court of Appeal, Simler LJ agreed with both the FTT and UT that the FTT had no jurisdiction to entertain Mr Beadle's challenge to the PPN, approving (at §43) a passage set out at §45 of the decision of the UT in that 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 …"

44. At §§48–9, Simler LJ commented in similar vein that

> "it is a clear and necessary implication of the FA 2014 scheme for PPN (and APN) notices, construed as a whole and in light of its statutory purpose, that the ability to raise a collateral public law challenge to the validity of the underlying PPN is excluded at the penalty and enforcement stages. … In substance although not in form that would amount to a statutory appeal by the back door against the PPN, for which Parliament has expressly not provided, and during the course of which the disputed tax would be retained by the taxpayer, enabling him to enjoy the cash flow benefits that the scheme is designed to remove."

45. As Simler LJ explained, the purpose of the PPN regime is to deter marketed tax avoidance schemes by removing the cash flow benefit to taxpayers while those schemes are contested, irrespective of the validity of such schemes. The deliberate omission of statutory appeal rights is an indication that Parliament does not intend taxpayers to be able to make direct challenges to PPNs by way of appeals to the FTT, where the underlying tax dispute provides full appeal rights. By necessary implication, indirect challenges through penalty or other proceedings cannot have been intended either (§§49–50).

46. That reasoning applies with equal force to a determination by HMRC confirming an APN. If a taxpayer cannot challenge the validity of an APN/PPN by way of a penalty appeal, it would be completely illogical for the taxpayer to be able nevertheless to advance, in a penalty appeal, a challenge to a s. 222(4) determination confirming the APN/PPN and rejecting the taxpayer's representations as to the validity of the APN/PPN. If the position were otherwise, a taxpayer could use the s. 222 representations mechanism to engender an appeal route otherwise denied for the reasons set out in *Beadle*.

47. It is, therefore, not open to the FTT to entertain a penalty appeal based on a contention that a s. 222(4) determination failed to take account of all of the relevant representations and was therefore not valid. We do not accept EPL's submission that its challenge to the validity of the determination can be made without requiring the FTT to exercise a judicial review function. Its objection that HMRC's determination failed to take account of and respond to all of the relevant representations on the "amount" of the APN is a classic judicial review challenge.

48. The FTT was therefore correct to say (Decision §191) that it had no jurisdiction to consider whether the determination should be set aside on the grounds that HMRC failed to address certain of EPL's ultra vires objections. It is not, therefore necessary for us to address

the correctness of FTT's prior conclusion (Decision §§181–2) that the determination was flawed for failure to take into account those ultra vires objections. Whether or not HMRC's determination should have taken account of and responded to those objections can only be determined by embarking on precisely the enquiry which, as is clear from *Beadle*, is not open to the FTT in an APN penalty appeal.

49. In the present case, HMRC's 22 February 2017 letter responded to EPL's representations expressed as being made pursuant to s. 222(2)(a) and (b), regarding Conditions A, B and C in s. 219, and the amounts specified in the APNs. The letter concluded with a clear confirmation of the APNs and their amounts. There is no dispute that the letter met the formal requirements of s. 222(4). The letter was therefore a determination within the meaning of s. 222(4), which triggered the 30-day period under s. 55(8D) TMA. Unless and until the determination is successfully challenged in a court of competent jurisdiction, it is presumed to be valid: *Beadle* §4.

DID EPL HAVE A REASONABLE EXCUSE?

Whether the appeal raises an error of law

50. EPL does not challenge the facts found by the FTT, but contends that the FTT erred in law in concluding on the basis of those facts that EPL did not have a reasonable excuse for the late payment of the APNs. HMRC submit that the FTT's conclusions in relation to reasonable excuse were findings of fact and not capable of challenge save on the basis set out in *Edwards v Bairstow* [1956] AC 14.

51. After the hearing in this case and before this decision was released, EPL applied for the parties to be allowed to make submissions on the decision of the UT in *HMRC v A Taxpayer* [2023] UKUT 182 (TCC), which was released on 28 July 2023. We granted the application and also subsequently allowed EPL to reply to the submissions made by HMRC.

52. The relevant question in *A Taxpayer* was whether certain circumstances were "exceptional circumstances beyond [the person's] control" preventing a taxpayer from leaving the UK (so as to cause the normal statutory residence test day limits to be exceeded) for the purposes of paragraph 22(4) of Schedule 45 to the Finance Act 2013. The UT in *A Taxpayer* held that the FTT's decision that the circumstances in that case were "exceptional" was a mixed finding of fact and law, with the question as to whether or not the circumstances were "exceptional" being a question of law to be answered by reference to the primary findings of fact.

53. EPL contended that the issue in *A Taxpayer* is directly analogous to the question in this case as to whether or not an excuse is "reasonable". Both are questions of law, to be answered by reference to the primary findings of fact found by the FTT. In EPL's submission, the question of law in this case is whether the primary facts found are or are not capable of amounting to an objectively reasonable excuse, i.e. capable of satisfying the objective requirement of reasonableness.

54. HMRC's primary response was that the decision in *A Taxpayer* is not relevant here because it concerned different legislation with different wording, i.e. "exceptional circumstances" as opposed to "reasonable excuse". Further, HMRC pointed out that the UT in *A Taxpayer* expressly stated at §54 that the two concepts were not the same:

> "In our judgment, the para 22(4) requirements are not similar to a reasonable excuse test but are instead entirely objective, for the following reasons:
>
> > (1) The statutory provisions make no reference to the person acting 'reasonably', or having 'a reasonable excuse', so as to require a tribunal to consider his particular circumstances, such as his belief, experience, relevant attributes and his situation at the relevant time.
> >
> > (2) Para 22(4) is also followed by para 22(5), which provides two examples of 'exceptional circumstances': national or local emergencies such as war, civil unrest or natural disasters; and a sudden or life-threatening illness or injury. All these scenarios are objectively verifiable; they do not depend on the taxpayer's reasonable belief.
> >
> > (3) Further support is provided by the government's response to the consultation on the SRT, cited by the FTT at §128, which said (our emphasis) that the purpose of the new provisions was to 'introduce a statutory definition of tax residence (statutory residence test) that is transparent, objective and simple to use'."

55. HMRC maintained that the meaning of the phrase "reasonable excuse" is a question of law, and that a finding by the FTT as to whether a particular taxpayer had a "reasonable excuse" in the particular circumstances of any given case is a finding of fact.

56. The passage in *A Taxpayer* relied on by EPL is at §110, where the UT observed:

> "Whether or not the circumstances were 'exceptional' is a mixed question of fact and law. This Tribunal cannot interfere with the findings of fact made by the FTT unless there was no evidence to that effect. However, whether one or more findings of fact mean that the Taxpayer's circumstances were 'exceptional' is a question of law."

57. We agree with that observation, but note that (as HMRC said) the UT in *A Taxpayer* was not concerned with the meaning of "reasonable excuse" but a different concept and legislative provision. In our view, the observation at §110 does not add anything to the comments of the UT in *Perrin v HMRC* [2018] STC 1302:

> "43. In the present case, in deciding whether the appellant had a reasonable excuse for her failure to file her return on time, how long that reasonable excuse lasted, and whether she filed the return without unreasonable delay after that excuse came to an end, the FTT was carrying out its own value judgment, applying its understanding of the concepts of 'reasonable excuse' and 'without unreasonable delay' to the primary facts which it had found.
>
> 44. None of the relevant primary facts found by the FTT are disputed by the appellant. It is therefore clear … that the Upper Tribunal can only overturn the FTT's decision if we are satisfied that the FTT was wrong in law to interpret the statutory phrases 'reasonable excuse' and 'without unreasonable delay' in the way it did, or if it plainly misapplied the correct law to the facts which it found."

58. As in *Perrin*, there is no challenge to the findings of fact by the FTT in this case. That being the case, the question is whether the FTT misinterpreted the phrase "reasonable excuse" or, having interpreted it correctly, misapplied the concept to the facts which it had found, which are both questions of law.

The FTT's reasoning

59. The starting point in that regard is, as the FTT set out at §197, the approach set out by the UT at §81 of *Perrin*:

> "(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 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, [the Tribunal] 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 [Tribunal], 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 … In doing so, the [Tribunal] should again the 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."

60. As to the third of those steps, the FTT noted the judgment in *Beadle*, in which the Court of Appeal (at §§57–9) found that a reasonable belief that the PPN was invalid or allegedly invalid could not form a reasonable excuse for failure to pay within the payment period.

61. The FTT then referred to the decision of the UT in *Sheiling Properties v HMRC* [2020] UKUT 175 (TCC), cited by counsel for EPL, in which the UT distinguished between "procedural invalidity" and "substantive invalidity", holding at §78 that the policy considerations driving the APN code are less persuasive in determining the reasonableness of a belief where the taxpayer's belief is that "what purports to be on its face an APN is not an APN at all". At §81 of *Sheiling* the UT said that in assessing the objective reasonableness of a belief that the APN was procedurally invalid, the FTT should identify whether the taxpayer believed that the APN was "obviously procedurally invalid" as opposed to merely arguably so, giving as an example an "obvious or gross error" in the notice such as where the decimal point was incorrectly placed in the statement of the amount to be paid. It commented at §84 that if the alleged ground of procedural invalidity required detailed submissions by the parties on competing legal arguments, that was by definition "not a gross or obvious error, and, as such, is considerably less likely to be objectively reasonable in this context."

62. Having considered those cases, the FTT's decision was as follows:

> "210. We accept that *Sheiling* provides support for the view that a gross or obvious procedural error in an APN can provide the basis for a reasonable excuse defence. However, we agree with Mr Hall that a genuine belief in the success of a JR based on the failure by the Designated Officer to form a view on the effectiveness of the scheme is not [a] 'gross or obvious' error, but instead one which requires 'detailed legal submissions': this is evident from

> the *Rowe* litigation as well as from the length and complexity of the relevant parts of this Decision.
>
> 211. It therefore follows that a person's belief that a JR would succeed because of the failure by the Designated Officer to form a view on the effectiveness of the scheme cannot form an objectively reasonable excuse for the purposes of an appeal against an APN penalty. That is sufficient to decide Issue Two in HMRC's favour, but in case we are wrong in our analysis we have also considered *Perrin*."

63. The FTT then considered the *Perrin* four-step approach, and decided as follows:

> "213. It is clear from our findings of fact that, although Mr Jones genuinely believed that the JR would succeed, his belief was based on trust in the expertise of his advisers, and not on any understanding of the merits of the claim, see §109ff. It follows that Mr Jones had no knowledge of the Designated Officer ground, and did not rely on it.
>
> 214. The third stage of *Perrin* is to consider whether this uninformed faith in his advisers was reasonable for a person in Mr Jones's position, and we find that it was not. He is an intelligent and experienced businessman, who regularly makes contracts with his suppliers. He was capable of understanding the PPS Scheme sufficiently to explain it to Menzies."

64. In case it was wrong on that point and Mr Jones's faith in the success of the judicial review was reasonable, the FTT went on to consider the fourth step in *Perrin*, i.e. when that reasonable excuse ceased and whether EPL remedied the failure without unreasonable delay. The FTT found that it was clear that EPL could not have believed that the judicial review had any reasonable prospects of success after the Court of Appeal's judgment in *Rowe* on 12 December 2017. EPL failed to make the payments without unreasonable delay after that date and so was liable for the penalties: Decision §§215–6.

65. The FTT next considered whether EPL had a reasonable excuse on the basis that HMRC had accepted that EPL should have interim relief in its letter dated 28 November 2017, on the terms set out at §25 above. Those terms were (essentially) that HMRC would not enforce payment under the APNs or associated penalties until the High Court had disposed of the judicial review claim. HMRC specifically reserved the right, among other things, to issue further APNs and penalties for failure to pay any APN (including any further APN).

66. Applying the approach required by *Perrin*, the FTT found that Mr Jones did not understand the meaning of the term "interim relief" and that EPL had not proved that Mr Jones had any understanding that, as a result of interim relief being agreed, no penalties would be chargeable for the failure to pay the APNs. The FTT also held that, even if Mr Jones *had* believed that the interim relief order meant he did not have to pay the APNs, that would not have formed a reasonable excuse because that belief was not objectively reasonable, since the interim relief agreed by HMRC merely stayed enforcement and did not change the APN payment dates or preclude penalties for failure to pay on time, and EPL's legal advisers did not advise him that the interim order had changed the date by which payment was legally due: Decision §§240–3.

Discussion

67. Mr McDonnell submitted, relying on *Sheiling*, that the FTT erred in law in concluding that a belief that the APNs were invalid "cannot form an objectively reasonably excuse"

because it is not "an obvious or gross error". He contended that the UT in *Sheiling* had not held that only gross or obvious errors could give rise to a reasonable excuse.

68. Mr Brinsmead-Stockham argued that *Sheiling* was wrongly decided on this point, since it was inconsistent with *Beadle*. His submission was that the effect of *Beadle* was that any form of collateral challenge to the substantive validity of an APN could not form the basis of a reasonable excuse in an APN penalty appeal, with "substantive validity" for these purposes including all collateral challenges which assert that the conditions for issuing an APN are not satisfied.

69. We recognise that the scope of the approach set out in *Sheiling* may need to be explored in a future case. In its recent judgment in *William Archer v HMRC* [2023] EWCA Civ 626, the Court of Appeal noted that there was uncertainty as to the scope of the cases where non-payment of an APN might be reasonable, and expressly did not decide whether the *Sheiling* distinction between substantive and procedural invalidity was correct (§78d). Nor do we consider it necessary to determine that in this case. That is because, irrespective of whether a belief of the taxpayer in the invalidity of the APN on particular grounds might in principle form an objectively reasonable excuse, in the present case the FTT found as a matter of fact that Mr Jones did not have any understanding of the merits of the claim, and specifically did not have any knowledge of the designated officer points. In other words EPL's decision not to pay the amounts specified in the APNs did not, as a matter of fact, rely on a belief as to the invalidity of the APNs on the designated officer grounds. Instead, Mr Jones simply relied on a belief that the judicial review would succeed based on trust in the expertise of his advisors. That was, the FTT found, not reasonable for a person in Mr Jones' position; and in any event that belief was not tenable after 12 December 2017 (when the Court of Appeal's judgment in *Rowe* was handed down).

70. Mr McDonnell submitted that the FTT erred in concluding that Mr Jones's status as an "intelligent and experienced businessman" indicated that EPL's reliance on legal advice and trust in its legal advisers could not ground its reasonable excuse defence. His submission was that it was not relevant to take into account whether Mr Jones, as a layman, understood the legal issues or not. All that needed to be established was that he believed that the judicial review would succeed.

71. At §19 of *William Archer*, Whipple LJ emphasised that reasonableness is to be determined in each case depending on the facts, citing with approval §161 of *Barrett v HMRC* [2015] UKFTT 329 (TC) which noted that reasonableness

> "… is a question of degree having regard to all the circumstances, including the particular circumstance of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different."

72. *Perrin* §81 likewise makes clear that the Tribunal should take into account the experience and relevant attributes of the taxpayer in deciding whether what the taxpayer did was reasonable. The FTT found, as a matter of fact, that it was not reasonable for a person in Mr Jones' position to make a decision not to pay based on uninformed faith in his advisors. That was a finding of fact which the FTT was entitled to make on the evidence before it. We do not consider there to be any error of law in the FTT's application of the concept of a reasonable excuse in this regard.

73. In *William Archer*, on which Mr McDonnell placed heavy reliance, the Court of Appeal considered that Mr Archer had a reasonable excuse for non-payment of the amount set out in APNs, following the issue of closure notices disallowing the losses claimed by Mr Archer pursuant to two marketed tax avoidance schemes. Whipple LJ found that although there was no evidence before the court as to Mr Archer's belief as to the merits of the judicial review proceedings, it was open to the court to draw an inference that the judicial review proceedings were the reason for non-payment, and this was all that was required (§§69 and 92–5).

74. Importantly, however, Whipple LJ expressly distinguished Mr Archer's situation from the APN cases such as *Beadle* and the FTT's judgment in the present case, where the "pay now, argue later" principle was engaged, such that there are specific policy reasons for removing the cashflow advantage to taxpayers while the disputed tax avoidance schemes are contested. While Mr Archer had received an APN, his representations in relation to that APN had gone completely unanswered by HMRC. Absent any response, the FTT and UT had found that no payment was due under the APNs issued to Mr Archer. Whipple LJ held that in those circumstances the "pay now, argue later" principle did not apply. The reasoning in cases such as *Beadle* and the present case was therefore not helpful (*William Archer* §§31 and 79–81).

75. *William Archer* was therefore, as Whipple LJ expressly found, a decision taken in a different context, in which the court proceeded on the basis that a taxpayer with a reasonable case would not have to pay the tax until after the appeal was determined. The present appeal, by contrast, falls squarely within the category of cases in which the APN has been confirmed by a determination by HMRC, where the starting point under *Beadle* is (as set out above) that a reasonable excuse for failure to pay will not be established on the basis of a belief (however reasonable) that a judicial review will succeed in establishing the invalidity of the APN.

76. In the latter category of case, while the Court of Appeal in *William Archer* recognised that there may in principle be cases where non-payment of the amount due under an APN might be reasonable, such cases will necessarily turn on an assessment of their particular facts. It follows that the FTT was entirely correct to ask itself whether the particular facts of the present case, on the evidence before it. made it objectively reasonable for EPL to decide not to pay.

77. In relation to the remaining question of whether the existence of an agreement between EPL and HMRC to provide for interim relief could form the basis of a reasonable excuse, Mr McDonnell submitted that the terms of the interim relief agreement did not prevent HMRC from issuing penalty notices, but equally those terms did not mean that EPL did not have any reasonable excuse. He contended that nobody would expect payment to be made while an interim relief order was in place, and it was therefore illogical that there should be any liability for penalties in those circumstances. It must follow, he said, that EPL had a reasonable excuse for not paying while the interim relief was in position.

78. Mr Brinsmead Stockham pointed out that the FTT found that Mr Jones did not have any belief in relation to the interim relief, which was (again) fatal to EPL's reliance on this point as a reasonable excuse. He also submitted that the FTT had found that, given the specific terms of the interim relief, it would not have been objectively reasonable for Mr Jones to believe that HMRC would not issue penalties.

79. We do not consider that there was any error of law in the FTT's conclusion that the existence of interim relief did not support a reasonable excuse for failure to pay the APNs. That conclusion was based on the FTT's findings of fact that Mr Jones did not understand the meaning of "interim relief" or that, as a result of the agreement with HMRC, there would be

no penalties chargeable if EPL failed to pay by the due date. In the absence of any findings of fact that Mr Jones believed that the effect of the interim relief order meant that the judicial review would succeed, or that EPL was no longer liable to pay by the due date, or that EPL would escape liability for penalties for non-payment if the judicial review claim failed, the FTT was bound to find that EPL did not have a reasonable excuse.

80. Further, we consider that the FTT was correct to conclude at §243 that it was plain from the terms of the interim relief that it merely stayed enforcement of the APNs and did not prevent HMRC from issuing penalties. In those circumstances, and since EPL was not advised that the interim order had changed the due date for payment, any belief to the contrary would not have been objectively reasonable. (In this respect, again, we note that the Court of Appeal in *William Archer* expressly noted that the facts of the present case were different from the situation of Mr Archer, where the Administrative Court had made an order granting interim relief which was silent on whether HMRC were entitled to impose penalties for non-payment: *William Archer* §38.)

81. In conclusion on this issue, we are satisfied that the FTT correctly interpreted the statutory phrases "reasonable excuse" and "without unreasonable delay" and applied them appropriately to the facts which they found. In the absence of any error of law, the FTT's decision that EPL did not have a reasonable excuse for its failure to pay the APNs by their due dates must stand.

DISPOSITION

82. For the reasons given above, EPL's appeal is dismissed.

COSTS

83. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is proposed that the order be made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MRS JUSTICE BACON
JUDGE GREG SINFIELD

Release date: 9 November 2023