[2018] UKFTT 0354 (TC)

TC06568

Appeal number: TC/2018/00380

INCOME TAX – Accelerated payment notices – surcharges – whether made in accordance with legal requirements - whether reasonable excuse – observations on Class 4 NICs position – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER ALLEYNE **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Taylor House, London EC1 on 29 May 2018, with post-hearing submissions by HMRC on 6 June 2018

The Appellant participated in the hearing by telephone

Ms Ally Keating, Solicitor's Office and Legal Services, HM Revenue and Customs, for the Respondents

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DECISION

1. This was an appeal by Mr Peter Alleyne ("the appellant") against five surcharges totalling £3,901.31 imposed under s 59C of the Taxes Management Act 1970 ("TMA"), as the result of his failure to comply with five accelerated payment notices ("APNs") given to him by the respondents ("HMRC") under s 219(2)(b) of the Finance Act ("FA") 2014.

The hearing

2. The hearing of the appellant's appeals was due to start at 2 pm. Shortly before that time I was informed by the clerk that there was no attendance by or on behalf of the appellant. The clerk phoned the appellant on the number given by him, and spoke to the appellant who said that he was unaware of the hearing.

3. In Ms Keating's presence I then phoned the appellant. I told him that the papers I had showed that he had been sent notice of the hearing by email and I gave him the address used which he accepted was his current one. He said he must have overlooked it.

4. I offered the appellant three options. He could ask for a postponement to a later date; he could agree to let me decide the case on paper; or he could participate by phone. This latter course is what he chose.

5. After HMRC had opened their case as to the procedural issues with the surcharges, I asked the appellant to say what he wanted about the reasonable excuse he had put forward in the papers. I asked him some questions about what he said and about his finances more generally with a view to seeing if his excuse was a reasonable one within the meaning given by s 59C TMA. Ms Keating did not wish to cross-examine the appellant.

6. I reserved my decision because I had decided to require further information and submissions from HMRC on a point of law relating to the way the surcharge was assessed. I have received that information and those submissions, and taken them into account in coming to this decision.

The facts

7. The basic facts about the appellant's dealings with HMRC are not in dispute and I take the following from the bundle of documents I had and from those exhibited to HMRC's skeleton argument.

8. On 26 November 2003 HMRC gave notice in writing to the appellant of their intention to open an enquiry into the appellant's 2001-02 tax return. The subject matter of the enquiry was a claim by the appellant that article 3(2) of the UK/Isle of Man Double Taxation Arrangement (the letter called it an "Agreement") applied to exempt from UK tax profits received by the appellant "via your Interest in Possession Trusts". Certain information about the profits and the claim were requested.

9. A similar letter was sent to the appellant in relation to 2002-03 although the information requested differed to an extent

10. Letters stating an intention to open an enquiry were also sent in relation to 2004-05, 2005-06 and 2006-07, but the information requested was in a separate letter to the appellant's accountants, and I have not seen them.

11. On 18 March and 18 May 2009 HMRC sent five letters to the appellant giving the conclusions of their enquiries into the returns and notifying him of amendments to his returns, in all years seeking additional tax. The letters warned the appellant of possible surcharges if the tax was not paid in time.

12. On 3 and 30 April 2009 Montpelier Tax Consultants appealed on behalf of the appellant against the conclusions and amendments and requested postponement of the tax charged, a request which was granted.

13. The next item chronologically in the papers is a letter from HMRC Counter Avoidance AP Team on 8 November 2016 informing the appellant that he would receive an APN and a follower notice. It referred to a scheme used by the appellant, the IR35 arrangement, but no "scheme reference", which I take to mean that the scheme was not a notified one under the DOTAS arrangements in FA 2004. A Factsheet about follower notices and APNs was enclosed which referred to surcharges and the "unpostponement" of the tax shown on the amendments to the returns.

14. On 25 November 2016 HMRC issued APNs for the five enquiry years under cover of a letter.

15. On 9 January 2017 HMRC sent five letters warning the appellant of the approaching deadline to pay the APN amounts.

16. On 11 February 2017 the appellant sent representations to HMRC about the APNs.

17. On 24 March 2017 HMRC gave their response to the representations. They confirmed the APNs in the original amounts. That letter revealed that five separate APNs had been given to the appellant requiring amounts of Class 4 National Insurance Contributions ("NICs") to be paid (no copies of these APNs are in the file).

18. On 7 July 2017 HMRC issued five notices of surcharge to the appellant on account of his failure to pay the unpostponed income tax by 29 April 2017.

19. On 12 July 2017 the appellant appealed against the surcharges.

20. On 29 August 2017 HMRC gave their "view of the matter" in relation to all surcharges including five in relation to unpostponed Class 4 NICs.

21. On 25 September 2017 the appellant requested a review under s 49B TMA.

22. On 21 November 2017 the review officer in HMRC gave the conclusions of her review which was to uphold the surcharges in relation to income tax.

23. On 15 January 2018 the appellant notified his appeals to the tribunal.

24. The appeals so notified were against the income tax surcharges only. The position as to Class 4 NICs is described later. The amounts of the surcharges were £471.45, £857.30, £758.37, £1,331.75 and £482.44.

The law

25. I gratefully borrow here (but with some amendments) from the decision of Judge John Brooks in *Irena Morgan v HMRC* [2017] UKFTT 619 (TC) which I was told is the only previously reported case involving surcharges under s 59C TMA on APN amounts unpaid by the due date.

26. The circumstances in which an APN may be issued are set out in s 219 FA 2014 which, so far as relevant to this appeal, provides:

> "(1) HMRC may give a notice (an "accelerated payment notice") to a person ("P") if Conditions A to C are met.
>
> (2) Condition A is that—
>
> …
>
> (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been—
>
> (i) determined by the tribunal or court to which it is addressed, or
>
> (ii) abandoned or otherwise disposed of.
>
> (3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular arrangements ("the chosen arrangements").
>
> (4) Condition C is that one or more of the following requirements are met—
>
> (a) HMRC has given (or, at the same time as giving the accelerated payment notice, gives) P a follower notice under Chapter 2—
>
> (i) in relation to the same return or claim or, as the case may be, appeal, and
>
> (ii) by reason of the same tax advantage and the chosen arrangements;
>
> …"

27. In this case, the APNs were issued to the appellant, who has an outstanding appeal (see below), under s 219(2)(b) FA 2014. The content of such an APN is prescribed by s 221 FA 2014. This provides:

> "(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, and
>
> (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).
>
> (5) If a notice is given by reason of two or all of the requirements in section 219(4) being met, the denied advantage is to be determined as if the notice were given by virtue of such one of them as is stated in the notice as being used for this purpose.
>
> …"

28. Section 222 FA 2014 entitles a person receiving an APN to make representations to HMRC objecting to it on the grounds that Conditions A to C in s 219 FA 2014 are not satisfied, or objecting to the amount of accelerated payment that is required. Any such 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.

29. There is no statutory right of appeal to this tribunal against HMRC's decision to issue an APN. However, there is a right of appeal against a surcharge (or penalty) imposed as a consequence of a taxpayer's failure (or alleged failure) to make an accelerated payment.

30. In relation to cases where, as here, there is a pending appeal against the conclusions of an enquiry into a return, s 224 FA 2014 inserts subsections (8B) to (8D) into s 55 TMA which relevantly provides:

> "(1) This section applies to an appeal to the tribunal against—
>
> …
>
> (aa) a conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act,
>
> …

(2) Except as otherwise provided by the following provisions of this section, the tax charged—

(a) by the amendment or assessment, or

(b) where the appeal is against a conclusion stated by a closure notice, as a result of that conclusion,

shall be due and payable as if there had been no appeal.

(3) If the appellant has grounds for believing that the amendment or assessment overcharges the appellant to tax, or as a result of the conclusion stated in the closure notice the tax charged on the appellant is excessive, the appellant may—

(a) first apply by notice in writing to HMRC within 30 days of the specified date for a determination by them of the amount of tax the payment of which should be postponed pending the determination of the appeal;

(b) where such a determination is not agreed, refer the application for postponement to the tribunal within 30 days from the date of the document notifying HMRC's decision on the amount to be postponed.

An application under paragraph (a) must state the amount believed to be overcharged to tax and the grounds for that belief.

…

(6) The amount of tax the payment of which shall be postponed pending the determination of the appeal shall be the amount (if any) in which it appears ..., that there are reasonable grounds for believing that the appellant is overcharged to tax; and—

(a) in the case of a determination made on an application under subsection (3) above … the date on which any tax the payment of which is not so postponed is due and payable shall be determined as if the tax were charged by an amendment or assessment notice of which was issued on the date of that determination and against which there had been no appeal; …

…

…

(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 Finance Act 2014 and that notice has not been withdrawn.

(8C) Nothing in this section enables the postponement of the payment of …—

…

(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.

..."

31. Section 59C TMA (surcharges on unpaid income tax and capital gains tax) is applicable in the present case, which concerns returns and tax payable for the years of assessment 2001-02 to 2006-07 (except 2003-04) because, although repealed by the Finance Act 2009 Schedules 55 and 56 (Income Tax Self Assessment and Pension Schemes) (Appointed Days and Consequential and Savings Provisions) Order 2011 (SI 2011/702) ("the Order"), s 59C TMA is saved by art 20 of the Order "in relation to the tax year 2009-10 or any previous tax year."

32. The relevant provisions of s 59C TMA state:

"(1) This section applies in relation to any income tax or capital gains tax which has become payable by a person (the taxpayer) in accordance with section 55 or 59B of this Act.

(2) Where any of the tax remains unpaid on the day following the expiry of 28 days from the due date, the taxpayer shall be liable to a surcharge equal to 5 per cent of the unpaid tax.

(3) Where any of the tax remains unpaid on the day following the expiry of 6 months from the due date, the taxpayer shall be liable to a further surcharge equal to 5 per cent of the unpaid tax.

…

(5) An officer of the Board may impose a surcharge under subsection (2) or (3) above; and notice of the imposition of such a surcharge—

(a) shall be served on the taxpayer, and

(b) shall state the day on which it is issued and the time within which an appeal against the imposition of the surcharge may be brought.

…

(7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.

(8) Subject to subsection (9) below, the provisions of this Act relating to appeals shall have effect in relation to an appeal under subsection (7) above as they have effect in relation to an appeal against an assessment to tax.

(9) On an appeal under subsection (7) above that is notified to the tribunal section 50(6) to (8) of this Act shall not apply but the tribunal may—

(a) if it appears ... that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or

(b) if it does not so appear ..., confirm the imposition of the surcharge.

(10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above.

(11) The Board may in their discretion—

(a) mitigate any surcharge under subsection (2) or (3) above, or

(b) stay or compound any proceedings for the recovery of any such surcharge,

and may also, after judgment, further mitigate or entirely remit the surcharge.

(12) In this section—

"the due date", in relation to any tax, means the date on which the tax becomes due and payable;

"the period of default", in relation to any tax which remained unpaid after the due date, means the period beginning with that date and ending with the day before that on which the tax was paid."

Submissions

33. Mr Alleyne's grounds of appeal as submitted in his Notice of Appeal to the tribunal can be summarised as:

(1) He did not at the time for payment of the APNs have the funds to pay them. He has since arranged to pay the APNs by drawing down his pension, he now being unemployed.

(2) His appeal was not dealt with in a timely manner (45 days) because HMRC said his recorded delivery letters had been sent to the wrong person in HMRC.

(3) He fully expected the legal processes against the APNs to have been resolved by now.

34. The third ground is a reference to the fact that the appellant is one of a large number of people whose scheme has been the subject of both follower notices and

APNs where those people have sought to have the issue of the follower notices and APNs judicially reviewed. I was shown a copy of an Order made by Nugee J in the Administrative Court in the case of *Mrs Aileen Broomfield and Others v Commissioners for HM Revenue and Customs* whereby he gave permission for the claim for judicial review to proceed on certain grounds but not others, and granted interim relief in relation to the APNs (but not the follower notices) to the claimants (of which the appellant was one) in accordance with a consent order.

35. I was also shown a copy of the consent order which required any party to the claim seeking interim relief to provide evidence of hardship to HMRC by 16 September 2017. The order provided that nothing in it affected HMRC's entitlement to "issue any notice of penalty to the claimant in respect of any failure to pay a penalty arising from an APN".

36. With all respect to the solicitors who drafted this agreement, I do not think that this says what they intended. There is no penalty for failing to pay a *penalty*. The penalty is for failing to pay the amount in the APN by the relevant date. And while the order does not explicitly refer to a surcharge, as surcharge is a somewhat euphemistic way of referring to what is obviously a penalty, I consider it encompasses the surcharges in this case.

37. I therefore consider that the order does not in any way invalidate HMRC's entitlement to issue the notices of surcharge in this case.

38. HMRC's submissions as set out in their skeleton and repeated at the hearing were:

(1) In accordance with the decision of this tribunal in *Nijjar v HMRC* [2017] UKFTT 175 (TC) (Judge Jonathan Richards) HMRC have shown that:

(a) The documents issued to the appellant were APNs.

(b) The APNs were issued pursuant to s 219(2)(b) FA 2014 (*Nijjar* was a s 219(2)(a) case).

(c) Payment of the amount in the APN had not been made by the date given by s 59C TMA. The appellant did not dispute this.

(d) The penalty had been correctly calculated in accordance with the legislation. The appellant did not dispute this either.

(2) Inability to pay the tax cannot be a reasonable excuse – s 59C(10) TMA.

(3) The appellant's redundancy and retirement was in October 2017. The APN was issued on 25 November 2016 at a time when he was able to manage his own affairs.

(4) He did attempt to make a time to pay ("TTP") arrangement but this was on 28 November 2017, after the due date for paying the APN. I take this to be a reference to the possible application of s 108 FA 2009 (suspension of penalties during currency of a TTP agreement). He had been warned in the APN notice that if he had payment problems to contact HMRC "straightaway". His actions

in waiting for 7 months before attempting to negotiate a TTP agreement were not those of a reasonable person.

(5) As to the appellant's complaint about HMRC delays, the tribunal does not have jurisdiction to consider them.

(6) As to the judicial review proceedings the appellant did not produce a witness statement with evidence of hardship for the purposes of claiming interim relief.

(7) In summary HMRC say the surcharges were validly issued and the appellant has no reasonable excuse for late payment.

Discussion

39. I deal first with a number of issues where the answer is clear cut.

40. I agree with HMRC that I have no jurisdiction to deal with the appellant's complaints about HMRC delays.

41. I agree that there was no time to pay agreement satisfying the conditions in s 108 FA 2009, and that I cannot suspend the penalty on that account.

42. I agree that the four "*Nijjar*" conditions (§38(1)) are passed. Unlike *Nijjar* this was not a case where an enquiry was still ongoing, so the relevant paragraph in s 219(2) was paragraph (a). This had been stated on the face of the APNs. The APNs also complied with the requirements in s 221(2) FA 2014.

43. At the hearing I questioned Ms Keating about the process used in imposing the surcharge. I did this because s 59C(5) TMA requires that an officer of the Board imposes the surcharge yet it was said to be the case by HMRC's Enquiry Manual at EM4106 that the imposition "on the great majority of occasions" was automatically made by a computer. "Board" must now, in accordance with s 50(1) Commissioners for Revenue and Customs Act 2005, be read as meaning those Commissioners, and I take "impose" in s 59C(5) to mean "assess" or "determine", the words usually used in relation to penalties.

44. At Ms Keating's request, after the hearing I directed HMRC to produce submissions on the point. I received HMRC's submissions with a witness statement from an officer of HMRC. From these I am satisfied that an officer of HMRC did indeed impose the surcharges and that they were not made automatically.

45. Accordingly I am satisfied that HMRC have shown that the surcharges were validly imposed on the appellant.

46. I now consider whether the appellant had a reasonable excuse for not paying the tax shown on the APNs by the due date. As HMRC pointed out, s 59C(10) TMA says that inability to pay is not a reasonable excuse for the purposes of that section. Ms Keating accepted though that the binding authorities on the identical wording in s 71(1)(a) Value Added Tax Act 1994 in relation to the default surcharge applying for

VAT were equally relevant and binding here. Those cases included in particular *Steptoe v Commissioners of Customs & Excise* [1992] STC 757 in the Court of Appeal.

47. The question then becomes whether the reasons the appellant was unable to pay give him a reasonable excuse for not paying. Because it was not clear to me that the appellant had appreciated that he could seek to show what those reasons were and why they prevented him from being able to pay, I asked him some questions over the phone in a way that allowed Ms Keating to not only hear my questions but also the appellant's answers. Ms Keating was also given the opportunity to ask the appellant questions, but declined.

48. In his phone evidence the appellant said that he had not been advised by the scheme promoter, Montpelier, to set aside any money to pay any tax that might become due if the scheme failed, and he had not done anything of that sort on his own initiative. He stressed that after April 2009, when the closure notices had been issued and appealed against, there had been no contact from HMRC right up until the warning letter about the APNs and follower notices in November 2016. He had taken the view that HMRC were not pursuing the case and that there was no need for him to put funds aside. He had in effect spent or invested the tax that he thought he had saved.

49. At the time of the due date for payment of the APNs his main asset was his share in the equity of his home (jointly owned with his wife). He had considered whether he could sell it and downsize so as to be able to pay the APN tax, but it was not a decision that he could take by himself. The same applied to the question of borrowing on the security of the house.

50. He pointed out that he had been made redundant in October 2017 and had used some of his redundancy pay and his pension to pay the APN tax. He commented that as a black person over 60 he would have had difficulty in finding alternative employment in the financial services industry, a factor which led him to retire and use his pension to pay the tax. He had now negotiated a TTP agreement with HMRC.

51. I accept the appellant's evidence on this issue, which was not challenged. In my opinion, the appellant had a reasonable excuse for not paying the APN tax at all times before the date when he finally paid it.

52. This was not a case, as it so often is in VAT default surcharges, of a trader knowing they have a quarterly obligation to pay over the net VAT they have collected on behalf of the Government deciding to pay other creditors before HMRC and citing vague cash flow problems.

53. In this case the tax liabilities alleged by HMRC to exist, if established, would have been payable, by virtue of s 59B TMA, on 31 January 2003, 2004, 2006, 2007 and 2008. They were particularised by amendments made to the appellant's returns in March and May 2009 and those amendments were appealed within time. As the appellant pointed out, there was then a seven and a half year gap before HMRC used powers which did not exist in 2009 to make the tax shown on the amendments and postponed almost immediately payable. That was the main cause of the appellant's

inability to find the ready money to pay the tax. In my view a reasonable person would be entitled to assume that a nearly eight year silence from HMRC meant that there was unlikely to be much of a chance of having to pay the tax on the amendments, and certainly not within a few months of a demand for tax coming out of the blue. Even if they were told that the appeals had sprung to life and were to be contested before this tribunal, a reasonable person would be entitled to assume that they would have much longer than a few months from such an intimation to the date when any tax would have to be paid.

54. I do not read the appellant's ground (3) (see §33) as a claim that he had a reasonable belief that ultimately the tax would be found to be not due, and that that could amount to a reasonable excuse. Such a claim has been the subject of a certain amount of disagreement in this tribunal (compare *Fraser v HMRC* [2018] UKFTT 301 (TC) and *Chapman v HMRC* [2017] UKFTT 800 (TC)) and I do not intend to weigh in on it. It seems to me however that it would be much harder for a person in the appellant's circumstances, where he has been issued with a follower notice before or at the same time as an APN, to show that such a belief remained a genuine one.

55. It might possibly make a little difference that the decision which led to the follower notice in this case was a First-tier Tribunal decision (*Huitson v HMRC* [2015] UKFTT 448 (TC)) but as I have said I do not take the appellant as having raised this ground of appeal despite his reference to the judicial review.

Observations on Class 4 NICs

56. A number of documents in my bundle show that a separate set of APNs had been issued to the appellant seeking payment of amounts of Class 4 NICs. It was then obvious to me and confirmed by Ms Keating that the subject matter of the amendments to the appellant's returns was the profits he had, directly or indirectly, received from his carrying on a trade in partnership, where the partnership was resident in the Isle of Man (see §8). The profits of a trade are subject not only to income tax (under Case I of Schedule D in ICTA 1988 up to 2004-05, and Part 2 ITTOIA 2005 thereafter) but also to a charge under s 16 Social Security (Contributions and Benefits) Act 1992 ("SSCBA") (Class 4 NICs) and Class 4 NICs were included in the amendments to the returns.

57. On 11 February 2017 the appellant sent HMRC his representations about the APNs. In that letter, which I am confident was drafted for him, probably by Montpelier or those advising them, he argued that the APNs for Class 4 NICs were invalid as "tax appeals" in s 203 FA 2014 did not include NICs, nor did Schedule 2 to the National Insurance Contributions Act 2015 deem the word tax in Part 4 FA 2014 to include Class 4 NICs. In addition the letter said that, in respect of NICs, HMRC is subject to the now long since passed time limits in the Limitation Act 1980 ("LA80").

58. HMRC's response to the representations of 24 March 2017 said that LA80 did not make the APNs statute barred as the date on which the cause of action accrued is not the end of the tax year but the statutory due date, as Class 4 NICs are collected with income tax under self-assessment so the statutory due date for Class 4 is the same as for income tax.

59. Following appeals by the appellant against surcharges including those for NICs, HMRC gave their "view of the matter". For some reason I cannot fathom, the NICs surcharge for 2002-03 alone was not listed as one of the matters appealed. The "view of the matter" letter made no mention of Class 4 NICs as a separate subject.

60. In a letter of 16 October 2017 HMRC's Counter Avoidance team responded to letters from the appellant addressed to the officer who considered his representations on the follower notices. In this letter the officer addressed Class 4 NICs and said:

> (1) Corrective action under the follower notices is still required to bring Class 4 NICs into charge.
>
> (2) But if corrective action is taken, HMRC would not seek to enforce collection of the Class 4 NICs
>
> (3) The penalties to which the appellant had become liable for not taking corrective action will be calculated without reference to Class 4 NICs
>
> (4) There is no effect on the APNs which release Class 4 NICs for collection as being unpostponed.
>
> (5) But HMRC will withdraw any issued, but unpaid surcharges relating to Class 4 NICs.

61. On 8 December 2017 the appellant wrote to HMRC's Debt Management Unit's Accelerated Payments team in connection with the APN. In this he said:

> "… I am part of a JR contesting the tax and already the NI position has been deemed invalid in (*sic*) the Limitations Act 1980".

62. The review conclusions letter in relation to the surcharges said:

> … this review is solely on the surcharges raised on the APNs for tax as the surcharges raised on the APNs for [Class 4 NICs] have been withdrawn by Counter Avoidance."

63. On 22 December 2017 the Counter Avoidance team responded to a letter from the appellant of 22 December 2017. It said that the challenge to the validity of the Class 4 APNs and follower notices was inaccurate, and repeated the matters in §60.

64. The appellant said in his Notice of Appeal that he was not appealing the Class 4 NICs surcharges as HMRC said they had been withdrawn.

65. At the hearing HMRC confirmed that in their view the Class 4 NICs were not before the tribunal.

66. I expressed the view to HMRC that I was wholly unclear of the basis of HMRC's concession on this issue, and in particular I did not understand how HMRC could unilaterally withdraw an assessment to surcharges on Class 4 NICs.

67. On reflection, the answer may be that HMRC consider that s 59C no longer applies to Class 4 NICs. Section 16(1)(b) SSCBA applied Part 5A TMA which includes

s 59C to Class 4 NICs as it applies to income tax. Section 59C was repealed by art 5 of the Order. But the savings in art 20 were:

> "Articles 4 to 7, 8 (a) and (b)(i), 9 to 13, 15 and 16 have no effect in relation to—
>
> (a) a return or other document which is required to be made or delivered to Her Majesty's Revenue and Customs, or
>
> (b) an amount of tax which is payable,
>
> in relation to the tax year 2009-10 or any previous tax year."

68. The question is: does the Order in general and art 20 in particular apply to Class 4 NICs? Certainly Schedule 56 FA 2009 (late payment penalties) which replaced s 59C in relation to income tax does apply to Class 4 NICs – s 16(1)(c) SSCBA. But the Order was made not under Schedule 56 FA 2009 but under sections 106 and 107 FA 2009 which are not made applicable to Class 4 NICs by s 16 SSCBA. This then seems to be a possible reason: s 59C surcharges cannot apply to Class 4 NICs having been repealed as to income tax (and by application of s 16(1)(b)) to Class 4 NICs by art 5, but only saved as to income tax (and not Class 4 NICs) by art 20.

69. The alternative view on the ability of HMRC to unilaterally cancel a surcharge would be that while s 30A(4) TMA forbids any change to an assessment to income tax once made, except by law, and section 16(1)(a) SSCBA applies s 30A TMA (being part of the provisions of the Income Tax Acts relating to assessments to income tax) to assessments to Class 4 NICs, nothing in s 59C TMA, which is charged by an imposition not an assessment, imports s 30A into itself. Indeed s 59C(5) mirrors s 30A(3), and it would not need to do so if that section applied to s 59C impositions. The only part of the rest of TMA that is imported into s 59C is Part 5 relating to appeals. Thus a surcharge may be withdrawn otherwise than by operation of another provision of TMA such as s 54 or s 50.

70. This reasoning would explain why HMRC say they can withdraw the surcharges, either because they had no power to impose them in the first place or because they can withdraw them at will, as with VAT assessments. But as regards the follower notices and the APNs I wholly fail to understand why HMRC say they cannot enforce collection of the Class 4 NICs that become liable to be paid following corrective action under the follower notices or the Class 4 NICs that are unpostponed under the APNs.

71. The basis of this view seems to be that, in agreement with the appellant (or rather his advisers) LA80 will prevent collection of the Class 4 NICs. It is well known that LA 80 applies to the enforcement of NICs by reference to the date when an employer becomes liable to pay them – see HMRC's Manual "Decisions and Appeals for National Insurance Contributions and Statutory Payments" at DANSP14100 etc. But that Manual makes it clear that LA 80 applies only to debts due for Classes of NICs, especially Class 1, other than Class 4. By s 16(1)(a) SSCBA Class 4 NICs are assimilated into the income tax enforcement regime, and are not included in s 5 and Schedule 2 Social Security Contributions (Transfers of Functions, Etc) Act 1999.

72. So it seems that HMRC accept that they cannot enforce payment of Class 4 NICs established by the APNs and corrective action under the follower notices. Yet HMRC acknowledged in their letter of 16 October 2017 that for Class 4 the position is the same as for income tax, that LA80 runs from the due date. If so, how can they then enforce the income tax liabilities, given that for Class 4 NICs the due dates are the same as they are for income tax. Either they can enforce the Class 4 NICs or they can't enforce the income tax debts.

73. That is a conundrum which I do not have to solve. But no doubt fertile minds will have considered the implications of the HMRC statements which will have been made to many others in the appellant's position.

74. It did also occur to me that in a situation where the profits arise from an Isle of Man partnership with apparently no permanent establishment in the UK, s 15(1)(c) SSCBA would apply to extinguish any liability to Class 4 NICs on the basis of the decision in *Colquhoun (Surveyor of Taxes) v Brooks* 2 TC 490. But that is not apparently HMRC's view or they would have withdrawn, or at least intimated that they would seek to withdraw on an appeal or by a s 54 TMA agreement, the APNs relating to Class 4 NICs, and not just said they would or could not enforce them.

Decision

75. Under s 59C(7)(a) TMA I set all the surcharges aside.

76. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 27 JUNE 2018