[2018] UKFTT 33 (TC)

TC06313

Appeal number: TC/2017/04963

Income Tax – Follower Notice – Penalty – Sections 204-214 of Finance Act 2014 - necessary corrective action not taken – reasonable in all the circumstances – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

EMMANUEL ONILLON **Appellant**

- and -

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

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at Taylor House, London on 16 January 2018

Michael Firth, Counsel instructed by Elliotts Shah Accountants for the Appellant

Christopher Shea, Officer of HM Revenue and Customs Solicitors Office and Legal services, for the Respondents

DECISION

1. This is an appeal against a follower notice penalty issued by HMRC to Emmanuel Onillon, the Appellant, on 10 May 2016 in the amount of £78,026.76.

The facts

2. The Tribunal received a bundle of documents on behalf of HMRC including correspondence and relevant notices. At the outset of the hearing the Appellant supplied a hard copy of the email sent to him on 2 March 2015 by Mr Praphul Shah, his accountant. The Tribunal admitted this in evidence. The Tribunal heard oral evidence from Mr Shah and the Appellant who were both cross examined.

3. The Tribunal finds the following facts.

4. In the 2006/07 tax year, the Appellant entered into a tax avoidance scheme 'Working Wheels' that has subsequently been held not to work (*Flanagan v. HMRC* [2014] UKFTT 175 (TC)). The effect on his tax return was that a repayment of £949.68 became a repayment of £261,038.88.

5. HMRC refused to make the repayment because "most of the overpayment for 2007 relates to the losses relating to the Disclosed Avoidance 69509799" (letter of 9 April 2008). An enquiry into the 2006/07 return was opened on 9 October 2008. The letter confirmed that no repayment would be made until the enquiry was completed.

6. On 28 November 2014, HMRC sent a notice to the Appellant a warning letter. It stated that "We are writing to tell you that you will soon need to make a payment of the amount that relates to your use of the tax avoidance scheme shown in this letter. You will also need to decide whether to amend your return to counteract the tax advantage that you gained from using the tax avoidance scheme. This is called 'taking corrective action'."

7. The letter went on to warn that HMRC would be sending a follower notice: "This will ask you to take corrective action by amending your return to counteract the tax advantage from your use of the avoidance scheme."; and an accelerated payment notice. It also stated "What if you now want to settle your tax affairs: If you now want to settle your tax affairs you need to phone us straightaway on the number shown at the top of this letter. We will then tell you what you need to do next. It is entirely up to you whether you wish to settle your tax affairs. If you do not want to settle then the current compliance check will remain open." The letter included advice about what to do when he was to receive the notices, what to do if he disagreed with the notices and his appeal rights for the current compliance check.

8. The letter also enclosed a factsheet on tax avoidance schemes, follower notices and accelerated payments.

9. By way of a letter covering sent to the Appellant dated 17 December 2014, HMRC enclosed a follower notice and an accelerated payment notice.

10. The covering letter enclosing both notices included the following:

What you need to do now

Please read the notices carefully as they ask or require you to take action. They also contain other important information, including about penalties for not complying with the notices. The follower notice asks you to take corrective action (which is explained in the notice) by the date shown in the notice. The accelerated payment notice requires you to pay the amount due by the date shown in the notice…….

Taking corrective action

If you do what the follower notice asks, by amending your return, you must pay the amount due resulting from the amendment……..

If you do not do what the follower notice asks and take corrective action, you must still pay the amount shown in the accelerated payment notice…….

[The letter sent to the Appellant contained a cut and paste error stating '**ain purpose, or one of the main purpo**' rather than a heading to the next section but the Tribunal has seen the correct version of the letter with the heading inserted which should read '**If you do not take corrective action'**]

If you **do not** do what the follower notice asks and take corrective action, you must still pay the amount shown in the accelerated payment notice……

If you choose not to take corrective action and continue to dispute the tax effects of the scheme through to litigation, you may be charged the penalty set out in the notice.

If you now want to settle your tax affairs, you need to phone us straightaway on the number at the top of this letter. We will then tell you what you need to do next.

11. The follower notice was also dated 17 December 2014 and addressed to the Appellant. At the bottom of the second page and on the third page it stated:

What you need to do in response to this notice – taking corrective action

If you do not take the necessary 'corrective action' by the date shown below, you will be liable to pay a penalty under section 208 of the Finance Act 2014.

To take corrective action, you must:

Step 1: amend your Self Assessment Tax Return for the year ended 5 April 2007. Your amendment needs to counteract the denied advantage referred to above.

Step 2: notify us that you have taken Step 1. You must also tell us of the amount of the denied advantage and (where it is different) the amount of additional tax which has or will become due and payable in respect of tax by reason of the first step being taken.

Please **do not** try to amend your tax return online, you **must** complete the enclosed form and return it to us.

……..

You must make sure that we receive the completed form no later than 24 March 2015. However if you object to the notice and make representations to us the date for taking corrective action may change……..

What to do if you disagree with this follower notice

……..

Penalties for failing to take corrective action

If you decide not to do what the follower notice ask you to do by **24 March 2015** and the notice is not withdrawn, we may charge you a penalty. You will be charged up to 50% of the value of the denied advantage as determined by schedule 30 to the Finance Act 2014…….

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 of more of the following:

…….

12. Enclosed with the follower notice was a form headed 'Tax avoidance schemes Amending your return in response to a follower notice.' This form was that referred to within the Follower Notice for the Appellant to use to amend his tax return.

13. The form consisted of one page providing a box for the Appellant to enter his signature, a box or him to enter the date and box headed 'Amount of Additional tax'. It contained the following instructions:

The follower notice dated 17 December 2014 asks you to amend your return to counteract the tax advantage asserted to result from the avoidance scheme shown in that notice.

If you want to amend your return, please:

- Read the statement at Part 1

- sign and date Part 1 to confirm that you agree the statement

- complete Part 2 to show the additional amount of tax that is due and payable, or will become due and payable, as a result of your amendment to the return

- attach copies of your tax calculation showing how you worked out the amount that you entered in Part 2

- Send the completed form to us no later than 24 March 2015

14. Part 2 of the form at the bottom of the page stated, 'The amendment for the tax year ended 5 April 2007 results in additional tax due and payable as shown below, and as shown in the tax calculation, which is attached'. There was then a box titled 'Amount of Additional tax' for the Appellant to enter the additional tax due and payable.

15. Together with the covering letter, Follower Notice and form described above, there was an Accelerated payment notice enclosed dated 17 December 2014 for the

year ended 5 April 2007. It stated that the amount due from the Appellant in respect of the notice was £260,089.20.

16. It was accepted by all parties that the accelerated payment notice should not have been issued – HMRC had not made any repayment to the Appellant and no further tax was due from him.

17. The final documents sent to the Appellant were a computation of accelerated payment stating that the amount of accelerated payment was £260,089.20 and a computation of tax advantage. They referred to enclosed computations which were set out on a separate sheet.

18. This document was also dated 17 December 2014 and headed Tax calculation for 2006-2007. It contained HMRC's schedule of revised tax calculation for the Appellant for this year. Within this schedule it described the income tax overpaid as £261,038.88 based on the Appellant's returned figures and £949.68 based on HMRC's revised tax calculation.

19. The Appellant submits that this is precisely the same form of document that HMRC use to show an amendment to a tax return. There is no need for the Tribunal to resolve this point.

20. The letter and documents dated 17 December 2014 were also sent to the Appellant's accountants and advisers, Elliotts Shah & Co.

21. The letter dated 17 December 2014 was not originally received by the Appellant and consequently it was resent on 18 February 2015.

22. On 25 February 2015 HMRC sent a reminder to the Appellant of the deadline for making the accelerated payment of £260,089.20 by 24 March 2015. A copy was also sent to Elliotts Shah & Co.

23. On 2 March 2015 the Appellant's adviser, Mr Shah, phoned HMRC to discuss the content of the letter dated 17 December 2014. The fact of there being a phone call is evidenced by telephone records and is not in dispute by HMRC although they hold no note or record of the conversation.

24. Mr Shah gave evidence about the phone call and was cross examined.

25. He believed he was making the call in response to the letter of 17 December 2014 so that it was as much in response to the follower notice as the accelerated payment notice. He was challenged by Mr Shea about this in cross examination on the basis it was said the call was only in response to the accelerated payment notice and reminder letter. Mr Shah stated that he did not make the call to HMRC because of reminder letter dated 25 February 2015 – this letter would have been received after 2 March 2015.

26. The Tribunal is satisfied that Mr Shah believed he was calling about all of the Appellant's tax affairs as covered by the letter of 17 December 2014 which enclosed all the notices and other attachments.

27. Furthermore, the Tribunal accepts Mr Shah's evidence that he believed he was responding to the invitation set out in the covering letter dated 17 December 2014:

> If you choose not to take corrective action and continue to dispute the tax effects of the scheme through to litigation, you may be charge the penalty set out in the notice.
>
> If you now want to settle your tax affairs, you need to phone us straightaway on the number at the top of this letter. We will then tell you what you need to do next.

28. The Tribunal notes this was in similar terms to the warning letter of 28 November 2014.

> What if you now want to settle your tax affairs: If you now want to settle your tax affairs you need to phone us straightaway on the number shown at the top of this letter. We will then tell you what you need to do next.

29. During that call, Mr Shah (the Appellant's adviser) understood HMRC's officer to have told him that no further action was required in respect of the Appellant's tax affairs / the letter of 17 December 2014 and the matter was settled.

30. Mr Shah and the Appellant gave evidence about the circumstances leading up to the call and the contents of that phone call.

31. Mr Shah stated that he telephoned HMRC as the Appellant had asked him to. The Appellant had wanted to settle his tax affairs as per the covering letter to the follower notice and APN dated 17 December 2014 which stated that 'If you want to settle your tax affairs phone us straightaway on the number at the top of this letter. We will then tell you what you need to do next.'

32. Mr Shah told the officer of HMRC over the phone that the Appellant wanted to settle his affairs and agreed with the assessment dated 17 December 2014, that the Appellant did not receive the original tax refund and overall the Appellant still had a small refund due. At that stage the officer of HMRC wanted to check the refund on her screen as she said she could not see it on the screen – Mr Shah said it must be in the suspense account somewhere because it was never refunded to the Appellant. There was surprise by her when Mr Shah said the Appellant never got the refund as she could not see it on the screen.

33. Mr Shah asked what was next to be done. The HMRC officer said she had looked at the screen and agreed the assessment and said there was no action to be taken at this stage.

34. The Tribunal accepts Mr Shah's evidence and is satisfied on the balance of probabilities that this is what transpired.

35. In cross-examination Mr Shah accepted that the follower notice set out what corrective action must be taken and stated that the Appellant must use the enclosed form to amend his return and the Appellant had not done so. Nonetheless he stated he had rung HMRC on 2 March 2015 in line with the invitation in the 17 December 2014 covering letter. He was quite clear that while of his handwritten notes of 17 December 2014 do not state that the follower notice was settled, both the APN and Follower notice were discussed in the phone call. The Tribunal accepts Mr Shah's evidence.

36. The Appellant also gave evidence that he asked Mr Shah to contact HMRC – as action was necessary following the letter dated 17 December 2014. After receiving the letter, the Appellant stated he asked Mr Shah to call HMRC. The Appellant stated he asked Mr Shah to confirm to with HMRC that he had never received any benefit. He wanted Mr Shah to call HMRC immediately to find out what needed to be done – to close the case.

37. Following the conversation Mr Shah said to the Appellant that he had a conversation with HMRC and no action was required. The Appellant stated he took this advice and that was all that was required from him. Mr Shah had called HMRC and confirmed there was nothing else to be done.

38. The Appellant's understanding was that no benefit had been paid to him by HMRC, he had done what he needed to and Mr Shah called the number indicated in the letter of 17 December 2014 so that this was all that was required. He had received confirmation from HMRC that no money was ever paid to him, and he believed, through Mr Shah, that HMRC had confirmed that no further action would be taken and the matter was settled.

39. The Appellant stated he believed he had followed HMRC's instruction to call them per the instruction in the letter dated 17 December 2014.

40. The Appellant stated that on 2 March 2015 – Mr Shah emailed him to say had rung HMRC and said he never got the money refunded and that will bring that year to an end. He trusted the advice he had received as per the email confirmation.

41. In cross examination the Appellant accepted that the follower notice explained the corrective action required – to take step 1 and step 2 and to return the form once completed. He accepted that it was clear what one needed to do on this form which was to be returned.

42. However, the Appellant stated that the follower notice and the form contained a different instruction from the covering of the same date. While he accepted he had not taken the action required by the follower notice by 24 March 2015, or at all since, he had contacted his tax adviser to follow the instruction in the covering letter to call the number indicated and do what HMRC said should be done. Mr Shah did this for him and he said no further action was required and there was nothing to pay.

43. The Appellant did believe he had acted reasonably and action had been taken. He did read the follower notice but followed the instructions in the covering letter.

44. The Appellant stated that at the time he did not see a difference between the covering letter and the notice. He accepted that with the benefit of hindsight he now understood the difference. At the time he had turned to his adviser and relied on his confirmation that matters were brought to an end.

45. The Tribunal is satisfied on the balance of probabilities that the Appellant's evidence is accurate to the best of his knowledge and belief.

46. Mr Shah made a manuscript note of his action and advice on a copy of HMRC's covering letter of 17 December 2014 'No Action no tax has been refunded - PS Rang 2/3/15 Small repayment due'.

47. On 2 March 2015 Mr Shah emailed the Appellant in the following terms:

Subject: Re: Tax Return

Dear Emmanuel

I have rung and told the HMRC inspector on your case, that you never got the money refunded on the 2007 claim.

They have now seen the entries on your tax account and agree.

You still have a small refund of £949.68 from other income / expenses in 2007 and have requested them to refund it to you.

That will bring that year to an end.

All remains is for you to claim against the sponsors or seek a full or partial return of the funds in working wheel.

……..

48. It is right to record that a copy of this email was only served on HMRC and the Tribunal on the afternoon of the hearing of the appeal. Mr Shah gave evidence that this email was sent to the Appellant after the conversation he had with HMRC. Mr Shah explained to the Appellant that he never got the refund and this now seen in HMRC's tax account on screen but there was a still refund of £949.58 to be paid and the matter was at the moment settled.

49. Based on this, Mr Shah advised the Appellant that no further action was required as the matter had been concluded ie. that there was no need to take any further action in relation to the accelerated payment notice or the follower notice. This was also the Appellant's belief. The Tribunal accepts this evidence.

50. On 13 August 2015 HMRC sent a letter notifying the Appellant that he would now be liable to a penalty of 50% of the tax in dispute (which is referred to as 'the denied advantage' in the follower notice). It said that the penalty could be reduced for co-operation but not to a rate less than 10%. The letter was also copied to Elliotts Shah.

51. In response to this letter, the Appellant's adviser again phoned HMRC on 24 August 2015 to explain that there should not be a penalty because the Appellant had not received a tax advantage. The HMRC caseworker did not tell the Appellant's adviser that there was any corrective action still required to be taken but stated HMRC's "letter explained that we may charge a penalty and it would be based on the outcome of the enquiry which still had to be completed. I told him that he had to advise his client as he saw fit in the light of the letter we had sent."

52. The caseworker noted: "Since speaking with the agent, I see that the benefit of the tax advantage wasn't ever received (not) because we'd issued a 'nil' APN but because the benefit of the advantage was paid back as APN by the due date……."

53. Mr Shah gave evidence about this telephone call that he was surprised to receive a copy of the August letter because in March 2015 he had spoken to HMRC by phone and agreed the assessment over the phone and therefore believed there was no action to be taken at that stage.

54. Mr Shah rang the inspector and asked her why she wanted to charge a penalty when the Appellant had not received the disputed tax refund and they had settled his case when he rang in March 2015

55. Mr Shah stated that the officer said this was a standard letter going out to all the Working Wheels cases and he should advise his client accordingly that HMRC were charging a penalty.

56. Mr Shah then advised the Appellant they would have to appeal the penalty – and that all his tax was paid – there was nothing further to pay.

57. Mr Shah accepted in cross examination that during the telephone call of 24 August 2015 HMRC did not say there would be no penalty or that no corrective action was needed to be taken in relation to the follower notice.

58. Again, the Tribunal accepts Mr Shah's evidence.

59. On 18 February 2016 HMRC sent a letter purporting to close their enquiry and amend the Appellant's self-assessment. It stated:

> "I am therefore amending your tax return to deny all the losses claimed in relation to your declared self -employment as a Car Trader.
>
> • Your original Self- Assessment showed that £261,038.80 too much tax had been paid.
>
> • Your Self- Assessment now shows that £949.60 too much tax has been paid.
>
> The difference is £260,089.20.
>
> I have updated your Self- Assessment statement to reflect the above."

60. Enclosed was exactly the same revised tax calculation that had been sent on 17 December 2014, only with a new date (15 February 2016).

61. On 1 March 2016 the Appellant's adviser wrote to HMRC in response to their letter of 18 February 2016 stating that the 2007 calculation was agreed and that the refund arising from other activities was £949.60 and should be repaid.

62. On 10 May 2016, HMRC issued a notice of penalty assessment for failing to take corrective action in the sum of £78,026.76. This explained that of the total reduction available for co-operation, the Appellant had been denied 50% for failing to take any corrective action.

63. The Notice of Penalty Assessment was addressed to the Appellant and stated that it was for the tax year 6 April 2006 to 5 April 2007 and therefore satisfied the requirements of section 211(2) FA 2014. It was issued within 90 days of the closure of the enquiry and was therefore within the time limit set in section 211(5) FA 2014.

64. The Penalty charged was £78,026.76 representing 30% of the denied advantage of £260,089.20. HMRC calculated the reduction in the range of the penalty as follows:

1. Maximum penalty 50%, minimum penalty 10%
2. Penalty range – 40%
3. Reductions allocated for s210(3)(a) to (e)

Section		Available	Given
a	Assisting quantifying tax	20%	20%
b	Counteracted denied advantage	50%	0%
c	Provide information to enable corrective action	10%	10%
d	Provide information to make settlement	10%	10%
e	Access to records	10%	10%
		100%	50%

4. Reduction in penalty range 50% x 40% = 20%
5. Net penalty 50%-20% = 30%

65. The Appellant's adviser notified HMRC that he wished to appeal the penalty and subsequently asked for an internal review on the grounds that: the return had already been amended by HMRC to remove the loss on 17 December 2014 by the revised income tax calculation included with the letters; even if it had not, they reasonably believed it had.

66. In HMRC's review (dated 2 June 2017) they did not consider all of the issues raised by the Appellant during the appeal to the Tribunal but upheld the penalty. The Review Officer stated the following:

"The validity of the APN nor the amount has been contested and will not form party of my review. I acknowledge the confusion that must have been caused when HMRC pursued payment of the notice when it was in fact covered by the overpayment that had been retained following the processing of your return The notice however was still valid and relevant, its purpose being to obtain a payment on account of the dispute matter. Payment thereof has no reflection on the follower notice.

The validity of the Follower notice is not in question as with the APN I will not cover that aspect as part of my review.

That notice stipulated that you were required to take action by 24 March 2015; I have seen no evidence to suggest that either you or your agent have taken active steps to amend your return within the statutory time limit nor anything to suggest that you were defending the original advantage per your 2007 Self-Assessment Income Tax Return.

Your agent makes reference to a call to HMRC on 2 March 2015 but I have seen no evidence of that on HMRC's system so I am unable to establish what was discussed by either party. I am however not aware of any circumstances that would absolve you from complying with the notice.

……"

The Appeal Grounds

67. The penalty was appealed to the Tribunal on 22 June 2017. The Appellant's grounds of appeal stated as follows:

"HMRC originally sent a letter dated 17 December 2014 enclosing:-

Tax avoidance scheme, amending your return, to complete part 1 or 2.
Follower notice under section 204 of the Finance Act 2014.
Accelerated payment notice for £260,089.20.
Revised tax assessment for 2006-7.

Upon receipt of the letter and contents on 25th February 2015, we rang the counter avoidance AP team on 2 March 2015.

1) The 2006-7 tax return as amended by HMRC showed a net overall repayment to our client of £949.68.
2) HMRC had not refunded the original 2006/7 tax and were withholding it in their system, therefore there was no accelerated payment to make.
3) The revised 2006-7 assessment was agreed and there were no further corrections due on the tax return as amended by HMRC.
4) The notes of our phone call have not been seen or made available to the HMRC reviewer as she could not see them logged, on their system.
   Our appeal letter of 11th May 2016 on the penalty charge mentions that, "no consideration has been taken into account of our correspondence and phone calls, between us and the HMRC offices"; when they issued the penalty notice on 10 May 2016. A copy of our phone log from our itemised phone bill shows a 5-minute call to the HMRC appeal team on phone no. 03000535416, on 2 March 2015. Our client was advised, based on the phone conversation with HMRC officer, that there were no further corrective actions required on the tax return.
5) So, it is a surprise that HMRC are seeking a penalty, when they had already corrected the assessment on 17 December 2014 and agreed by us with them.

There has been correspondence between us and HMRC office up to 10th May 2016, when they decided to issue the penalty notice.
Both HMRC officer and the Reviewer have ignored our phone call conversations and subsequent correspondence, on the matter."

The Law

68. The onus is on HMRC to demonstrate that the conditions for issuing a Penalty for failing to comply with the Follower Notice are satisfied. The onus is also on HMRC to demonstrate that the penalty amount has been correctly calculated.

69. The onus is on the Appellant to demonstrate that it was reasonable in all the circumstances not to take corrective action. The onus would also be upon the Appellant to demonstrate that he has not been given an adequate reduction for co-operation pursuant to s210 FA 2014; as he so contends.

70. The standard of proof is the civil standard being the balance of probabilities.

The Legislation
Statutory provisions dealing with Follower Notices (FNs)

71. The legislation relevant to the issue of FNs and associated penalties, is contained in section 204-218 and schedule 30 of the Finance Act 2014 (FA 2014).

72. The circumstances in which a FN may be issued are set out in section 204 FA 2014. That section provides as follows:

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.

(6) A follower notice may not be given after the end of the period of 12 months beginning with the later of—

(a) the day on which the judicial ruling mentioned in Condition C is made, and

(b) the day the return or claim to which subsection (2)(a) refers was received by HMRC or (as the case may be) the day the tax appeal to which subsection (2)(b) refers was made

73. Section 206 FA 2014 imposes requirements as to the contents of a FN as follows:

A follower notice must—

(a) identify the judicial ruling in respect of which Condition C in section 204 is met,

(b) explain why HMRC considers that the ruling meets the requirements of section 205(3), and

(c) explain the effects of sections 207 to 210.

74. The definition of "judicial ruling" relevant in the circumstances of this appeal is contained in section 205 FA 2014. In essence, it is a ruling of a court or tribunal on one or more issues and is "relevant" to the chosen arrangements if it relates to tax arrangements, the principles set out or reasons given in the ruling if applied to the chosen arrangements entered into by the taxpayer have the effect of denying him the asserted advantage, or a part of it, and is a final ruling.

75. Section 207 FA 2014 entitles a person receiving a FN to make representations to HMRC objecting to the FN on the grounds that Conditions A, B or D referred to in paragraph s204 FA 2014 are not satisfied, or objecting that the judicial ruling is not relevant to the chosen arrangements or the notice was not given within the period in s204(6) FA 2014. 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.

76. Section 208(2) FA 2014 imposes a liability to a penalty if "necessary corrective action" is not taken in respect of the "denied advantage" within the "specified time" as follows:

(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.

77. Section 208(3) FA 2014 defines the "denied advantage" as follows:

(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).

78. Section 208(4), (5)&(6) FA 2014 specifies the "necessary corrective action", as relevant, as follows:

(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;

...

(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.

79. Section 208(8) FA 2014 defines the "specified time" as follows:

(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.

80. Section 209(1) FA 2014 states the penalty is 50% of the denied advantage.

81. Section 210(1) allows HMRC to reduce the amount of the penalty if the person upon whom the penalty is imposed has co-operated with HMRC to reflect the "quality" of co-operation. Section 210(3) specifies what must be done for there to have been co-operation as follows:

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.

82. Section 210(4) provides that the penalty cannot be reduced below 10% of the value of the denied advantage.

83. Section 211 FA 2014 specifies, amongst other things, that:

(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.
…
(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,

Statutory provisions relating to an appeal against the penalty

84. The grounds of appeal and powers of the Tribunal are set out in s214 FA 2014. That provides, relevantly, as follows:

214 Appeal against a section 208 penalty…

(1) P may appeal against a decision of HMRC that a penalty is payable by P under section 208.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P under section 208.

(3) The grounds on which an appeal under subsection (1) may be made include in particular—

(a) that Condition A, B or D in section 204 was not met in relation to the follower notice,

(b) that the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements,

(c) that the notice was not given within the period specified in subsection (6) of that section, or

(d) that it was reasonable in all the circumstances for P not to have taken the necessary corrective action (see section 208(4)) in respect of the denied advantage.

……..

(8) On an appeal under subsection (1), the tribunal may affirm or cancel HMRC's decision.

(9) On an appeal under subsection (2), the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

85. Therefore, the Tribunal has jurisdiction to consider both whether a penalty should be imposed (s.214(1)) and, if so, the amount (s.214(2)). It has jurisdiction to substitute any decision that HMRC could have made (s.214(9)).

Appellant's submissions

86. Mr Firth, on behalf of the Appellant, submitted:

(a) The Appellant did not fail to take any corrective action that he could or should have taken.
(b) If there was a failure to take corrective action, it was reasonable for the Appellant not to take corrective action.
(c) If a penalty was due, it should be reduced to 10% to reflect the circumstances of the case and the Appellant's co-operation (or else should be further reduced beyond the amount by which HMRC have reduced it).

(a) No failure to take corrective action

87. It was submitted that the document enclosed with the letter of 17 December 2014 notified the Appellant that HMRC had revised the figures in his tax return to remove the tax loss originally claimed. This was precisely the document HMRC use to notify taxpayers of amendments to their tax returns.

88. Mr Firth submitted that where HMRC revise the figures in a taxpayer's return themselves, there cannot be any requirement in the legislation for the taxpayer to do the same thing.

89. Thus, when section 208(5) refers to the taxpayer amending his return to counteract the denied advantage, that must be interpreted as only requiring him to do so if it has not already been amended by HMRC. Similarly, section 208(6) only applies if the taxpayer was the one who took the first step, rather than HMRC.

90. Accordingly, as HMRC had already amended the figures in the Appellant's return and notified the Appellant of that, there was further action required to be taken by the Appellant and no relevant failure to take corrective action.

(b) Reasonable not to take corrective action

91. Mr Firth submitted that it was reasonable for the Appellant not to take any corrective action for one or more of the following reasons.

92. First, even if the legislation is not to be interpreted in the way submitted above, such that there is still an obligation to amend an already amended tax return, the failure to amend it must be a reasonable one. Put another way, it is not reasonable to require the taxpayer to do something that has already been done.

93. Second, even if HMRC's conduct did not amount to amending the Appellant's tax return and substituting revised figures, the document with the revised tax calculations plainly gives the impression that that is what has happened. The taxpayer is being told that the figures in his return have been revised and compares the "returned" figures with the "revised" figures and sets out a revised figure for income tax overpaid.

94. This impression is supported by the fact, as noted above, that this is precisely the same document HMRC use to communicate actual amendments and revised figures to a taxpayer (as they did in the present case).

95. Third, the impression given by the document with the revised tax calculations was further confirmed by the phone call made to HMRC on 2 March 2015. The number called was 03000 535416 which was precisely the number shown on the covering letter enclosing both notices to the Appellant's adviser.

96. The Appellant's adviser, Mr Shah, was told that no action as required in respect of the notices. It was reasonable to accept that statement from HMRC and communicate it to the Appellant (*Birley Estate Ltd v. HMRC* [2017] UKFTT 720 TC, §6). It was reasonable, in those circumstances, for the Appellant to believe that no corrective action was required.

97. Alternatively, even if the Appellant's adviser unreasonably misunderstood HMRC (which is strenuously denied), it was reasonable for the Appellant to rely on his professional adviser in this respect (see *Jackson v. HMRC* [2017] UKFTT 341 (TC)).

(c) Reduction for co-operation

98. Mr Firth submitted that HMRC's policy is to allocate 50% of the total available reduction to taking corrective action. They denied the Appellant any of the benefit of that reduction. He submitted on behalf of the Appellant that that approach was incorrect.

99. First, there is no basis for HMRC's rigid approach. The legislation refers to the different types of co-operation at s.210(3) but does not fix the maximum effect of each type of co-operation. The relative importance of each type may vary from case to case.

100. Second, HMRC approached the relevance of taking corrective action in an all or nothing manner. That is obviously flawed. There is a spectrum of different types of behaviour that a person may take from actively pursuing the tax advantage, despite the relevant judicial ruling, to simply forgetting to take corrective action. In the context of legislation intended to bring tax disputes to an end in a swift and efficient way, a person who actively fights for the denied advantage and is unsuccessful should obviously receive a larger penalty than the person who forgets and puts up no fight when reminded.

101. This point could either go to how much weight to attach to counteracting the denied advantage in a particular case (50% of the total reduction available or something less) or the proportion of that weight to be given to a particular Appellant.

102. Third, on 13 August 2015, HMRC wrote to the Appellant saying that he was now liable to a penalty. The Appellant's adviser called HMRC to discuss this and express their view that there could be no penalty because there was no advantage.

HMRC entirely failed to explain their view that this was wrong and that corrective action could (and should) still be taken.

103. If HMRC had explained that corrective action still need to be taken, there is no doubt that it would have been taken.

104. Fourth, on 1 March 2016, but before the penalty was assessed (s.210(1)(b)), the Appellant's adviser confirmed that he accepted the tax calculation for 2007 (as he had ever since the December 2014 letter). This plainly ought to be relevant in assessing what reduction for co-operation should be given. By accepting the amendment and not appealing, the Appellant had assisted in counteracting the advantage.

105. For all these reasons, Mr Firth submitted that the penalty (if one were due) should be reduced to 10%.

HMRC's Submissions

The Penalty

106. Mr Shea, on behalf of HMRC, submitted as follows:

107. The Appellant was a participant in the Working Wheels scheme. He made a claim for loss relief in his 2006-07 tax return.

108. A tax enquiry was opened into the Appellant's 2006-07 tax return by letter dated 9 October 2008. The notice specified that it was concerned with the use of the scheme number 69509799. (This is the number for the Working Wheels scheme.)

109. As no previous FN had been given to the Appellant, the conditions A, B & D for giving a FN at section 204 were therefore met.

110. While the enquiry was still open, the appeals (against closure notices) of three other participants in the same scheme were heard before the First-tier Tribunal in *Flanagan v HMRC* [2014] UKFTT 175(TC). The decision of the First-tier Tribunal was released on 20 February 2014. The First-tier Tribunal held that no loss was realised by the scheme participants. Permission to appeal to the Upper Tribunal was refused by both the First-tier Tribunal and Upper Tribunal. The Upper Tribunal refused permission on 17 September 2014. The First-tier Tribunal's decision was therefore final.

111. The condition C for giving a FN at section 204 FA 2014 was therefore met.

112. On 17 December 2014, HMRC issued a FN to the Appellant requiring corrective action to be taken in respect of losses claimed and used in 2006-07. **(**The Appellant was therefore given within the period of 12 months beginning with the day on which the judicial ruling was made as required by section 204(6) FA 2014).

113. The FN identified *Flanagan v HMRC* [2014] UKFTT 175(TC), explained why the ruling meets the requirements of section 205(3) and explained the effects of

sections 207-210 FA 2014. The notice therefore met the requirements of section 206 FA 2014.

114. No representations were made and the Appellant therefore became liable to a penalty for failing to take the necessary corrective action at the end of 24 March 2015 being the end of the 90 day post-notice period in accordance with section 208(8) FA 2014.

115. On 18 February 2016, HMRC issued a closure notice in respect of the 2006-07 enquiry.

116. The closure notice enclosed a copy of the computation showing the calculation of the denied advantage of £260,089.20.

117. No corrective action specified in the FN has been taken. HMRC issued a Notice of Penalty Assessment in regard to the Appellant's failure to take the corrective action on 10 May 2016.

118. Mr Shea submitted that HMRC had applied the reductions in accordance with its normal policy. Maximum reductions have been granted in all categories with the exception of "counteracted denied advantage." As no corrective action was taken no mitigation was due under this heading.

119. Mr Shea submitted that it was reasonable to have a policy guide for penalties to ensure some consistency. The guidance is determined on a scheme by scheme basis and then applied taking into consideration of the individual circumstances. HMRC submit the policy is reasonable and fair in the context of a penalty that is for failure to take corrective action within a particular time. Whether corrective action is taken at all must be an important factor.

120. Mr Shea submitted that the Appellant suggests that HMRC's all or nothing approach to taking collective action is flawed and there is a spectrum of behaviour. He submitted that this has echoes of the argument of only slight pregnancy and is clearly flawed. Pursuant to section 10 (1) (c) mitigation can only be given if there has been co-operation.

121. Section 210(3) FA 2014 is quite specific about what constitutes co-operation.

> *P has co-operated with HMRC **only** if P has done one or more of the following—...*
> *(b) counteracted the denied advantage*

122. Mr Shea submitted that in this case that the denied advantage was not counteracted and therefore there can be no mitigation under this heading. Parliament has seen fit not to allow mitigation under (b) for the bringing of dispute to an end in any other way than taking corrective action and thus give up any rights to pursue the matter further.

123. He submitted that the purpose of the legislation is to bring finality to a dispute through the taking of corrective action. The Appellant did not do this and as a result even now he could submit a late appeal and he has suffered a penalty about which he was clearly warned.

124. The penalty having been correctly issued in accordance with the legislation HMRC submitted that it was for the Appellant to prove his grounds of appeal.

Reasonable in all the circumstances

125. Although not explicitly stated in the grounds of appeal HMRC assumed that the Appellant's grounds were intended to support a claim that it was "reasonable in all the circumstances[1]" for him not to take corrective action.

126. Mr Shea submitted that "reasonable in all the circumstances" must be construed in its legislative context. The purpose of Part 4 Chapter 2 FA14 is to discourage taxpayers from pursuing their dispute in avoidance cases once their scheme has been shown to fail in another party's litigation. Once issued with a Follower Notice, the taxpayer is made aware that while he is entitled to carry on with his dispute, he will face a significant financial penalty if he does not succeed. To avoid a penalty, therefore, it cannot be sufficient merely that the taxpayer believes he might be right, it must be reasonable in light of all the circumstances for him to take this position.

127. Mr Shea submitted as follows: "Reasonable in all the circumstances" must be viewed in light of the facts of the matter and the legislative context. A position which, viewed in context, frustrates the purpose of the legislation is unlikely to be viewed as reasonable in all the circumstances. For example, it is not enough for a taxpayer to simply decide to see how the litigation plays out and not take corrective action. Any decision not to take corrective action should be a properly informed choice.

128. All the facts will include the taxpayer's individual circumstances, and any factors they have, or should have, taken into account in deciding whether to take corrective action.

129. HMRC submitted that "reasonable" must be construed objectively, not subjectively. This means that the taxpayer must have done what a prudent and reasonable hypothetical person would have done in his situation in light of all the facts and the legislative context.

130. In some cases, lack of compliance may be reasonable in all the circumstances because a person was unable to comply on time.

131. Mr Shea submitted that the Appellant appears to claim he did not take the necessary corrective action as the tax in dispute had been paid. This is clearly not a reason for failing to take the necessary corrective action to settle the dispute.

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[1] S214(3)(d) FA 2014 (TAB E 9)

132. He submits that the Appellant was told expressly and on more than one occasion what was required.

133. On 28 November 2014, HMRC sent to the Appellant and his agent, Elliots Shah & Co, a letter and fact sheets explaining that a FN was to be issued. That letter pointed out that the FN would require the Appellant to take corrective action and made it clear the FN and accelerated payment notice (APN) were separate matters.

134. The accompanying fact sheet CC/FS25a explained under the heading "About follower notices and accelerated payments" the different purposes of FNs and APNs.

135. The fact sheet then goes on to explain the circumstances in which an FN is issued, the action it requires and the penalties for failing to act.

136. The FN was issued on 17 December 2014 to the Appellant and was copied to his agent. The Appellant was required to take corrective action within 90 days (specified as 24 March 2015) which could be varied if he made representations within this time and warned of penalties of up to 50% if he did not do what the FN asked.

137. Under the heading "What you need to do in response to this notice – taking corrective action" the notice explained what was required in order to take corrective action.

138. Enclosed with the FN was a form that enabled corrective action to be taken by its completion and return to HMRC.

139. At the same time an accelerated payment notice was issued. Included with this notice was a computation of the amount. The page headed "Computation of accelerated payment" says at the end "Tax Advantage £260,089.20 (see enclosed computations)"

140. In HMRC's schedule of revised tax calculations the enclosed computations can be seen. These are the computations the Appellant claims were an amendment. HMRC submit that they were clearly a computation of the accelerated payment and not an amendment and no one could reasonably have mistaken them as such.

141. Section 28A TMA 1970 specifying the requirements of closing an enquiry which are that the taxpayer is told the enquiries are completed and what the conclusions are and make any amendments arising from the conclusion. The closure notice of February 2016 displays these attributes; the computation produced by HMRC does not. The accompanying computation sent in February 2016 with the closure notice is the same as that sent in December 2014 but as the APN and closure notice required the same computation that is no surprise. The same computation might also be issued with an assessment, jeopardy amendment or with proposals to settle by agreement or by contract.

142. On 2 March 2015 the Appellant's representative made a five minute phone call to HMRC AP Team 9. HMRC has no record of this call but accepts it took place.

143. The grounds of appeal suggest that during this call HMRC were informed, "The revised 2006-7 assessment was agreed and there were no further corrections due on the tax return as amended by HMRC".

144. The enquiry was not closed until 18 February 2016 and so at the time of the call the tax return had not in fact been amended by HMRC.

145. In view of the advice in previous correspondence no reasonable person could have believed anything said in a telephone conversation constituted corrective action.

146. It is most unlikely an HMRC officer would have said no further corrective action was needed, as that would have been entirely contrary to the legislation and practice.

147. It may well be that an HMRC officer confirmed that there was no further action needed with regard to the APN. HMRC notes that that phone call was made following the receipt of a reminder to pay the APN issued on 25 February 2015. HMRC say that it is most likely that the phone call was related to that and this is evidenced by the specific grounds of appeal and the manuscript notes on the letter of 17 December 2014.

148. The manuscript notes on the letter 17 December 2014 say first, "No Action no tax has been refunded" and then there are initials. HMRC infer that this was written when the letter was first received. Next is the note, "Rang 2/3/15 small repayment due". Neither of these two notes makes any mention of the FN or that HMRC has said no corrective action required.

149. Mr Shea submitted that the Appellant relied on *Birley Estates Ltd v HMRC* [2017] UKFTT 720 for the proposition that it was reasonable for the Appellant's adviser to think he had been told by HMRC no further corrective action was required and to communicate that to his client. The circumstances of that decision (not binding on this Tribunal,) were entirely different. That case concerned an application to admit a late appeal, where the Appellant a contractor in the construction industry had not made an appeal on time as he thought the matter had been dealt with in a telephone call.

150. In that case the Appellant was an employee of Lehman Brothers Ltd being paid in excess of £800,000. In this appeal the written communications from HMRC meant that he could not reasonably have believed corrective action had been taken. All that was required was for him to read them. In this case there were explicit and clear warnings that there would be substantial liability to penalties if corrective action was not taken.

151. The APN was issued in accordance with HMRC's normal practice but Payment of the APN was being mistakenly chased by HMRC, it should have been reallocated from the Self Assessment account when the APN was issued. When the enquiry was opened the repayment said to be due on the tax return was blocked. This created a credit on the self-assessment account. When this was realised HMRC transferred the credit on the self-assessment account to the APN so no payment was required by the Appellant.

152. The Appellant's representative says that following the telephone call with HMRC on 2 March 2015 they advised their client no further corrective action was required.

153. Mr Shea submitted that no reasonable person could have accepted that advice at face value. The guidance and notices issued by HMRC made it clear that the APN and FN were separate matters and the Appellant had no reason to believe settlement of the APN would detract from the necessity to take corrective action in accordance with the follower notice.

154. The Appellant relies on *John Jackson v HMRC* [2017] UKFTT 341 to support their position that it was reasonable to rely on his professional adviser. HMRC submit that it does not. That was a case concerned with reasonable excuse and this is not. In that case the circumstances were entirely different. The Appellant was not relying on the advice of his adviser but on the adviser carrying out an action.

155. The Tribunal found at 59 page 13:

> *"It was something that he believed Greystone were capable of doing, that they had authority to do and they had accepted responsibility for doing."* There is no evidence any of those factors apply in this case.

156. In view of the guidance and notices issued by HMRC the Appellant could not reasonably have believed corrective action had been taken. He did not need specialist advice to tell him this. The Commissioners say that it cannot be reasonable in all the circumstances for an Appellant to accept the advice of his agent not to take corrective action, where there is clear advice from HMRC to the contrary and no specialist knowledge is required to understand that advice.

157. On 13 August 2015, HMRC issued a letter warning the Appellant that he was liable to a penalty as no corrective action had been taken and what action might help reduce the percentage penalty.

158. Still no corrective action was taken.

159. On 24 August 2015 the Appellant's representative called HMRC in response to the letter 13 August 2015 and said as there was no tax advantage there would not be a penalty. He was told that the letter said HMRC <u>may</u> charge a penalty and it would be based on the outcome of the enquiry which still had to be completed. He was told he would have to advise his client as he saw fit in the light of the letter HMRC had sent.

160. Mr Shea submits that the Appellant complains that his adviser was not expressly told corrective action had not been taken and corrective action could and should be taken. This ignores the fact an officer will deal with the question put to her and it does not appear it was put to her that no corrective action was needed. If it had there is no doubt the officer would have explained it had not. There is no indication the officer misled the adviser by suggesting corrective action was not required or that no penalty would be charged.

161. It also ignores the fact the Appellant and his adviser had a letter explaining the liability to a penalty because no corrective action had been taken and how that penalty might be reduced.

162. HMRC submit that regardless of any advice given by his representative, it should have been clear to the Appellant on a plain reading of the guidance and notices sent to him by HMRC, that no corrective action had been taken and that as a consequence he would be liable to penalties.

163. In summary, HMRC submit that no corrective action was taken by the Appellant as required by the FN and there was no reason for the Appellant to believe that it had been. He is therefore liable to the penalty.

Discussion and Decision

164. It is not in dispute that a valid follower notice was issued to the Appellant dated 17 December 2014.

165. It is not in dispute that the Appellant failed to take the necessary corrective action required by 24 March 2015 required under section 208(4), (5) & (6) FA 2014:

(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;

...

(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.

166. The Appellant did not amend his return to counteract the denied advantage nor notify HMRC of this step and the denied advantage as required for the purposes of section 208(4) FA by the deadline required (or at all).

167. Further, he did not take the steps set out within the Follower Notice which were said to be the necessary corrective action – signing and returning the enclosed form with additional tax due and attaching copies of a tax calculation to show how he worked out that amount.

168. Therefore the Appellant failed to comply with the necessary corrective action contained in the statute and the requirements of the follower notice itself. The Appellant's denied tax advantage was only counteracted by HMRC's closure notice in February 2016 and at no time did prior or subsequently did the Appellant amend his return to do so.

Reasonable in all the circumstances not to have taken the necessary corrective action?

169. The issue in the appeal is therefore whether it was 'Reasonable in all the circumstances' – for the purposes of section 214(3)(d) FA 2014 for the Appellant not to have taken the necessary corrective action required by the statute.

170. The burden of proof is upon the Appellant to establish 'that it was reasonable in all the circumstances for the Appellant not to have taken the necessary corrective action in respect of the denied advantage.'

171. The Tribunal understands that this provision has not been considered before. Nonetheless, the starting point must be that there is no need to add any gloss to the words contained in the statute.

172. The Tribunal takes into account HMRC's submission that "reasonable in all the circumstances" must be construed in its legislative context. The purpose of Part 4 Chapter 2 FA14 is to discourage taxpayers from pursuing their dispute in avoidance cases once their scheme has been shown to fail in another party's litigation. Once issued with a Follower Notice, the taxpayer is made aware that while they are entitled to carry on with his dispute, they will face a significant financial penalty if they do not succeed. To avoid a penalty, therefore, it cannot be sufficient merely that the taxpayer believes they might be right, it must be reasonable in light of all the circumstances for them to take this position.

173. The Tribunal also takes into account HM "Reasonable in all the circumstances" must be viewed in light of the facts of the matter and the legislative context. A position which, viewed in context, frustrates the purpose of the legislation is unlikely to be viewed as reasonable in all the circumstances. For example, it is not enough for a taxpayer to simply decide to see how the litigation plays out and not take corrective action. Any decision not to take corrective action should be a properly informed choice.

174. All the circumstances will include the taxpayer's individual circumstances, and any factors they have, or should have, taken into account in deciding whether to take corrective action.

175. The Tribunal accepts HMRC's submission that "reasonable" must be construed objectively, not subjectively. This means that the taxpayer must have done what a prudent and reasonable hypothetical person would have done in his situation in light of all the facts and the legislative context.

176. It goes without saying that the test is not identical to the test of 'reasonable excuse', for instance, found in schedules 55 and 56 of the Finance Act 2009 (FA 2009). For example, there are no statutory exclusions to what may be 'reasonable in all the circumstances' such as found in paragraph 23(2) of schedule 55 of FA 2009.

177. Nonetheless, the test is similar to that for a reasonable excuse because it is an objective test and thus "is a matter to be considered in the light of all the

circumstances of the particular case" - *Rowland v HMRC* (2006) STC (SCD) 536 at paragraph 18.

178. In the Tribunal's view therefore, the test is broader than the formulation of 'reasonable excuse' derived from the judgment of His Honour Judge Medd OBE QC in *The Clean Car Company Ltd v Customs and Excise* [1991] VATTR 234 in which the Judge stated:

"the test of whether or not there is a reasonable excuse is an objective one. In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?"

179. While it is worth considering what a reasonable and prudent taxpayer in the position of the Appellant would have done if in the Appellant's position, the Tribunal must look at all the circumstances.

180. It is a fact specific exercise. This must mean that the reasonableness of the beliefs and actions of the taxpayer are relevant in light of their attributes, just as the actions of HMRC and any other external circumstances are so.

181. The Tribunal is satisfied that it was reasonable in all the circumstances for the Appellant not to take the necessary corrective action on the specific facts of this case.

182. The Tribunal accepts that the appellant was sent a warning letter, a document with facts and guidance, covering letter and follower notice all of which explained what necessary corrective action was required and the consequences, in the form of a penalty, which would follow from any failure. In those circumstances the starting point would be that the appellant's failure to comply was unreasonable.

183. Nonetheless, the Tribunal has taken into account all of the circumstances set out below when arriving at its conclusion. While individually, these factors may not be sufficient, collectively, they render the Appellant's failure to take the necessary corrective action to be reasonable in all the circumstances.

184. Some of the factors are ones that the Appellant subjectively relied upon and some, while not necessarily in the Appellant's mind, objectively justify the reasonableness of his failure to comply.

185. First, the Appellant instructed his accountant to deal with the correspondence of 17 December 2014 which included the Follower Notice. Mr Shah was instructed well before the deadline of 24 March 2015 and took action by 2 March 2015. Whether this action was inspired or not by HMRC's reminder letter of 25 February 2015 chasing the accelerate payment, or was in response to the original 17 December 2014 it matters not. Action was taken on the Appellant's behalf by his adviser well before the deadline of 24 March 2015.

186. Second, HMRC's covering letter of 17 December 2014 enclosing the Follower Notice was open to ambiguity as to the type of response it required. The covering letter stated:

> If you **do not** do what the follower notice asks and take corrective action, you must still pay the amount shown in the accelerated payment notice……
>
> If you choose not to take corrective action and continue to dispute the tax effects of the scheme through to litigation, you may be charge the penalty set out in the notice.
>
> If you now want to settle your tax affairs, you need to phone us straightaway on the number at the top of this letter. We will then tell you what you need to do next.

187. Thus, the letter left open an interpretation, contrary to the clear terms of the Follower Notice, that one might not take the necessary corrective action but choose to settle one's tax affairs by ringing HMRC and being told what to do next.

188. That is the course of action that the Appellant and Mr Shah chose to follow and they relied on this ambiguity to found their belief that this was a reasonable course of action to take. On the specific facts of this case the Tribunal is satisfied that this was a reasonable belief to hold because of the third factor set out below. While ordinarily a taxpayer should follow the clear and explicit instructions on the Follower Notice, even where a covering letter appears contradictory or ambiguous, there were further reasonable grounds for the Appellant to believe that he should not simply follow the instructions in the Follower Notice.

189. Third, HMRC concede that they wrongly issued the Appellant an APN requiring him to pay over £260,000. There were no grounds to issue an APN to the Appellant requiring payment of this sum – even after the tax advantage he sought had been denied, the Appellant was entitled to a refund of tax. There was no payment due by the Appellant as he had never received the repayment which he sought.

190. Therefore, it was reasonable for the Appellant, through his accountant, on confirming with HMRC that the Appellant had never received the repayment, to ignore the APN issued by HMRC. That APN, wrongly demanding payment, was issued with the Follower Notice. It was reasonable for the Appellant to ignore the APN and not blindly follow its instructions contained within the notice to pay to HMRC a sum of money wrongly said to be due in tax.

191. This was an example of a case where an Appellant what was not required to follow unquestioningly HMRC's instructions within a formal notice. On that basis, a failure to follow instructions in a Follower Notice sent at the same time as the APN, in circumstances where the Follower Notice, while correctly issued, contained potentially contradictory instructions to its covering letter and the Appellant followed the instructions on the covering letter. It is incumbent upon HMRC to make sure that the paperwork and demands it issues to taxpayers are accurate and valid if they wish to rely on failures to comply.

192. Fourth, as above, the Appellant, through his accountant, followed the instructions on HMRC's covering letter that if not taking corrective action but wishing to settle the tax affairs, to telephone HMRC to be told what to do next. Mr Shah spoke to an officer at HMRC on 2 March 2015 about the Appellant's tax affairs to make sure they were settled. On receiving confirmation that the Appellant had never received the disputed repayment from HMRC, and that therefore there was no further tax due Mr Shah believed he was told by HMRC that the Appellant's tax affairs were settled. Mr Shah made a contemporaneous note of this and emailed the Appellant on the same day conveying the same. Mr Shah and the Appellant believed the phone call to have finalised the Appellant's position which meant the Appellant was not required to take any further action.

193. There is no record that Mr Shah was told by HMRC that the Follower Notice did not need to be complied with and Mr Shah did not ask for or receive confirmation in writing as to the terms of the phone call – that the Appellant's tax affairs were settled and that he would not comply with the Follower notice. Nor did the Appellant request this from Mr Shah or HMRC.

194. Therefore, the actions of the Appellant and Mr Shah, were by no means perfect. Nonetheless, taking into account all the factors set out above, the actions fell within a reasonable range of responses when explaining the circumstances in which the Appellant failed to take the necessary corrective action to comply with the Follower Notice.

195. Fifth, the Appellant reasonably relied on his accountant's advice, and his email confirmation of the same, in the circumstances of this case. There is no need to resolve Mr Firth's arguments as to circumstances in which it is reasonable to rely on a third party adviser – suffice to say section 214(3) FA 2014 contains no statutory exclusion limiting reliance on third parties such as found in statutes addressing reasonable excuse.

196. Sixth, even after the Appellant's tax advantage had been denied he had no further tax to pay to HMRC – he had never received the repayment sought and he was not obliged to pay any further sums in tax. In fact he was still entitled to a refund.

197. Seventh, the Appellant took no further steps to receive repayment of the refund sought from HMRC since taking part in the Working wheels scheme in 2007. The enquiry was opened in 2008 and the repayment had been blocked at this time with the appellant making no further attempt to receive the repayment.

198. At no time after receiving the follower notice in December 2014 did the appellant seek to contest the denial of the tax advantage. Through his accountant, Mr Shah, he accepted confirmation that he would not receive a refund or repayment of tax in March 2015. Through his accountant, he accepted the closure notice issued by HMRC in March 2016.

199. The Appellant took no other active to contest or pursued the denied tax advantage. He pursued no litigation against HMRC nor pursued any appeals to the

Tribunal or through the Courts. This was a world away from the taxpayer who, in the face of an adverse ruling, vigorously disputes the tax advantage denied in every conceivable forum until all avenues are exhausted. Therefore, the appellant did not seek to undermine the purpose of the Follower Notice legislation.

200. Eighth, the wording on the form which HMRC sent to the Appellant to return by which to amend his tax return was drafted in a way that was not as clear as it might have been. It does not perfectly correspond to, mirror or reflect section 208(6) FA 2014:

(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.

201. This does not of itself excuse, the Appellant's failure to complete it and return it but the form does not correspond to the statutory definition of 'necessary corrective action'.

202. Box 2 of the form provided space for the taxpayer to set out the additional amount of tax to pay. Including a box for the additional amount of tax to pay may not always apply to all taxpayers, such as the Appellant, where even accepting the denied tax advantage, it would still result in no additional tax to pay. It may be right to say that there was an additional tax liability, but this was already subsumed within the blocked repayment. There was no additional tax to pay at the time the form was issued. Therefore, a correct statement for the Appellant to make in this box would have been £0 (or more correctly, 'there is an additional tax liability of £260, 089.20 which became due and payable but has already been accounted for by HMRC's retention of funds so that there are no additional sums to pay'). If the appellant had complied perfectly then he should have stated something along these lines in the form, albeit the form provide one small box for a figure to be entered.

203. The form also asks that the taxpayer provides and attach their tax calculation to demonstrate how this figure has been arrived at. Perhaps the box might provide a more open description than 'additional amount of tax to pay' – such as: 'additional amount which has or will become due and payable in respect of tax by reason of amendment to the return to counteract the denied advantage' or 'Nature of the amendment to the return and any additional amount of tax to pay' indicating if HMRC's revised tax calculation, if provided in a schedule, is accepted.

204. The Appellant failed to sign and date this form, enter the figure or wording suggested above into Box 2 and enclose and send back to HMRC their revised schedule of tax calculation, indicating on the face that it was agreed. This would have sufficed to constitute the necessary corrective action. It was this failure that gave rise to the penalty.

205. Mr Firth has sought to rely on HMRC providing the schedule of revised tax calculation enclosed to the Appellant together with the follower notice on 17 December 2014. He suggested this document provided a basis for the Appellant to form a reasonable belief that his tax return had already been amended by HMRC so that he was not required to take any further action to amend it. The Tribunal rejects this submission. The document was not titled 'Amendment to a Tax Return' and the Tribunal has not made any findings as to when this type of schedule is used by HMRC to amend returns.

206. Furthermore, neither Mr Shah nor the Appellant stated that they in fact relied upon the schedule as founding any belief that the Appellant's tax return had already been amended by HMRC to counteract the denied advantage. It would not have been reasonable to do so.

207. Nonetheless, in circumstances where the effect of HMRC denying the Appellant's tax advantage was shown in their revised schedule to be a reduction in the repayment and no additional tax amount was due, there was very limited action due from the Appellant to constitute necessary corrective action. He was not required to provide any separate tax calculation of his own but merely approve HMRC's schedule. He might reasonably believe that the calculation had been done for him.

208. Summing up, therefore, there were a number of factors that, when examined collectively, rendered it reasonable in all the circumstances for the Appellant not to take the necessary corrective action to counteract the denied advantage.

209. As indicated above, there was more that the Appellant could have done short of taking the necessary corrective action. He and his accountant might have asked for written confirmation of the phone call of 2 March 2015 from HMRC. In many cases it may not be reasonable for a person to rely on a phone call with HMRC in the absence of written confirmation of its contents. There will otherwise be room for ambiguity as to the matters discussed and what matters have been settled and whether further action is required. Further, officers of HMRC dealing with telephone enquiries cannot be obliged to have 'perfect sight' of all of an appellant's tax affairs and a taxpayer should give primary weight to the instructions sent to them in written correspondence or in formal notices.

210. Nonetheless, the Tribunal must stand back and look at the overall picture. It must have regard to the day to day reality of taxpayers dealing with their tax affairs. While there was more that the Appellant could have done short of taking the necessary corrective action his failure was reasonable in all the circumstances.

211. As above, the Tribunal has considered the clear requirements as to steps to be followed in the warning letter, Follower Notice and factsheet in light of the fact they were somewhat diluted by the room for ambiguity in the covering letter and incorrect issue of an APN demanding payment which could be properly ignored.

212. The circumstances of this case were out of the ordinary: there was no additional tax to pay, the Appellant did not dispute the revised liability, there was room for

ambiguity in the covering letter to the Follower Notice, and the Follower Notice was accompanied by a wrongly issued APN demanding payment. In the circumstances, the steps the Appellant did take, through his accountant Mr Shah, were reasonable.

213. In these circumstances, there is no need for the Tribunal to go on to consider the discount for cooperation given by HMRC to the Appellant in any detail. The Tribunal does note that HMRC's non-statutory policy attributing different weight to each of statutory factors for cooperation contained in section 210 FA 2014 would not bind the Tribunal and the Tribunal would have been entitled to consider the Appellant's level of cooperation afresh.

Conclusion

214. For the reasons set out above, the Tribunal is satisfied that the Appellant's failure to take the necessary corrective action was reasonable in all the circumstances. The appeal is allowed and the penalty is cancelled.

215. 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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 30 JANUARY 2018