[2019] UKFTT 0220 (TC)

TC07067

Appeal number: TC/2017/08362

INCOME TAX – accelerated payment notices – penalties for non-compliance – time to pay agreement – reasonable excuse – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASE Plc **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 9 November 2018 with further written submissions on 15 and 18 February 2019

Mr Chris Cummings, head of tax for the Appellant

Ms Natalie Mason of HM Revenue & Customs Solicitor's Office and Legal Services appeared for the Respondents

DECISION

Background

1. This is a consolidated appeal against penalties imposed for failure to pay various accelerated payment notices ("APNs") issued by the respondents. The APNs were issued in connection with the appellant's use of an avoidance scheme in tax years 2011-12 and 2012-13. The scheme involved avoidance of PAYE and national insurance contributions through an "Employer Financed Retirement Benefits Scheme" also known as "OneE tax Lazarus" ("the Scheme"). Three APNs were issued on 14 September 2016. The first concerned income tax of £282,000 for tax year 2011-12, the second concerned income tax of £208,016 for tax year 2012-13 and the third concerned national insurance contributions of £98,468 for tax year 2011-12. The sums identified were required to be paid by the appellant pursuant to the APN legislation in Finance Act 2014 ("FA 2014").

2. I set out below details of the statutory framework, the basis on which the APNs were issued, and the penalty regime. Briefly, FA 2014 makes provision for a penalty of 5% of the sum specified as due in an APN if it is not paid by the due date. Further penalties arise where non-payment continues beyond certain dates. Liability to a penalty will not arise where there is an agreement for deferred payment of the sum due, otherwise known as a time to pay agreement or where the taxpayer has a reasonable excuse for failing to pay the sum by the due date. There is also provision for HMRC to reduce penalties in the case of special circumstances.

3. Three sets of penalties were issued. The first set of penalties were issued on 3 February 2017 for non-payment of the disputed tax. The penalties were for 5% of the sum identified in each APN, namely £14,100, £10,400 and £4,923 respectively. The second set of penalties were issued on 26 June 2017 in the same amounts. The third set of penalties were issued on 26 February 2018, again in the same amounts. The total penalties in dispute therefore in this appeal amount to £88,269.

4. Separate appeals were lodged against each set of penalties. The appeal against the first set of penalties was out of time, but the respondents do not object to an extension of time for that appeal and I extend time accordingly. The penalties were confirmed by the respondents on review and appeals were notified to the Tribunal. The appeals have been consolidated and heard together.

5. The appellant asserts in this appeal that there was a deferred payment agreement effective from 4 October 2016 so that there is no liability to penalties for non-payment of the sums required by the APNs, alternatively that the appellant has a reasonable excuse for non-payment of the APNs. The appellant originally asserted that the APNs were "incorrect" but it was confirmed by Mr Cummings at the outset of the hearing that this ground of appeal is not pursued.

Statutory Framework

6. The circumstances in which an APN may be issued are set out in section 219 FA 2014 which 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—
>
> (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—
>
> …
>
> (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, or …"

7. The present APNs were given on the basis that section 219(2)(b) was satisfied. Section 221 FA 2014 sets out certain requirements for an APN given pursuant to section 219(2)(b). In particular, the APN must specify the disputed tax and explain the right to make representations and the restrictions on postponement of tax provided by section 224.

8. 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 in section 219 are not satisfied, or objecting to the amount of disputed tax specified in the APN. Any representations must be made within 90 days of the date the notice was given and HMRC are obliged to consider any representations that are made. Section 222(2) provides that the representations are to be in writing.

9. Section 55(8B) – (8D) Taxes Management Act 1970 ("TMA 1970") which were introduced by section 224 provide 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)—

(a) the understated tax to which the payment specified in the notice under section 220(2)(b) of that Act relates,

(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."

10. It can be seen therefore that the effect of the APN is that the postponement of tax under appeal ceases with effect from the date the APN is given. It is the underlying tax liability which becomes payable as a result of the issue of an APN, to the extent of the disputed tax identified in the APN. I shall refer to this as "the disputed tax". Both parties and witnesses in this case referred variously to "the APN liability" and "the APN tax". Strictly, that is incorrect. The position in the present case may be contrasted with APN's issued pursuant to section 219(2)(a) where there is an enquiry in progress rather than an assessment under appeal. In the former case, the APN itself gives rise to a liability to make an "accelerated payment" which by virtue of section 223(3) is treated as a payment on account of the understated tax.

11. The date on which the disputed tax becomes due and payable depends on whether representations were made pursuant to section 222 FA 2014. If no representations were made then it is due and payable on the last day of the period of 90 days from the date the notice was given. If representations were made, it is due and payable 30 days after HMRC's determination under section 222 if that is later than the 90 day period. Similar provisions apply for national insurance contributions.

12. There is no statutory right of appeal against HMRC's decision to issue an APN. There is a right of appeal to this Tribunal against a penalty that is imposed as a result of failure to pay the disputed tax by the due date.

13. Schedule 56 Finance Act 2009 ("Schedule 56") charges penalties for late payment of tax and national insurance contributions by reference to a "penalty date" specified in paragraph 1. For present purposes Item 18 in the Table in paragraph 1 is relevant. The penalty date is 30 days after the date on which the disputed tax became due and payable pursuant to section 55(8D) TMA 1970 (see *Sheiling Properties Ltd v HM Revenue & Customs [2018] UKFTT 0247 (TC)*). Paragraph 3 provides for three penalties for tax unpaid on or before the penalty date. A first penalty of 5% of the unpaid tax, a second penalty of 5% of the tax which is still unpaid 5 months after the penalty date and a third penalty of 5% of the tax which is still unpaid 11 months after the penalty date.

14. Paragraph 13 confers a right of appeal to this Tribunal. The scope of the right of appeal is set out in paragraph 13 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."

15. Paragraph 10 Schedule 56 provides that in circumstances where there is an agreement to defer payment of the sum due, the taxpayer will not become liable to a penalty:

> *"Suspension of penalty during currency of agreement for deferred payment*
>
> 10(1) This paragraph applies if —
>
> (a) P fails to pay an amount of tax when it becomes due and payable,
> (b) P makes a request to HMRC that payment of the amount of tax be deferred, and
> (c) HMRC agrees that payment of that amount may be deferred for a period ("the deferral period").
>
> (2) If P would (apart from this sub-paragraph) become liable, between the date on which P makes the request and the end of the deferral period, to a penalty under any paragraph of this Schedule for failing to pay that amount, P is not liable to that penalty.
>
> (3) But if —
>
> (a) P breaks the agreement (see sub-paragraph (4)), and
> (b) HMRC serves on P a notice specifying any penalty to which P would become liable apart from sub-paragraph (2),
>
> P becomes liable, at the date of the notice, to that penalty.
>
> (4) P breaks an agreement if —
>
> (a) P fails to pay the amount of tax in question when the deferral period ends, or

(b) the deferral is subject to P complying with a condition (including a condition that part of the amount be paid during the deferral period) and P fails to comply with it.

(5) If the agreement mentioned in sub-paragraph (1)(c) is varied at any time by a further agreement between P and HMRC, this paragraph applies from that time to the agreement as varied."

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

" **16 Reasonable excuse**

(1) Liability to a penalty under any paragraph of this section does not arise in relation to a failure to make 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."

17. Schedule 56 also includes provisions which entitle HMRC to reduce a penalty by reason of "special circumstances". There is a limited right of appeal against HMRC's decision on special circumstances which arises only where that decision is "flawed" in the judicial review sense of that term.

18. Paragraph 15 Schedule 56 sets out the scope of the Tribunal's powers on an appeal against a penalty 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."

Findings of Fact

19. There are three broad issues in this appeal:

(1) Whether there was a request for a deferred payment agreement prior to any of dates on which the penalties arose with a subsequent agreement so that there is no liability for non-payment of the disputed tax.

(2) Whether the appellant has a reasonable excuse for non-payment of the disputed tax.

(3) Whether the penalties ought to be reduced because of special circumstances.

20. These issues require me to consider the dealings between the appellant and HMRC in relation to the APNs and more widely in relation to the underlying tax liabilities arising from the appellant's use of the Scheme.

21. The first issue is essentially a question of fact. Paragraph 10 Schedule 56 applies if the taxpayer makes a request for deferral where HMRC agree that the payment may be deferred for a period. I must therefore make findings of fact as to whether and if so when any deferral request was made and whether HMRC agreed to that deferral request. It was common ground that the request for deferral must be made prior to the date on which liability for a penalty arises. In those circumstances liability to the penalty will not arise if HMRC agree a deferral period, even if that agreement comes after the date on which the penalty would otherwise arise.

22. The second and third issues depend upon an assessment of the facts once found.

23. I heard evidence from Mr Matthew Cliffe on behalf of the respondents. Mr Cliffe is an officer of HMRC with overall responsibility for a number of PAYE and national insurance avoidance schemes including the Scheme. On behalf of the appellants I heard evidence from Mr Chris Cummings, the appellant's head of tax, Mr Martin Redfern, a tax manager at the appellant and Mr Michael Sanchez, the appellant's finance director. All witnesses made witness statements, gave oral evidence and were cross examined. Based on the oral and documentary evidence before me I make the following findings of fact.

24. The appellant is a firm of accountants and tax advisers. It acted for and advised clients who utilised the Scheme and also utilised the Scheme itself.

25. The APNs in the present case were given to the appellant pursuant to section 219(2)(b) FA 2014 and satisfied the requirements of section 221 FA 2014. There was no issue concerning the validity of the APNs. The APN's were given on 14 September 2016. There is an issue as to whether the appellant made any representations pursuant to section 222 so as to extend the due date for payment defined by section 55 TMA 1970. The respondents contend that no representations were made.

26. For the reasons given below it is clear that no representations pursuant to section 222 were made. The date on which the disputed tax became due and payable is therefore the last day of the period of 90 days beginning with the day on which the APNs were given. Allowing for delivery of the notices in the ordinary course of post the due date for payment was 16 December 2016. The penalty date for the purpose of

Schedule 56 was 15 January 2017. Penalties became due pursuant to paragraph 3 Schedule 56 if the disputed tax remained unpaid on 16 January 2017, 16 June 2017 and 16 December 2017.

27. Mr Cummings is an experienced tax professional who has worked in the tax field for over 35 years. He was responsible for leading the appellant's dealings with HMRC in connection with the Scheme, both on behalf of the appellant and on behalf of its clients.

28. Mr Cliffe is an experienced officer of HMRC and since 2011 has been at the level of a senior tax inspector. He has overall responsibility for HMRC's approach for a number of avoidance schemes, including the Scheme. His responsibilities include setting the terms on which HMRC might settle with taxpayers who utilised the Scheme, having consulted with technical specialists and HMRC's Anti-Avoidance Board. He is not generally involved in specific cases unless the case is to be litigated or is particularly difficult. Specific cases are dealt with by other officers under Mr Cliffe's guidance or instruction.

29. HMRC issued determinations and decisions to the appellant in March and April 2016 on the basis that the Scheme was not effective. For convenience I shall call these "assessments". The appellant appealed those assessments in April and May 2016. Requests by the appellant to postpone the tax and national insurance due under the assessments were agreed by HMRC on 8 June 2016.

30. The APNs were issued to the appellant on 14 September 2016. It was not disputed that the fact the underlying tax had originally been postponed did not affect the appellant's liability to pay the disputed tax identified in the APNs. The effect of section 55(8B) – (8D) TMA 1970 was that the disputed tax fell due as described above.

31. Mr Sanchez in his role as the appellant's finance director dealt with demands for payment by HMRC. He had no contact with HMRC between June 2016 and May 2017 concerning payment of the disputed tax. He was however aware of the penalty notices which I describe below at the time they were sent. Mr Sanchez's evidence was that during all his dealings with HMRC he understood that the appellant was in negotiations regarding settlement of the disputed tax.

32. Mr Cliffe first became involved with the appellant when a letter requesting information was sent out in his name on 26 September 2016. The letter referred to the possibility of settling liabilities in relation to the Scheme and also referred to the fact that APNs were being issued. This seems to have been a standard form letter and in fact APNs had already been issued to the appellant.

33. In response to that letter Mr Cummings approached Mr Cliffe requesting a meeting to discuss the Scheme in general. Mr Cliffe understood that the appellant had a number of clients who had used the Scheme and wanted to explore settlement. Mr Cummings and Mr Cliffe then had three meetings, on 4 October 2016, 16 May 2017 and 15 January 2018. I shall call these the First Meeting, the Second Meeting and the

Third Meeting. All meetings were conducted on a without prejudice basis and in a professional and courteous manner.

34. Mr Redfern, the appellant's tax manager and also an experienced tax professional, attended each of the three meetings with Mr Cummings. His evidence effectively confirmed the evidence of Mr Cummings as to what happened at the meetings.

35. Mr Cummings sent Mr Cliffe brief details of the cases he wished to discuss in advance of the First Meeting. At the First Meeting Mr Cummings set out how he thought each case could be settled, broadly in two groups. In one group he suggested that the amount made available to employees could be treated as earnings. In the other group the Scheme could be reversed so that the employer's accounts would be re-written as though the Scheme had never been used. The former option would result in tax and national insurance liabilities whilst the latter option would result in a corporation tax liability. Both Mr Cummings and Mr Cliffe would have been aware that if HMRC did not agree to the latter option then in broad terms the amount of PAYE and national insurance liabilities would be significantly greater than the corporation tax liability.

36. The First Meeting followed shortly after the APNs were issued to the appellant. Mr Cliffe has no recollection of any discussion at the First Meeting about the APNs and he has no notes of the meeting. Understandably, in the absence of any notes Mr Cliffe's recollection of the First Meeting was vague. In his evidence he said that if APNs were discussed "I expect that my comments would have been relatively 'stock' as I'd explained to other agents and customers". By this Mr Cliffe meant that he would have explained that APNs were dealt with by an independent team within HMRC and Mr Cliffe had "no sway" over the issue, cancellation or collection of APNs. When Mr Cliffe referred to "collection of the APNs" he ought to have referred to collection of the disputed tax identified in the APNs which, as I have previously stated is the underlying liability to tax and national insurance which was under appeal.

37. Mr Cliffe believed he would also have said that whilst approaches to settle were welcomed, APNs would remain in place and due until settlement of the underlying tax was final. Once a settlement was reached the APN would fall away and sums paid in relation to the APN would be used as part of the settlement. Any queries or representations about an APN should be directed to the team who issued it using contact details on the notice itself.

38. Mr Cummings was clear in his evidence, supported by the evidence of Mr Redfern, that Mr Cliffe did not refer to the APNs in these terms but that there was discussion of the APNs. The appellant's case is to the effect that it was understood that liability for the disputed tax would be deferred whilst the appellant and HMRC were negotiating the amount of the underlying tax liabilities.

39. Mr Cummings said that at the conclusion of the First Meeting he had clearly advised Mr Cliffe that the appellant would settle the tax liability once agreed by way of time to pay arrangements. Mr Cummings did not understand that he would have to

contact the APN team separately to avoid triggering an APN penalty. In giving this evidence Mr Cummings relied on his recollection of the meeting and subsequent events. Mr Cummings told me that some typed notes were prepared following the First Meeting but he doubted whether they still existed. Mr Redfern told me that he took notes of that meeting. It is unfortunate that it appears no one from the appellant took any steps before the hearing to locate those notes, but I do not draw any adverse inference from that fact. I must deal with the evidence as it stands.

40. Mr Cliffe said that he had no recollection of the appellant requesting an instalment arrangement for sums due under the APNs. He said that if time to pay the APNs had been requested he would have advised contacting the APN team. The appellant does not say that at this stage it had requested deferral of the disputed tax for a specific period and it is not suggested that Mr Cliffe agreed a specific deferral period.

41. I accept the evidence of Mr Cummings. It is supported by the evidence of Mr Redfern. There are no notes of the First Meeting and whilst I cannot be satisfied as to precisely what was said in relation to the APNs I am satisfied that it is likely they were discussed. I am also satisfied that Mr Cummings and Mr Redfern were at least left with an understanding that payment of the disputed tax would be deferred whilst the appellant and HMRC were negotiating the underlying tax liabilities.

42. It appears that in Mr Cliffe's mind the underlying substantive liability for PAYE and national insurance was separate to the liabilities under the APNs for which he considered he had no responsibility. To that extent it appears to me that Mr Cliffe and Mr Cummings were to some extent at cross purposes in the First Meeting. Mr Cliffe was primarily concerned with negotiating the underlying tax liabilities. Mr Cummings was concerned to negotiate those liabilities but he was also concerned with the APNs and time for payment. Mr Cummings did not appreciate that Mr Cliffe considered he had no responsibility in relation to the APNs and time to pay the disputed tax. For the reasons already given I am satisfied that what fell due was the underlying disputed tax in respect of which postponement had ceased. Mr Cliffe was therefore wrong to distinguish liability for the underlying tax and liability for the sum identified in the APNs.

43. Mr Cummings submitted that what was said by him to Mr Cliffe at the meeting amounted to representations for the purposes of the APN, in particular section 222. There are two reasons why I do not accept that anything said at the meeting was intended to amount to representations for the purposes of section 222:

(1) Mr Cummings did not say as much at the time.

(2) Section 222(2) and the APN's themselves require any representations to be in writing.

44. It appears to me that the appellant's suggestion that representations were made is an analysis after the event and does not reflect the intention of Mr Cummings at the time of the First Meeting. Mr Cliffe's evidence which I accept is that representations

under section 222 are dealt with HMRC's APN team and that he would not involve himself in representations unless they were passed to him by the APN team.

45. It appears that Mr Cliffe emailed Mr Cummings on 5 October 2016 following the First Meeting with a number of questions to which he wanted answers in order to progress each case. There is no copy of that email in the evidence. Mr Cummings wrote to Mr Cliffe on 14 October 2016 with 11 schedules setting out responses to the questions. There was a schedule for each individual taxpayer including the appellant. The questions and responses related to the dates of certain Scheme documentation and the dates, amounts and recipients of Scheme payments. Mr Cummings summarised the individual positions in relation to various clients, including a number of clients who wished to pay monies due by way of instalments.

46. Mr Cummings referred in this letter to the position of the appellant. He set out the treatment which the appellant wished to adopt in relation to payments made under the Scheme, including the associated treatment for PAYE, national insurance and corporation tax purposes. The appellant wished sums paid to shareholders in the appellant to be returned to the appellant and treated as never having been paid. It wished sums paid to non-shareholders to be treated as written off with a corporation tax deduction and tax chargeable by way of P11D disclosure rather than through PAYE and national insurance. There was no reference in Mr Cummings' letter to the payment of sums due by way of instalments.

47. Where there were references to payment in instalments by certain clients of the appellant, Mr Cliffe told me and I accept that he understood this referred to payment of the underlying liability, rather than the APNs. For the reasons given above I consider that his understanding was incorrect. The result was that Mr Cliffe considered that any time to pay arrangement in relation to APNs had to be addressed to the APN team using the details set out in the APNs. The APNs state as follows:

> "**What if you have problems paying**
>
> If you think you will have problems paying the amount due, please phone us straightaway on the number shown at the top of this notice."

48. Mr Cummings suggested that the letter dated 14 October 2016 amounted to representations pursuant to section 222. I do not accept that suggestion. The letter was seeking to settle the appeals, rather than challenging the conditions for the issue of APNs or the amount of the disputed tax stated in the APNs.

49. Further information was provided to Mr Cliffe by Mr Redfern on 20 October 2016. The appellant was then expecting to receive comments from Mr Cliffe to the proposals made in their letter and calculations to support a possible settlement, in particular with regard to the Appellant's tax position. The appellant's proposals were being treated by HMRC as a "bespoke proposal" for HMRC's consideration. It appears that Mr Cliffe had delegated a response to a member of his team, but there was no response.

50. On 10 November 2016 HMRC sent three reminders to the appellant in respect of the APNs. These documents reminded the appellant that the due date for payment of the disputed tax was 16 December 2016.

51. Mr Redfern sent an email to HMRC dated 30 November 2016 chasing a response from Mr Cliffe. Mr Cliffe accepted that he should have followed matters up more promptly, but that other work pressures got in the way.

52. Mr Cummings emailed Mr Cliffe on 11 January 2017, shortly before liability for the first penalty arose. He noted the absence of a response following the First Meeting and the subsequent provision of information, specifically in relation to the "tax profile" of each case and the proposals for the payment of tax. The purpose of Mr Cummings' email was to set out the views of the appellant's clients, and in particular the frustrations that they were feeling at the lack of progress. Mr Cummings referred to considerable concerns in relation to the APNs and penalties referable to the APNs. He stated as follows:

> "… even those clients who agree with the APN but need time to pay and have provided all the details to you in order to find an accommodation as we have put forward on their behalf, will look to challenge the imposition of penalties if they are chargeable without reference to the taxpayers circumstances and to the initiative we have undertaken on our clients behalf to try to reach an accommodation to resolve this matter."

53. By January 2017 Mr Cummings had the APNs in mind and was aware of and concerned about the APN penalties. The fact that he did not contact the APN team with those concerns, but instead was referring his concerns to Mr Cliffe, supports his evidence that he saw Mr Cliffe as his point of contact in relation to the tax liabilities the APNs. I am satisfied that Mr Cummings did see Mr Cliffe as his point of contact in relation to the APNs and it was reasonable for him to do so. Mr Cliffe did not tell Mr Cummings that he ought to address his concerns in relation to the APNs or any request for time to pay to the separate APN team.

54. On 3 February 2017 HMRC sent three first penalty notices to the appellant. The penalty notices identified that the APNs had been due for payment on 16 December 2016 and had not been paid within 30 days of the due date. The notices described the penalty date as 31 days after the due date for payment and set out the circumstances in which further penalties may be payable if the sums due under the APNs were not paid within 5 months of the penalty date and again within 11 months of the penalty date.

55. There continued to be delay on the part of Mr Cliffe and his team in dealing with Mr Cummings. In an email dated 4 May 2017 Mr Cliffe expressed his gratitude for Mr Cummings understanding and patience and acknowledged that he had not been able to give the time and attention to the affairs of the appellant and its clients as they might reasonably expect.

56. In May 2017 HMRC's debt management department ("DM") began to contact the appellant in relation to sums due. The documentary evidence as to DM's dealings with the appellant and Mr Cliffe and the attempts by DM to enforce payment of the tax due takes the form of system notes which are not entirely clear. My findings of

fact in relation to the involvement of DM are based on these notes and the oral evidence before me.

57. On 5 May 2017 DM phoned the appellant to speak to Mr Sanchez who was out of the office. They spoke to Mr Michael Jones a director of the Appellant. Mr Jones told DM that there was a meeting scheduled for 17 May 2017 which was as much as he knew. The fact there was a meeting was confirmed to DM by a colleague of Mr Cliffe.

58. Mr Cliffe retained brief notes of the Second Meeting which I understand took place on 16 May 2017. He had a one page list of cases to be considered at the meeting including the appellant. The list had been provided by the appellant and Mr Cliffe made rough notes on the document. The document in evidence was redacted to obliterate the names and details of the appellant's clients. It appears that seven clients were on the list. There is a reference in Mr Cliffe's manuscript to "TTP Proposal Awaited" with three obliterations below it. Each taxpayer identified on the list has a manuscript narrative on the left, indicating who in Mr Cliffe's team was dealing with the client. In the appellant's case it was Mr Colin Smith. Four taxpayers not including the appellant had the letters ST next to their name which according to Mr Cliffe indicated that standard terms were available for settlement. Five clients not including the appellant had a number 2 or 4 next to their name which according to Mr Cliffe indicated the number of years over which instalments might be payable.

59. The note might be taken to suggest that no time to pay arrangement was being discussed in relation to the appellant's tax liabilities. Mr Cliffe's evidence was that he could not say for sure whether the appellant asked for a time to pay arrangement at the meeting. He said that it was unlikely but he acknowledged the possibility of oversight on his part.

60. The evidence of Mr Cummings supported by Mr Redfern was that Mr Cliffe was advised that the appellant might wish to discharge the tax liability by way of a time to pay arrangement.

61. It is not clear whether Mr Cliffe made his notes on the list before, during or after the Second Meeting. If he made the notes before the Second Meeting then they would clearly not include references to what was discussed at the meeting. In my view it is more likely than not that Mr Cummings did at least raise the possibility at the Second Meeting that the appellant might wish to have a time to pay arrangement, depending on what liabilities were agreed.

62. Mr Cummings continued to understand that Mr Cliffe was also dealing with the APNs and was not aware that HMRC would expect him to contact the separate APN team to seek deferral of the disputed tax to avoid a further APN penalty.

63. In late May and early June 2017 DM sought to contact Mr Cliffe but they were apparently unable to speak with him because he was away. There was nothing in HMRC's records to indicate that enforcement action should not be pursued. Mr Sanchez had contact with HMRC regarding demands for payment in a telephone call

on 21 June 2017. Mr Sanchez advised that the appellant was in settlement talks with Mr Cliffe which had nearly reached a conclusion. He was advised however that enforcement action would continue.

64. On 26 June 2017 HMRC sent three second penalty notices to the appellant.

65. Enforcement action apparently continued although it is not clear from the evidence what form this took.

66. On 5 July 2017 the appellant lodged notices of appeal against the second penalty notices. The grounds of appeal were as follows:

(1) The APNs were incorrect.

(2) The APNs and the penalties relate to tax years which are currently under investigation with HMRC.

(3) The appellant had been in contact with Mr Cliffe and following two meetings it was expecting further correspondence from Mr Cliffe.

67. When I look at the grounds of appeal in the context of the facts generally it seems to me that they confirm that the appellant was linking the obligation to pay the disputed tax and the settlement negotiations between Mr Cummings and Mr Cliffe.

68. On 18 July 2017 Mr Sanchez spoke by telephone to DM. Mr Sanchez told DM that the appellant was in final discussions with Mr Cliffe. Mr Sanchez was told by DM that they had emailed Mr Cliffe and that they would get back to him.

69. On 19 July 2017 Mr Cliffe emailed DM to say that he was near the end of a settlement agreement and that the delay was on HMRC's part, not the company's. He asked DM to "hold for 4 weeks to allow time to finalise and to contact Matthew Cliffe before taking any action". Mr Sanchez was told that DM would not be calling about the debt. Mr Sanchez interpreted this as meaning that HMRC were not at that stage pursuing the disputed tax. In my view he was entitled to adopt this interpretation.

70. If DM thought that Mr Cliffe had no responsibility in relation to payment of disputed tax then it is surprising that DM were contacting Mr Cliffe rather than the APN team. Mr Cliffe suggested that DM were making their own decision on enforcement and recognised that if settlement negotiations were taking place in relation to the underlying tax liability it was not in HMRC's interests to be seeking to enforce the liability at the same time. I do not accept that suggestion. It seems to me that DM, just like Mr Cummings, believed that Mr Cliffe did have at least some responsibility in relation to the APNs, and power to negotiate time to pay the disputed tax.

71. On 9 August 2017 HMRC acknowledged the appeals against the second penalty notices. The appeals were rejected on the basis that the appellant did not have any reasonable excuse for non-payment of the APNs. The appellant then requested a review of that decision.

72. On 29 September 2017 Mr Cummings emailed Mr Cliffe with calculations for the appellant and those of its clients who wished to reverse the Scheme transactions. This would have meant the sums paid would not be deductible for corporation tax purposes. He stated:

> "My expectation is that you will act in order to ensure that the APNs will be withdrawn and PAYE and NIC determinations and Notices will be withdrawn likewise."

73. The evidence does not show a response from Mr Cliffe. In particular, there is no evidence that Mr Cliffe told Mr Cummings that he did not have any responsibility for sums due under the APNs.

74. By letter dated 31 October 2017 the second penalties were confirmed on review.

75. On 31 October 2017 it appears that DM were seeking to clarify the position with Mr Cliffe and his team. It appears that DM asked Mr Smith, a colleague of Mr Cliffe, "if [settlement discussions] still ongoing can they arrange to stand over APN otherwise we [DM] have to pursue". Mr Smith said he would review the file and get back to DM. It appears that he did not do so. On 15 November 2017 Colin Smith told DM that Mr Cliffe had said that DM can pursue the APNs and that the appellant was aware. Again, this is consistent with Mr Cliffe having at least some responsibility and/or authority in relation to enforcement of the disputed tax.

76. On 15 November 2017 DM spoke to Mr Sanchez and told him that Mr Cliffe had said that the APNs were collectible and warned of winding up action. There was some discussion about the appellant providing cashflows for a time to pay arrangement. Again, this is evidence that DM believed that Mr Cliffe had at least some form of authority in relation to the APNs.

77. Mr Sanchez had a discussion with his co-directors as to how they would settle the disputed tax. At this stage Mr Cummings understood the directors had decided to accept the underlying tax liabilities and was advising the directors that £100,000 should be paid as soon as possible

78. On 22 November 2017 the appellant appealed against the first penalty notices. The appeal was at that stage rejected as being out of time.

79. On 23 November 2017 Mr Sanchez had a long call with DM in which he said that the appellant believed that the eventual settlement would be £100,000 and he hoped to confirm payment of that sum by 15 December 2017. DM advised that they had been told to collect the full amount, that the first penalties had been applied, that the second penalties had been applied but were stood over because they were under appeal and that the third penalties would be applied in due course. Mr Sanchez was invited to make an offer for the balance and said that he was thinking £3-5,000 per month. DM told Mr Sanchez that this would be rejected and a much larger amount based on the sum outstanding would be required.

80. I am not satisfied that this amounted to a request for time to pay. Mr Sanchez said that he was thinking of offering £3-5,000 per month but he did not actually make

such an offer. In any event, even if what Mr Sanchez said amounted to an offer it must be treated as having been refused. Mr Sanchez was not waiting for any further response from HMRC.

81. On 15 December 2017 Mr Sanchez spoke to DM and told them that the appellant was still seeking to reach a settlement with Mr Cliffe which might reduce the disputed tax to under £150,000. DM advised that the full amount was still payable. Mr Sanchez said that he would send £100,000 that day and would prepare cashflows and call back by 22 January 2018 with a time to pay offer

82. Mr Cummings' evidence is that it was only in mid-December 2017 that he realised through the dealings between Mr Sanchez and DM that DM were pursuing the APN penalties.

83. On 22 December 2017 the appellant paid £100,000 on account of its liabilities.

84. The Third Meeting took place on 15 January 2018. Mr Cummings says that Mr Cliffe confirmed that HMRC would be pursuing the APN penalties. I accept that is the case. It is not clear what else was discussed at that meeting. At this stage therefore, the appellant was aware that HMRC were treating the disputed tax as due and payable.

85. On 22 January 2018 Mr Sanchez told DM that the appellant was willing to pay another £10,000 until he could produce turnover and cashflow projections. DM agreed to suspend enforcement action for a month. The appellant paid the £10,000 on 31 January 2018.

86. On 14 February 2018 Mr Sanchez told DM that the appellant had a meeting regarding settlement in March 2018 and was looking to have the liability reclassed as a corporation tax liability which would reduce the amount of the APN. He said that he would pay another £10,000 on 28 February 2018 and call back to discuss a time to pay arrangement. Further sums of £10,000 were paid monthly but I am not satisfied that any time to pay proposal was put forward until 9 and 10 May 2018 when cashflows were produced and an offer to pay £16,000 per month was made. On 18 May 2018 a time to pay arrangement was agreed in relation to the APN liabilities which involved payments of £16,000 per month until November 2020.

Discussion

87. It seems to me that the appellant's arguments on this appeal may be summarised as follows:

(1) The appellant had requested time to pay the disputed tax whilst negotiating the underlying tax liabilities, and/or

(2) The appellant had a reasonable excuse for non-payment of the disputed tax, and/or

(3) There were special circumstances by reference to which HMRC should reduce the penalties for non-payment to nil.

88. In the light of my findings of fact I am not satisfied that there was any request for deferral of the disputed tax before it became due and payable. There was simply an understanding on the part of Mr Cummings that the disputed tax would not be payable whilst the settlement discussions were ongoing. Further I am not satisfied that HMRC agreed to defer the disputed tax until the appellant's offer on 9 and 10 May 2018 was accepted on 18 May 2018. In the circumstances the appellant cannot say that it is not liable to a penalty by virtue of paragraph 10 Schedule 36.

89. I must therefore go on to consider whether the appellant had a reasonable excuse for non-payment, or whether there were special circumstances.

90. Ms Mason submitted that there was no reasonable excuse for late payment. The appellant could not have reasonably believed that there was no requirement to contact the APN team. It had been told in the notice that if it had difficulty paying the disputed tax it should contact the number on the notice, which was the APN team. She further submitted that there was nothing by way of special circumstances to justify a reduction in the penalties.

91. I have found that Mr Cummings and Mr Cliffe were at cross-purposes in that Mr Cliffe was primarily concerned with negotiating the underlying tax liabilities. Mr Cummings was concerned to negotiate those liabilities but he was also concerned with the APNs and time for payment of the disputed tax. Mr Cummings did not appreciate that Mr Cliffe considered he had no responsibility in relation to the APNs and time to pay the disputed tax.

92. The approach to be taken to whether a taxpayer has a reasonable excuse in the context of penalties was considered by the Upper Tribunal in *Perrin v HM Revenue & Customs [2018] UKUT 0156 (TCC)* where it said as follows:

> "70. … the task facing the FTT when considering a reasonable excuse defence is to determine whether facts exist which, when judged objectively, amount to a reasonable excuse for the default and accordingly give rise to a valid defence. The burden of establishing the existence of those facts, on a balance of probabilities, lies on the taxpayer. In making its determination, the tribunal is making a value judgment which, assuming it has (a) found facts capable of being supported by the evidence, (b) applied the correct legal test and (c) come to a conclusion which is within the range of reasonable conclusions, no appellate tribunal or court can interfere with.
>
> 71. In deciding whether the excuse put forward is, viewed objectively, sufficient to amount to a reasonable excuse, the tribunal should bear in mind all relevant circumstances; because the issue is whether the particular taxpayer has a reasonable excuse, the experience, knowledge and other attributes of the particular taxpayer should be taken into account, as well as the situation in which that taxpayer was at the relevant time or times (in accordance with the decisions in The Clean Car Co and Coales).
>
> 72. Where the facts upon which the taxpayer relies include assertions as to some individual's state of mind (e.g. "I thought I had filed the required return", or "I did not believe it was necessary to file a return in these circumstances"), the question of whether that state of mind actually existed must be decided by the FTT just as much as

> any other facts relied on. In doing so, the FTT, as the primary fact-finding tribunal, is entitled to make an assessment of the credibility of the relevant witness …
>
> 73. Once it has made its findings of all the relevant facts, then the FTT must assess whether those facts (including, where relevant, the state of mind of any relevant witness) are sufficient to amount to a reasonable excuse, judged objectively.
>
> 74. Where a taxpayer's belief is in issue, it is often put forward as either the sole or main fact which is being relied on – e.g. "I did not think it was necessary to file a return", or "I genuinely and honestly believed that I had submitted a return". In such cases, the FTT may accept that the taxpayer did indeed genuinely and honestly hold the belief that he/she asserts; however that fact on its own is not enough. The FTT must still reach a decision as to whether that belief, in all the circumstances, was enough to amount to a reasonable excuse. So a taxpayer who was well used to filing annual self-assessment returns but was told by a friend one year in the pub that the annual filing requirement had been abolished might persuade a tribunal that he honestly and genuinely believed he was not required to file a return, but he would be unlikely to persuade it that the belief was objectively a reasonable one which could give rise to a reasonable excuse."

93. I am satisfied from the dealings as a whole between Mr Cummings and Mr Cliffe that Mr Cummings genuinely and honestly believed that Mr Cliffe was treating the disputed tax as deferred whilst settlement negotiations were continuing. I am further satisfied that viewed objectively this was a reasonable belief and amounts to a reasonable excuse for non-payment of the disputed tax whilst the negotiations were in progress.

94. I must next consider how long that reasonable excuse lasted. In my view the reasonable excuse lasted until 15 January 2018 at which time the appellant clearly understood from Mr Cliffe that HMRC were not deferring payment of the disputed tax and were pursuing the APN penalties. However, I do not consider it would be reasonable to expect the appellant to pay the disputed tax on that date. The appellant was entitled to expect some time to make a time to pay proposal. In adopting that approach, I take into account paragraph 16(2)(c) Schedule 56 which provides that the appellant should be treated as continuing to have a reasonable excuse if the failure is remedied without unreasonable delay after the excuse ceased.

95. It is clear that the appellant was not able to discharge the whole of the disputed tax immediately. However, there was no evidence before me as to why it took between 15 January 2018 and 9 May 2018 to put forward a time to pay arrangement. I accept that work would be necessary to prepare cashflows but there is no explanation as to why it took the appellant, a firm of accountants, some 4 months to prepare those cashflows. On the limited evidence available I consider that a time to pay proposal ought to have been submitted to the respondents by 31 March 2018 at the very latest, a period of some 7 weeks. On that basis the reasonable excuse ceased on 31 March 2018. Paragraph 16(1)(c) is not engaged because in my view the appellant did not thereafter remedy the failure without unreasonable delay.

96. In the circumstances, the appellant's failure to pay the disputed tax identified in the APNs prior to 31 March 2018 does not give rise to any liability to penalties. If the disputed tax had been due and payable on 31 March 2018 then the penalty date would have been 30 April 2018. I am satisfied therefore that the appellant was liable for a first penalty of 5% of the disputed tax. No liability arises for any subsequent penalties and I cancel those penalties.

97. Finally, I do not consider that HMRC's decision not to give a special reduction was flawed. The appellant's case on special circumstances is effectively the same as its case on reasonable excuse. In my view of the facts as found it cannot be said that that there were any special circumstances which would justify a special reduction of the first penalty which I have found is payable.

Conclusion

98. For all the reasons given above I substitute a decision that the appellant became liable to a first penalty for non-payment of the disputed tax on 1 May 2018. Otherwise the penalties are cancelled.

99. At the end of the hearing the appellant asked me to consider anonymising this decision if I were to find in favour of the appellant. The appellant made out no case as to why I should anonymise the decision and in any event, I have only found partly in favour of the appellant.

100. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 02 APRIL 2019