[2018] UKFTT 0401 (TC)

TC06603

Appeal number: TC/2017/06835

INCOME TAX – Follower Notice - penalty for failure to take corrective action- whether corrective action taken - whether penalty should be reduced for co-operation.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROBERT CULLEN **Appellant**

- and -

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

TRIBUNAL: JUDGE MARILYN MCKEEVER

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 3 July 2018

Mr David Conlan, tax advisor, for the Appellant

Mr Matt Beattie, Officer of the Respondents, for the Respondents

DECISION

Introduction

1. This case is about a penalty in the amount of £35,000 issued to the Appellant for failing to take corrective action after the issue of a follower notice to him. An Accelerated Payment Notice ("APN") and the follower notice were issued in relation to his participation in a tax avoidance scheme known as "Manufactured Interest Payments SG REPO- Kevin" ("the scheme").

2. The Appellant appeals on the grounds that he did take the corrective action and so the penalty is not due.

3. In the event that I find that the penalty is due, he also appeals the amount of the penalty and argues that he should receive a reduction in the penalty owing to his co-operation.

4. I had before me a bundle of documents and correspondence and also heard oral evidence from Mr Cullen. The bundle contained a witness statement from Sharon Jones, the HMRC officer who was responsible for the issue of follower notices in relation to the scheme. It was not necessary for Ms Jones to be cross-examined on her witness statement.

5. At the start of the hearing Mr Cullen produced a copy of form CADAcc38, completed and signed by him and dated 12 September 2016 ("the Form"). The Form had not previously been seen by either HMRC or Mr Conlan, Mr Cullen's accountant. Form CADAcc38 is provided by HMRC as a means of taking corrective action. The form was therefore clearly relevant and it was agreed that it would be admitted in evidence, although I discuss below the weight to be attached to it in the light of the circumstances of its production.

6. It is for HMRC to prove that the penalty is due and has been correctly calculated.

7. The Appellant can escape liability for the penalty if he can show that that it was reasonable in all the circumstances not to take corrective action. The Appellant does not seem to have argued that this is the case and indeed, he argues that he did take corrective action, so this defence is not relevant. The onus would also be on the Appellant to show he had not been given an adequate reduction in the penalty for co-operation.

8. In each case, the burden of proof is to the normal civil standard of the balance of probabilities.

The Law

9. APNs and follower notices were introduced by Finance Act 2014 (and references to statutory provisions are to provisions of that Act unless otherwise specified) as part of the government's anti-tax avoidance strategy. They serve different purposes.

10. Although of broader scope, follower notices are, in particular, aimed at marketed avoidance schemes which have been implemented by a number of people. The intention is to remove the need for HMRC to pursue every user of a scheme separately through the tribunals and the courts. Where one user has pursued an appeal which has been the subject of a "final decision", within the meaning of section 205(4), in a tribunal or court, HMRC can (subject to certain other conditions) issue a follower notice to other users of the same or a similar scheme. There is no appeal against a follower notice although the recipient may make representations on certain grounds. A taxpayer who receives a follower notice must take "corrective action" which, in effect, requires him to give up the tax advantage he asserts the relevant scheme provides and to adjust the amount of tax he owes accordingly. If the taxpayer does not take corrective action within the time limit, he becomes liable to a penalty.

11. APN's may be issued in conjunction with follower notices but also in other circumstances. An APN requires the taxpayer to pay any additional tax which HMRC consider to be due before the matter has been determined. The amount to be paid pursuant to an APN is not necessarily the same as the amount of the tax advantage which HMRC deny is due pursuant to the follower notice. The amount of the APN is the amount of tax which the taxpayer owes, once the tax advantage has been taken out of the equation.

12. Section 204 sets out when HMRC may issue a follower notice:

> **"204 Circumstances in which a follower notice may be given**
> (1) HMRC may give a notice (a "follower notice") to a person ("P") if Conditions A to D are met.
> (2) Condition A is that—
> (a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
> (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax, but that appeal has not yet been—
> (i) determined by the tribunal or court to which it is addressed, or
> (ii) abandoned or otherwise disposed of.
> (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular tax arrangements ("the chosen arrangements").
> (4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements.
> (5) Condition D is that no previous follower notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements, judicial ruling and tax period…."

13. Section 205 explains what constitutes a "judicial ruling" which is "relevant". In the present case, the relevant judicial ruling is the Court of Appeal decision in *Nicholas Barnes v HMRC* [2014] EWCA Civ 31 ("*Barnes*") which decided that the scheme did not achieve the intended tax result which was to reduce the income tax liability of those who participated in the scheme.

14. Section 208 provides for HMRC to issue a penalty if the taxpayer does not take "corrective action". It also sets out what constitutes corrective action and the time limits for taking such action.

> **"208 Penalty if corrective action not taken in response to follower notice**
> (1) This section applies where a follower notice is given to P (and not withdrawn).
> (2) P is liable to pay a penalty if the necessary corrective action is not taken in respect of the denied advantage (if any) before the specified time.
> (3) In this Chapter "the denied advantage" means so much of the asserted advantage (see section 204(3)) as is denied by the application of the principles laid down, or reasoning given, in the judicial ruling identified in the follower notice under section 206(a).
> (4) The necessary corrective action is taken in respect of the denied advantage if (and only if) P takes the steps set out in subsections (5) and (6).
> (5) The first step is that—
> (a) in the case of a follower notice given by virtue of section 204(2)(a), P amends a return or claim to counteract the denied advantage;
> (b) in the case of a follower notice given by virtue of section 204(2)(b), P takes all necessary action to enter into an agreement with HMRC (in writing) for the purpose of relinquishing the denied advantage.
> (6) The second step is that P notifies HMRC—
> (a) that P has taken the first step, and
> (b) of the denied advantage and (where different) the additional amount which has or will become due and payable in respect of tax by reason of the first step being taken.
> (7) In determining the additional amount which has or will become due and payable in respect of tax for the purposes of subsection (6)(b), it is to be assumed that, where P takes the necessary action as mentioned in subsection (5)(b), the agreement is then entered into.
> (8) In this Chapter—
> "the specified time" means—
> (a) if no representations objecting to the follower notice were made by P in accordance with subsection (1) of section 207, the end of the 90 day post-notice period;
> (b) if such representations were made and the notice is confirmed under that section (with or without amendment), the later of—
> (i) the end of the 90 day post-notice period, and
> (ii) the end of the 30 day post-representations period;
> "the 90 day post-notice period" means the period of 90 days beginning with the day on which the follower notice is given;
> "the 30 day post-representations period" means the period of 30 days beginning with the day on which P is notified of HMRC's determination under section 207…."

15. Section 211 confers power on HMRC to assess the penalty and includes time limits on the period during which they may do so:

"211 Assessment of a section 208 penalty

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

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

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

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

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

(4) An assessment—

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

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

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

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

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

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

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

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

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

16. Section 209 specifies that the amount of the penalty is 50% of the denied advantage. Section 210 allows HMRC to reduce the amount of the penalty to take account of the degree of co-operation provided by the taxpayer but with a minimum penalty of 10%. It also sets out what constitutes "co-operation" for this purpose.

"210 Reduction of a section 208 penalty for co-operation

(1) Where—

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

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

(c) P has co-operated with HMRC,

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

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

(3) P has co-operated with HMRC only if P has done one or more of the following—

(a) provided reasonable assistance to HMRC in quantifying the tax advantage;

(b) counteracted the denied advantage;

(c) provided HMRC with information enabling corrective action to be taken by HMRC;

(d) provided HMRC with information enabling HMRC to enter an agreement with P for the purpose of counteracting the denied advantage;

(e) allowed HMRC to access tax records for the purpose of ensuring that the denied advantage is fully counteracted.

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

17. Mr Cullen does not seek to argue that the follower notice was not properly issued. He asserts that he did take corrective action so the penalty is not due, or if it is, that the penalty should be reduced to take account of his co-operation.

The facts

18. Mr Cullen's tax return for the 2004-5 tax year disclosed that he had participated in the scheme and, as required, included the DOTAS reference for the scheme. HMRC opened an enquiry into the return on 14 December 2005 and issued a closure notice on 9 June 2011 as a result of which they amended his tax return to deny the claimed tax advantage. Mr Cullen appealed against the closure notice pending the final outcome of the *Barnes* case.

19. Following the Court of Appeal decision in *Barnes*, which was a "final decision", HMRC wrote to Mr Cullen on 27 August 2015 to inform him that he would be issued with an APN and a follower notice within the coming weeks. Communications with Mr Cullen were also copied to his accountants.

20. The letter explained what Mr Cullen would need to do when he received the follower notice. It said he would be be liable to pay a penalty if he did not take corrective action within 90 days of receipt of the notice. It explained what would constitute corrective action. The letter was accompanied by Factsheet CC/FS25a which set out further information about the penalties which might be charged and the amount of the penalties.

21. The follower notice was issued to Mr Cullen on 22 September 2015. Under the heading "Taking corrective action" it stated:

> "If you do not take the necessary corrective action by 29 December 2015 you will be liable to pay a penalty under section 208 Finance Act 2014.
>
> To take corrective action you must:
>
> - First step
>
> - Take all necessary action to enter into a written agreement with us to relinquish the denied advantage
>
> - Second step
>
> - Tell us that you have taken the first step
>
> - Tell us the amount of the denied advantage and (where different) the additional amount which has or will become due and payable in respect of tax by reason of the first step being taken
>
> To take corrective action you can complete the enclosed form CADAcc38 and send it back to us.

You must make sure you take the necessary corrective action no later than 29 December 2015…."

22. HMRC do not argue that corrective action can *only* be taken by completion of form CADAcc38, but it provides a simple way for a taxpayer to be certain that he has taken the corrective action required by section 208. In order to constitute corrective action the form must be received by HMRC. It is only necessary for HMRC to receive an appropriately completed form. Neither HMRC nor the taxpayer need do anything further.

23. The follower notice went on to say that if the necessary corrective action was not taken by 29 December 2015

"you will be liable to pay a penalty of 50% of the 'value of the denied advantage'…

We will reduce the penalty percentage rate if you co-operate with us before we send you a penalty assessment.

In this context, co-operation means one or more of the following:

- Providing us with reasonable help in working out the amount of the tax advantage
- Counteracting the denied advantage
- Give us the information to enable us to take corrective action
- Give us the information to enable us to reach an agreement with you to counteract the denied advantage
- Give us access to your records so that we can ensure that the denied advantage is fully counteracted.

We cannot reduce the penalty to less than 10% of the value of the denied advantage".

24. HMRC also issued an APN to Mr Cullen on 22 September 2015 in the amount of £12,860.16. This was due on or before 29 December 2015. He paid this amount, but not until 1 March 2016, two months after the deadline. There was no explanation as to why the amount was paid late.

25. On 3 May 2016, HMRC sent Mr Cullen a letter warning him that he was now liable for a penalty for failing to take corrective action. The letter included information about reducing the penalty and purported to include a factsheet giving further information on this. The factsheet was omitted but was sent separately on 12 May 2016. The factsheet repeated the information above about how the penalty might be reduced by co-operation. It also set out the percentage reduction in the penalty range which would be given for each type of co-operation. These were:

(a) Providing HMRC with reasonable help in working out the amount of the tax advantage- up to 20%

(b) Counteracting the denied advantage- up to 50%

(c) Giving HMRC the information to enable them to take corrective action- up to 10%

(d) Giving HMRC the information to enable them to reach an agreement with the taxpayer to counteract the denied advantage- up to 10%

(e) Giving HMRC access to the taxpayer's records so that they can ensure that the denied advantage is fully counteracted- up to 10%.

26. HMRC did not receive any response to the 3 May 2016 letter.

27. On 7 February 2017 HMRC held a panel meeting of technical, policy, legal and caseworker staff (the "panel") to discuss those participants in the scheme who had taken no, or late, corrective action and to discuss the penalty loadings. I had a redacted copy of the notes of the meeting in the bundle which stated that following the Court of Appeal decision in *Barnes*, the promoter of the scheme had withdrawn support and advised all users to take corrective action. The penalty in all cases appears to have been set at 50%. In Mr Cullen's case it was noted that "we still have not heard anything from Mr Cullen. He has paid his APN, therefore he has received out correspondence". The penalty was set at 50%.

28. On 16 February 2017 HMRC wrote to Mr Cullen to tell him that they intended to charge him a penalty. Neither Mr Cullen, nor his accountants responded to this letter. On 30 March 2017 HMRC issued the penalty assessment in the sum of £35,000 being 50% of the denied advantage.

29. On 4 May 2017 Mr Cullen's accountants appealed the penalty assessment but the appeal was not received by HMRC until 16 June 2017. HMRC accepted the appeal as in time because they were aware that there were problems with postal delays.

30. The grounds of appeal were that Mr Cullen had made payment in full to HMRC on 1 March 2016 and "then sent the relevant paperwork relinquishing the advantage in September 2016". There was nothing to say what this "paperwork" was, nor was any copy provided. The statement was based on what Mr Cullen had told them, rather than the accountants' first hand knowledge. In the course of the hearing, Mr Conlan obtained from his office a copy of an email from Mr Cullen to a member of staff who no longer works for the firm dated 5 June 2017 in which Mr Cullen made that statement. He did not at that time, nor at any time before or afterwards, until the morning of the hearing, produce a copy of the "paperwork" he said he had sent.

31. HMRC rejected the appeal on the basis that Mr Cullen had not taken timely action to counteract the denied tax advantage. The letter went on to say:

> "Although your agents state…that you took corrective action in September 2016, HMRC do not have any record of this having been received, and it should be noted that if corrective action had been taken at this time it would have been 8 months late."

32. The agents requested a statutory review. In addition to the above grounds of appeal, the agents submitted that Mr Cullen had fully co-operated with HMRC and provided reasonable assistance and information in relation to the tax advantage. The review conclusion letter was issued on 15 August 2017 upholding the penalty. The letter set out HMRC's approach to the reduction in penalty and the different types of co-operation and concluded that as Mr Cullen had not provided them with information to counteract the denied advantage, there would be no reduction in the 50% penalty. The letter reiterated that HMRC had no record of the alleged corrective action having been taken and that it would in any event have been significantly late.

33. On 12 September 2017, the Appellant appealed to the Tribunal.

34. HMRC's Sharon Jones said in her witness statement that "There is no record of a letter or form being received in September 2016 by either the Accelerated Payments Team or business as usual stream". Mr Beattie indicated that HMRC's records had been searched and nothing was found. Ms Jones also confirmed that no response was received to either the 3 May 2016 letter or the potential penalty letter of 16 February 2017.

35. It is relevant to this appeal that both Mr Cullen and his brother entered into the same scheme and the same firm of accountants acted for both of them.

36. Although there was no witness statement from Mr Cullen, it was agreed it would be helpful for him to give evidence about the corrective action he said he had taken. Mr Cullen said that he and his brother were told to make payment of the APN and that it was due at the end of December 2015. He overlooked this and did not make payment until 1 March. A few weeks after this he received a visit from a debt collector who said the payment had still not been made. He insisted that it had and she said that she would look into it. It seems that Mr Cullen did pay the amount, but not in the way set out in the APN and it ended up in a suspense account. The debt collector contacted him about a week later to say the money had been found. She also said that he would need to fill in some paperwork at some time. Mr Cullen got the impression that there was no rush to do this. He said he believed that the matter was now settled and "the Revenue were off the case".

37. Mr Cullen said that he and his brother had both sent off form CADAcc38 at the same time in September 2016. The accountants had submitted the brother's form. Mr Cullen submitted his form himself. He did not explain why this was but said that he spoke to the accountant on the phone who gave him the wording and he filled in the form accordingly and sent it. The person he spoke to no longer works for the accountants.

38. Mr Cullen further said that he thought HMRC must have got his form because his brother had said the tax scheme had been "sorted". He received the various letters which indicated that, so far as HMRC were concerned he had not taken corrective action, but did not see that he needed to send the form again as his brother's case had been cleared.

39. Ms Jones who, as noted, was the officer responsible for the follower notices in relation to the scheme explained what had happened. HMRC did not receive any corrective action form from either the Appellant or his brother in September 2016. Both of them were sent a penalty notice. At that point, the brother's agent (which was the same as the Appellant's agent) sent HMRC a copy of the form signed by the brother together with a copy of a covering letter from the accountant showing that it had been sent in September 2016. The penalty decision panel accepted that the brother had taken corrective action and decided to withdraw the penalty on the basis that HMRC had been out of time to issue the penalty. Under section 211(5)(b), HMRC cannot assess the penalty more than 90 days after the taxpayer has taken corrective action. If corrective action were taken on 12 September 2016, the penalty had to be assessed by the middle of December 2016, but the panel did not meet to decide the penalties until February 2017 and assuming that the brother's penalty notice was issued at a similar time to the Appellant's, HMRC were clearly out of time.

40. So the brother's case was different from that of the Appellant. As soon as the penalty notice was issued, he responded and had been able to prove that he *had* taken the necessary corrective action.

41. I now return to the Appellant's case. I am satisfied that HMRC did not receive the Form. The view of the matter letter, the review conclusion letter and Ms Jones' witness statement all agree on this. HMRC's conduct throughout, including the issue of the penalty warning letter and the penalty assessment itself, and the discussions of the panel as evidenced by the notes of the 7 February 2017 meeting, are all consistent with them not receiving the Form and I find as a fact that they did not.

42. The question then arises whether they can be deemed to have received the Form under section 7 of the Interpretation Act 1978, so that Mr Cullen must be treated as having taken corrective action at the time he said he did. In which case, HMRC would be out of time to assess the penalty by virtue of section 211(5)(b).

43. Section 7 of the Interpretation Act 1978 provides:

> **"7 References to service by post**
> Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

44. So first, Mr Cullen must prove that the form was properly addressed, pre-paid and posted. This he has not done. Even on the morning of the hearing, all he produced was the copy Form itself. The only other evidence was the email of 5 June 2017 in which Mr Cullen said "I sent the paperwork", but that was not a contemporaneous document and there is no indication of exactly what was sent or where it was sent to. Further, the deemed receipt can be displaced if "the contrary is proved". There is the evidence of the panel meeting and Ms Jones evidence and HMRC's action in sending the penalty notice which all indicates that HMRC did not receive the form. I find that Mr Cullen cannot rely on the Interpretation Act.

45. In cross-examination, Mr Cullen said that throughout his business and personal career he had never dealt directly with HMRC. He had always had an accountant. He did not pay attention to the many letters with which he was bombarded but gave at least some of them to his accountant. If Mr Cullen had never dealt with HMRC himself before, it seems implausible that he should fill in and send something as important as the Form himself. It was clear that a large sum of money was involved. The Form showed that the value of the denied advantage was £175,000 and the additional tax due as a result of relinquishing the denied advantage was £70,000. That meant a potential penalty of £35,000. Mr Cullen had said that he had worried about the £12,860 he had to pay on the APN as it was a lot of money and he described the penalty of £35,000 as "a no sleeping amount". Yet he says that, contrary to his normal practice he dealt with this himself instead of getting his accountant to do it.

46. At no point did he send anyone a copy of the Form.

47. He was asked why he did not produce a copy of the Form when he received correspondence from HMRC which clearly indicated that they did not think he had taken corrective action. He was unable to give a convincing answer. He said that he sent the form at the same time as his brother and thought he had done what he needed to do as he had paid the money and his brother's case had "been cleared". He did not see the need to send the Form again. Even when he instructed his accountants to appeal against the penalty, "it did not enter my mind" to send them a copy of the corrective action form and Mr Cullen said that the accountants did not ask for it.

48. As noted above, neither Mr Cullen, nor his accountants responded to any of the communications from HMRC. The letter enclosing the follower notice had headings on the first page of "What you need to do now" and "If you take corrective action". There were referenced to penalties. It set out the deadline for corrective action of 29 December 2015. The letter of 3 May 2016 warning Mr Cullen that he was liable to a penalty had a large subject heading "**You are now liable to a penalty of 50%-contact us now to help us reduce your penalty**". This was followed up by the omitted factsheet. The first sentence of the letter dated 16 February 2017 was "On 3 May 2016 we wrote to tell you that you are liable to pay a penalty because you did not take the necessary corrective action in response to a follower notice in time." It also asked for relevant information by

10 March 2017. The notice of penalty assessment dated 30 March 2017 was headed "Penalty for not taking corrective action in response to a follower notice" and on the first page it clearly stated the "no sleeping" amount of the penalty as £35,000. So all this correspondence said that HMRC did not think he had taken corrective action and at no point did Mr Cullen say "yes I did-here's a copy of the form". However little notice he takes of communications from HMRC, it is simply not credible that he should have failed to respond to HMRC or to his accountants in the light of all this correspondence if he had indeed taken corrective action.

49. It is not until the accountants' appeal letter of 4 May 2017 that it is first asserted that Mr Cullen sent "the relevant paperwork" in September 2016. Even then a copy of the Form was not sent.

50. In the light of this evidence I can attach little weight to Mr Cullen's production of the Form at the start of the hearing.

51. Having taken all the evidence into account and having weighed it carefully, I find that, on the balance of probabilities, Mr Cullen did not take corrective action in response to the follower notice.

Discussion

52. I have found that Mr Cullen did not take corrective action in response to the follower notice. Had he taken corrective action at the time he asserted that he did, he would have been *liable* for the penalty as the action would not have been taken within the 90 day time limit. However, HMRC would have been out of time to assess the penalty by virtue of section 208(5)9B) as the assessment was not made until March 2017.

53. As I have found that corrective action was not taken at all, the penalty has been properly charged and is due.

54. The Appellant does not seem to have argued that it was reasonable in all the circumstances that he did not take corrective action although he said he was told by HMRC (but a debt collector, not a caseworker) that there was "no rush" to submit the paperwork and he thought it had all been sorted out when he paid the APN. In the light of all the succeeding correspondence, the Appellant cannot be regarded as having acted reasonably. The various letters and factsheets made it quite clear that action was needed and was needed by definite deadlines. Nor, if he had sent the Form was it reasonable of him to ignore the subsequent letters which clearly indicated it had not been received. A reasonable person would have re-sent the Form or at least responded to say they had sent it. Mr Cullen has not shown that it was reasonable in all the circumstances that he did not take corrective action.

55. The question then arises whether it is possible and/or appropriate to reduce the penalty to take account of any of the five types of co-operation.

56. I set out in paragraph 25 above HMRC's approach to the reduction of penalties and in particular the percentage reductions allocated to each category of co-operation. This allocation is not statutory. Section 210(1) provides simply that HMRC may reduce the amount of the penalty to reflect the "quality" of the co-operation and "quality" includes timing, nature and extent. Section 210(3) provides that the taxpayer has co-operated with HMRC "only if P has done *one or more* of the following…" (emphasis added). On the plain words of the legislation it is open to the Tribunal to determine what reduction, if any, should be allowed on the facts of a particular case whether the taxpayer has co-operated in one way only or in all possible ways. The Tribunal cannot, of course, reduce the penalty below the statutory 10%, but section 214(9) provides that where the taxpayer appeals against the amount of the penalty, the Tribunal may "substitute for HMRC's decision, another decision that HMRC had power to make".

57. Mr Beattie submitted that, except in relation to co-operation type (b)-counteracting the denied advantage, the reductions were not, or not generally, relevant in an appeal case, such as the current case. That is right in relation to category (c) which is where P has " provided HMRC with information enabling corrective action to be taken by HMRC". Where a follower notice is given under section 204(2)(b)-where P has made a tax appeal, section 208(5)(b) provides that *P* must take the corrective action.

58. Mr Beattie did not expand on his argument. It seems to me that even where, as in this case, the taxpayer has appealed against a closure notice on the grounds that the scheme "worked", he can still be regarded as giving HMRC assistance and information which has enabled or will enable them to quantify the tax advantage and ensure that it is counteracted if the scheme fails.

59. Mr Conlan submitted that Mr Cullen had provided a great deal of co-operation as defined. His tax return had identified the tax advantage and documents and assistance were provided by the promotors of the scheme, the accountants concerned and his current accountants all of which had helped to quantify the amount of the advantage.

60. Mr Cullen disclosed the scheme in his tax return. He provided the DOTAS reference number and gave an explanation of how the scheme was supposed to generate the income tax deduction in the "white space". In the course of the ensuing enquiry, HMRC asked, in a letter of 14 December 2005, for a great deal of information in connection with the scheme and also for a number of documents. The enquiry was addressed to Mr Cullen's normal accountants but the reply was from another firm, NT Advisors LLP, who had presumably advised on the scheme. This firm provided some documents and promised to provide others and responded to the various questions. The bundle did not contain the actual documents provided. One of the "Particulars" required was "a calculation of the manufactured interest payment to the Gilt lender identifying all payments both received and made netted off". The manufactured interest payment was, according to the white space disclosure, the amount he was claiming to

deduct from his income in the tax return. The response from NT Advisors to this was "We believe this information is provided within the documents enclosed". So it appears that NT Advisors assisted in quantifying how the tax advantage was calculated.

61. The closure notice which was sent on 9 May 2011stated that the claimed relief in respect of a manufactured interest payment had been denied and the additional tax due was £70,000. HMRC amended Mr Cullen's tax return to reflect the additional tax due. A letter accompanying the closure notice referred to the First Tier Tribunal decision in *Barnes*, and stated that if Mr Cullen wished to keep the position open pending any appeal in *Barnes*, he should appeal against the closure notice. Mr Cullen's accountants did appeal on his behalf pending the final outcome of *Barnes*.

62. The appeal did not dispute the amount of the tax advantage and that amount of £70,000 formed the basis of the APN and the penalty charged for failure to take corrective action following the follower notice.

63. From the limited evidence I had before me and, in particular, the tax return and the exchange of correspondence with NT Advisors, and the fact that the figure which HMRC computed for the denied advantage does not seem to have been challenged, I infer that the Appellant provided reasonable assistance to HMRC in quantifying the tax advantage. It is therefore open to me to reduce the penalty for co-operation.

64. Taking account of the nature, timing and extent of the co-operation and the subsequent history of this matter, in which Mr Cullen did not provide any co-operation and all the circumstances of the case, I have concluded that the appropriate reduction to the penalty range is 15%. The penalty range is 40%, so 15% of that is 6%. The 50% rate is then reduced by 6% so the actual reduced penalty rate is 44% of the denied advantage of £70,000 giving a penalty of £30,800.

Decision

65. I have concluded that Mr Cullen did not take corrective action within the time limit or at all in response to the follower notice, so that the penalty is due and payable. Accordingly, I dismiss the appeal against the penalty.

66. I have found that Mr Cullen did provide some co-operation as that is defined in section 210 and I have concluded that it is appropriate to reduce the penalty to £30,800.

67. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are

referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 17 July 2018