Neutral Citation: [2024] UKFTT 00126 (TC)

Case Number: TC09068

FIRST-TIER
TAX CHAMBER

[By remote video/telephone hearing]

Appeal reference: TC/2022/13921

INCOME TAX - Follower Notice – Penalty- Sections 204 -214 Finance Act 2014 – necessary corrective action not taken – whether penalty amount should be reduced from 42% – no - whether reasonable in all the circumstances - yes – appeal allowed and penalties cancelled.

Heard on: 16 January 2024
Judgment date: 6 February 2024

Before

TRIBUNAL JUDGE RUTHVEN GEMMELL WS
SUSAN STOTT

Between

ROY BAKER

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: The Appellant represented himself ("RB")

For the Respondents: Rosemary James, litigator of HM Revenue and Customs' Solicitor's Office ("counsel for HMRC")

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video and both Roy Baker, the Appellant, ("RB"), and counsel for His Majesty's Revenue and Customs ("HMRC") attended remotely and the remote platform was the Tribunal video hearing system. The documents to which the Tribunal was referred comprised of a Bundle of documents of 593 pages, HMRC's Skeleton Argument of 13 pages and reference to a First-tier Tribunal decision *David Andreae v HMRC*, UKFTT 142 (TC), which had been omitted from the Bundle.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. RB appealed against HMRC's decision to charge penalties payable by him under section 208 Finance Act 2014 ("FA 2014") in respect of his failure to take corrective action required by Follower Notices (FNs") issued under Chapter 2 of Part 4 of FA 2014.

4. RB contends that the penalty percentage should be reduced from 42% in terms of section 214(2) FA 2014. HMRC say that the penalties have been appropriately reduced to reflect RB's co-operation and that he failed to take corrective action within the required time period.

5. In HMRC's statutory review conclusion of 08 November 2022, the FN penalty for 2008 was upheld, and the penalties for 2004 to 2007 were varied bring out a total of £34,923.49, on the basis that the FNs were validly issued because the relevant conditions of section 204 FA 2014 were met.

6. RB had failed to take corrective action by the initial due date of 18 November 2017, if penalties were to be avoided. On 16 September 2019, a notice of penalty assessment was issued for the years ended 5 April 2004 to 2008 inclusive.

7. In terms of the legislation, it was only "co-operation," as defined in section 210 (2) and (3) FA 2014, up until 16 September 2019 that was relevant as regards any reduction in the penalty under section 210 FA 2014.

8. The Tribunal heard evidence from RB. Counsel for HMRC declined to cross-examine him.

9. The burden of proof was on HMRC to show that the FN penalties were due, correctly calculated and correctly notified and for RB to establish that it was reasonable in all the circumstances not to have taken corrective action by 18 November 2017 and to show that the amount of the penalty should be reduced.

EVIDENCE AND FINDINGS OF FACT

10. RB is an IT data analyst specialising in analysing data in relation to complaints about his employers and others. He has, therefore an occupational emphasis on identifying mistakes and dealing with their consequences.

11. With this background, RB found that the litany of errors in communication by HMRC, which in 'his world' would also involve breaches of the General Data Protection regulations, important.

12. In the tax year ended 5 April 2005, RB utilised Montpelier Tax Consultants (Isle of Man) Ltd, ("Montpelier"). Montpelier promoted a tax scheme involving an Isle of Man trust and an Isle of Man partnership (the Scheme"). RB believed that the Scheme was bona fide but he had very little knowledge of it and so relied on Montpelier.

13. The Scheme sought to exploit the double taxation arrangements between the UK and the Isle of Man by routing his earnings through two Isle of Man partnerships and an Isle of Man trust. In his self-assessment tax returns for the years in question, RB returned income from the offshore trust and claimed an equivalent amount of double taxation relief.

14. HMRC opened enquiries into RB's tax returns under Section 9A Taxes Management Act ('TMA') 1970, as follows: Year ending 2004 on 19 December 2005; Year ending 2005 on10 October 2006; Year ending 2006 on11 May 2007; Year ending 2007 on 6 May 2008; and Year ending 2008 on 26 May 2009.

15. On 21 October 2009, HMRC issued closure notices under section 28A TMA 1970 for the years ending 2004, 2005, 2006, and 2007. The closure notices detailed HMRC's conclusion that additional income tax and NICs were due for these years.

16. On 30 October 2009, RB's then agent, Montpelier, notified HMRC of RB's appeal against the closure notices for the years ending 2004 to 2007.

17. On 12 August 2010, HMRC issued a closure notice under section 28A TMA 1970 for the year ending 2008. HMRC concluded that additional income tax and NICs were also due for this year and on 23 August 2010, Montpelier notified RB's appeal against this closure notice.

18. On 3 September 2015, the decision in *Huitson v The Commissioners for HM Revenue & Customs* [2015] UKFTT 448 (TC) was released.

19. *Huitson* also concerned a tax avoidance scheme marketed by Montpelier, and HMRC understood this to be the same scheme used by RB. The First-tier Tribunal concluded that the arrangements were not effective, and that Mr Huitson was liable to income tax and NICs on his share of the income from an Isle of Man trust.

20. HMRC considered that *Huitson* was relevant to the arrangements used by RB for the years in 2004 to 2008.

21. On 23 January 2016, HMRC considered that the decision in *Huitson* became final in terms of section 205(4)(b)(iii) FA 2014 when, following permission to appeal to the Upper Tribunal having been granted, the time limit for submitting the appeal expired without such notice being submitted.

22. On 06 July 2016, Montpelier on behalf of RB, filed an application with the Upper Tribunal for permission to appeal out of time and a final decision on this issue was issued by the Upper Tribunal on 09 August 2016. The number of taxpayers affected by *Huitson* had been notified at 8000 by HMRC which was then corrected to 1724, and so on 15 August 2016 a revised version of the decision in Huitson was issued to reference this.

23. On 11 November 2016, HMRC wrote to RB to say that they would soon be issuing Accelerated Payment Notices ('APNs') and FNs in respect of the years ending 2004 to 2008.

24. On 2 December 2016, HMRC sent APNs and FNs to RB, which were subsequently withdrawn, due to an error in the date in the FNs for corrective action.

25. On 13 January 2017, HMRC wrote to RB advising that the previously issued FNs and APNs had been withdrawn. The letter enclosed new FNs and APNs for the years ending 2004 to 2008, forms for affirming taking corrective action, and computations of the APN amounts.

26. The FNs specified the final judicial ruling relevant to RB's arrangements as *Huitson*; set out the corrective action required by RB to relinquish the denied advantage; specified 20 April 2017 as the deadline to either take corrective action or make representations objecting to the FN; and set out the penalties for failure to take corrective action on time.

27. On 4 April 2017, following phone calls between HMRC and RB, HMRC received RB's letters of 29 March 2017, which contained RB's representations objecting to the FNs and APNs.

28. The representations included amongst other matters that the FN issued on 13 January 2017 was wrong in law because Condition C was not met because H*uitson* was not a 'final judicial ruling'. This was based on the grounds that although Huitson's application for permission to appeal late was refused by the Upper-tier Tax Tribunal, the decision was subject to an appeal to the Court of Appeal and HMRC had not considered this.

29. Furthermore, the representations stated that a substantive part of the *Huitson* appeal had not been heard, specifically relating to 'Article 56 EEC Treaty'. In addition, the FN did not explain the effect of sections 207 to 210 FA 24 and included 'National Insurance' as required by section 203 FA 2014 .

30. RB stated that he understood he had a denied advantage but felt that something was not right in relation to the inclusion of NICs. Whereas RB said he may have been a bit naïve at the outset, he was liaising through Montpelier whom he relied upon and had no reason to disbelieve them. RB outlined the errors that had been made by HMRC including letters from HMRC on 29 December 2015 which had been sent to Montpelier, but which had not been sent to him.

31. RB said that the issue of NICs kept coming in and out of the whole matter and he did not understand why he had been subject to a penalty as he had agreed to pay the tax due on the Scheme in November 2017.

32. On 13 October 2017, HMRC issued their conclusions following RB's representations, upholding the FNs and APNs without amendment. The new date for corrective action was specified as 18 November 2017.

33. On 24 October 2017, HMRC telephoned RB, who confirmed he had received HMRC's letters of 13 October 2017, and that he had passed these to Montpelier. HMRC explained that the APNs and FNs required separate actions.

34. On 25 October 2017, RB wrote in response to HMRC's conclusions on the representations against the APNs and FNs. RB stated he would not be taking corrective action, but instead would be commencing a judicial review challenge against HMRC's letters of 13 October 2017. HMRC were unaware of any judicial review action commenced by RB.

35. RB stated that he had not taken corrective action based on the advice he received from Montpelier that he would have to give up his right of appeal if he relinquished his denied advantage. This was a requirement under section 209 FA 2014 in order to avoid a penalty.

36. In RB's opinion although he knew he had a denied advantage there were a number of "iffy items" and errors made by HMRC which gave him no confidence that what they were saying was correct. He, therefore, did not wish to give up a right to appeal. He claimed he was subsequently justified in doing so in relation to NICs as HMRC repeatedly changed their view on their inclusion.

37. If he had given up his right to appeal then he would have been penalised for something that HMRC would not have subsequently charged him but which he would no longer be able to challenge.

38. In relation to advice from Montpelier, however, RB stated that he had behaved "like a sheep" in that he had diligently followed it.

39. On 24 November 2017, following correspondence regarding a payment plan for the APNs, HMRC wrote to RB warning that he was now liable for a penalty for failing to take the

corrective action required by the FNs by 18 November 2017. The letter stated that the FNs had been issued on 31 January 2017, which was a typographical error, as the date the FNs were issued was 13 January 2017.

40. On 11 January 2018, HMRC wrote to RB, replying to the points in RB's letter of 25 October 2017. The letter stated that any Follower Notice ("FN") penalties would be calculated without reference to the Class 4 NICs.

41. On 6 March 2019, HMRC wrote to RB stating their view in relation to the NICs had changed, and that any future FN penalties would include the amount of the NICs in the calculation of the denied advantage. Because of this change, HMRC said that if RB took corrective action by 3 April 2019, they would not charge FN penalties, but that any FN penalties subsequently charged would be calculated by reference to income tax and NICs.

42. On 22nd March 2019, RB wrote to HMRC stating his view, which RB admitted had been provided by Montpelier, that NICs were subject to section 9 of The Limitation Act 1980. On this basis RB said he had only made payment of the APNs for NICs under sufferance and that the FNs were fundamentally flawed as there was no enforceable debt against RB for NICs. The letter stated, "it then logically follows that there can be no penalty."

43. On 9 May 2019, following further correspondence between RB and HMRC regarding the NICs, HMRC wrote to RB saying that as he had not taken corrective action by 3 April 2019, he would now be liable to a penalty, and that the penalty could be reduced if he co-operated.

44. On 2 August 2019, HMRC wrote to RB, setting out the FN penalties they intended to charge, inviting RB to provide any information that could affect the penalties by 30 August 2019.

45. On 16 September 2019, HMRC issued FN penalties for the years 2004 to 2008. The penalties were calculated at the maximum amount of 50% of the denied advantage relating to income tax and NICs for the years in question.

46. On 2 October 2019, RB wrote to HMRC to appeal the FN penalties referring to the Notices of Penalty Assessment dated 16 September 2019 totalling £45,714.42 for RB's failure to take corrective action in respect of the FNs dated 18 January 2017. The letter also referred to the APNs also dated 18 January 2017.

47. RB stated that he had made representations against both FNs and APNs which HMRC had replied to on 13 October 2017, but RB did not believe those replies properly or adequately dealt with his representations.

48. He also stated that the FNs relied on the judicial ruling of *Huitson*, but that decision only concerned the availability of double tax relief under the UK/ Isle of Man double tax treaty.

49. His letter continued:-

> "It did not concern my other ground of appeal that in fact I may have been an employee with that employer liable for PAYE and NIC. I understand that an appeal on these grounds was heard by the First Tier Tax Tribunal in May and the decision is awaited. Section 214(3)(b) FA 2014 refers to a judicial ruling but the ruling referred to in the FN does not deal with the substantive appeal of agency and PAYE. It appears that HMRC has not taken this matter into account.
>
> Section 214 (3)(d) [FA 2014] states that a permissible ground of appeal is that "in all the circumstances" it was reasonable for the taxpayer not to have taken the corrective action. In that context, please note the following:-

> (a) The Notices [of Penalty Assessment] charge a penalty on unpaid NIC. But in your letter to me dated 13 October 2017 you state under the heading "Next Steps" that you will not enforce additional Class 4 liabilities. This leaves aside the fact that there are no lawful NIC liabilities for the tax year 2003/2004, tax year 2004/2005, tax year 2005/ 2006, tax year 2006/ 2007 and tax year 2007/2008 which can be enforced against me.
>
> Despite your public policy you have not properly or at all engaged with me on a time to pay arrangement. That is discriminating and wrong.
>
> I would also like to comment on your failure to abate any part of the penalties instead of applying the maximum of 50%. This is despite the fact that I have co-operated with your enquiries throughout. That is neither fair nor reasonable."

50. On 9 January 2020, Montpelier notified an appeal against the 2004 to 2008 closure notices to the Tribunal, along with a form authorising Montpelier to act for RB in that appeal.

51. The appeal was allocated to a group of other similar appeals by Montpelier and was given the reference number TC/2020/00180.

52. On 16 June 2021, following Montpelier's failure to respond to any letters or directions in the group of appeals, the Tribunal confirmed that RB's appeal against the closure notice had been struck out.

53. RB was unaware that this appeal had been struck out as by this time he was receiving no communication or responses from Montpelier and was not advised by the Tribunal or by HMRC that the appeal was no longer active. He assumed that the delay in hearing anything in relation to the appeal was due to the delays being experienced at large as a result of the Covid-19 pandemic.

54. On 27 July 2022, HMRC issued their view of the matter and offered a statutory review in relation to the FN penalties. Again, this letter contained a number of errors this time in respect of the penalty amounts and dates of correspondence, and it did not address the FN penalties for the year ending 2008.

55. RB stated that this letter was not about his tax affairs at all and was in his view a data protection breach.

56. The letter advised that the penalty percentage for the FNs in respect of 2004 to 2007 would be decreased from 50% to 42% to reflect RB's co-operation and said that following the decision in *Lancashire & Others v Revenue & Customs* [2020] UKFTT 407 (TC), the FN penalty amounts would no longer include the NICs in the calculation of the denied advantage.

57. The letter was accompanied by schedules which did, however, show the correct penalty amounts.

58. On 16 August 2022, RB emailed HMRC to accept the offer of a review.

59. Then, on 9 September 2022, HMRC wrote to RB, explaining that the 2008 FN penalty had been inadvertently omitted from the letter of 27 July 2022.

60. This letter set out HMRC's view of the 2008 FN penalty and offered a statutory review. The letter advised that, as with the earlier penalties, the FN penalty for 2008 would be reduced to 42% of the denied advantage, and the calculation would no longer include the NICs.

61. On 27 September 2022, HMRC wrote to RB, seeking to extend the review period to 11 November 2022.

62. On 2 October 2022, RB emailed HMRC, confirming that he wished the 2008 FN penalty to be included in the review.

63. On 8 November 2022, HMRC issued their review conclusion letter. Due to the errors in the letter setting out view of the matter in relation to the 2004 to 2007 FN penalties, the review concluded that these penalties should be varied to the amounts that should have been stated in the July 2022 letter.

64. The FN penalty for 2008, as set out in HMRC's review of 9 September 2022, was upheld.

65. The FN penalties were calculated in the following way: The maximum penalty was 50% of the denied advantage, as per section 209(1) FA 2014 (as at the relevant time); The minimum penalty was 10% of the denied advantage (section 210(4) FA 2014); The penalty range was therefore 40%, this being the difference between the minimum and maximum penalty.

66. Section 210(1)(c) FA 2014 provides that the penalty can be reduced for a person's co-operation and HMRC gave a reduction of 20% out of a possible 100% to reflect the quality of the co-operation.

67. The penalty range of 40% was multiplied by the reduction for co-operation of 20% which resulted in a reduction to the maximum penalty of 8%.

68. Subtracting the reduction of 8% from the maximum penalty amount of 50% resulted in the penalty percentage of 42%.

69. The penalty percentage of 42% was applied to the value of the denied advantage, this being the additional amount of tax charged by the closure notices, and denied by the reasoning set out in *Huitson*, in respect of the income tax only.

70. On 7 December 2022, RB notified his appeal against the FN penalties to the Tribunal.

RB'S SUBMISSIONS

71. RB stated that he believed the penalty percentage is unfair and does not take into account all the actions that he carried out. He responded to every letter or enquiry sent and co-operated with enquiries as they progressed.

72. RB had relied on his advisers, Montpelier, and had no reason to believe that they were not truthful in their responses to the letters either sent on his behalf or sent by RB but advised as to the content by them.

73. RB stated that his advisers no longer exist as an organisation, and he does not deny that he needs to pay a penalty for the mistakes he made many years ago.

74. The most recent review of 27 July 2022 omitted dates and facts that reflect his co-operation. In November 2011, RB was sent a letter addressed to another taxpayer but to his address.

75. The first FNs were sent out in December 2016 only to be withdrawn and reissued the following month because of errors.

76. Between November 2017 in September 2019, RB still had an open appeal, and he repaid all the amounts noted on the APNs for the five tax years, including the disputed amounts.

77. Notwithstanding this, on 22 January 2018 RB received notices of surcharge for failure to pay an APN on time, despite having correctly paid it on time and met the due dates. The surcharge notices were subsequently withdrawn.

78. On 06 March 2019, RB received a letter regarding a change of date to the requirement to take corrective action from 18 November 2017 to 03 April 2019. This required him to agree to

relinquish the denied advantage but the narrative implied that he would also need to withdraw any appeals that were active. RB did not agree with this as he knew he had a right to appeal and should not have to sign away that right to meet the requirements.

79. At this time, his advisers had said that if an appeal were successful, he would not benefit if he had signed away his rights and, accordingly, he did not relinquish the denied advantage.

80. He was aware that penalties would follow but relied on the strength of his advisers' advice.

81. RB had raised the issue of the inclusion of NICs, and the 27 July 2022 review confirmed they were no longer charged as part of the penalty. RB stated that this "backed up" his decision not to withdraw his appeal.

82. RB did not wish to relinquish his right of appeal because of the vacillating nature of HMRC's treatment of NICs, which came in and out of the matter, and which were an issue from the start of HMRC's DOTAS actions. He considered and still does that there was something 'iffy' about HMRC's behaviour regarding NICs.

83. In this respect, he was in 'Catch 22' situation as he did not wish to incur penalties, but he had a lack of confidence and trust on what HMRC were advising him.

84. RB says that as far as he was aware he had an ongoing appeal and assumed, incorrectly as it transpired, that the appeal of January 2020 against the closure notices was active as he had not been told by anyone, not least Montpelier, that it had been struck out. He considered that the delay in the progress of the appeal was as a result of the Covid-19 Pandemic restrictions.

85. RB says that the continued and consistent errors and changes of mind made by HMRC 'started to add up' and for that reason he felt it correct not to relinquish his right of appeal. RB did not understand the full legal implications of not taking corrective action, at least until the end of the Tribunal hearing, but felt he had to trust his adviser, which he did, at least during the time when they were communicating with him.

86. RB says for HMRC to take nearly 3 years to send their review of the October 2019 appeal was "a bit excessive". The HMRC review of 27 July 2022 did not relate to him at all but instead to a different taxpayer.

87. RB says that although the Scheme was subsequently struck down, it was an honest misinterpretation to use it and not a deliberate route to avoid tax.

88. RB says that if the errors that HMRC have made during the process are taken into account the penalty is "a bit excessive" and that penalties should be due and payable in the tax year in question. If he had been responsible for as many errors in his employment he would have been "fired"

89. RB also had issues with self-assessment process or the lack of it and a lack of communication regarding the previous Tribunal decision, striking out the appeals from December 2019 in July 2021 a fact of which he was only informed of in July 2022.

HMRC'S SUBMISSIONS

90. HMRC contend that the conditions specified in section 204 FA 2014 are met, and as such, they were permitted to give RB a FN as:-

> (1) Condition A was met as RB had appealed against the amendments made to his returns in the closure notices, and that appeal had not been determined, abandoned or disposed of at the time the FN was issued.

(2) Condition B was met as the asserted advantage resulted from RB's use of a tax arrangement involving an Isle of Man partnership and trust.

(3) Condition C was met as HMRC are of the opinion that *Huitson* was a judicial ruling relevant to the arrangements used by RB.

(4) Condition D was met as the previous FNs given to RB were withdrawn.

91. HMRC also contend that the FNs met all the requirements of section 208 FA 2014: the relevant judicial ruling was identified and the reasons why it applied to RB's arrangements were explained, as were the effects of sections 207 to 210.

92. The decision in *Huitson* became final on 23 January 2016, and the FN was therefore validly given within the 12 months permitted by section 204(6) FA 2014.

Respondents' Errors and Delays

93. RB's grounds of appeal refer to errors made by HMRC in their correspondence: a letter dated 28 November 2011 which included the wrong name, the original FNs issued on 2 December 2016 which were subsequently withdrawn, a notice of APN surcharges issued on 22 January 2018 which was subsequently withdrawn, and the incorrect information in the view of the matter in respect of the FN penalties for 2004 to 2007.

94. Whilst these errors are regrettable, they do not invalidate the FNs or the FN penalties, nor do the errors affect RB's liability to pay the penalties.

95. Additionally, RB refers to a three-year delay in HMRC sending their view of the matter in response to his appeal against the FN penalties, which was notified to HMRC on 2 October 2019.

96. Throughout this period, HMRC were actively dealing with the appeal against the closure notices for the years relating to the FN penalties, including issuing their view of the matter, completing a statutory review of the decision to issue the closure notices, progressing the appeal notified to the Tribunal against the closure notices, and subsequently releasing the postponed tax for collection following the Tribunal striking out the closure notice appeal.

97. HMRC say that RB could have notified his appeal against the FN penalties to the Tribunal at any point after notifying the appeal to HMRC, if he did not want to continue to wait.

98. HMRC submit that any delay in dealing with the FN penalty appeal, and the errors in various pieces of correspondence, did not affect RB's ability to take corrective action, nor did they prevent RB from co-operating with HMRC (within the meaning of section 210 FA 2014).

Corrective Action

99. RB did not take the corrective action required by the FNs. Corrective action, for FNs given under 204(2)(b) FA 2014, includes requiring a person to relinquish the denied advantage, as specified in section 208(5)(b) FA 2014.

100. In *Comtek*, at paragraph 45, the Upper Tribunal explained that in these circumstances, full counteraction requires a taxpayer to give up the appeal and communicate this to HMRC.

101. By maintaining the appeal against the closure notices, RB continued to claim he is entitled to the denied advantage. The closure notice appeal was only disposed of when RB's representatives failed to comply with First-tier Tribunal's directions, and the appeal was struck out on 10 March 2021.

102. In his notice of appeal, RB asserts he has 'the right to appeal and should not have to sign that away to meet the requirements.' HMRC understand that RB has a statutory right, under

section 31 TMA 1970, to make an appeal against the amendments made by the closure notices. However, if an FN is correctly given, the consequence is that HMRC have a right to charge an FN penalty if corrective action is not taken.

103. This is explained in *Comtek*, where at paragraph 45, the Upper Tribunal states that the purpose of the FN regime 'is to provide taxpayers with a strong disincentive to continue to consume public resources by continuing tax disputes which appear to have been resolved by other finally decided cases.'

104. HMRC submit that this ground does not assist RB and demonstrates that he has continued to not take the corrective action required by the FNs to avoid the FN penalties.

Reduction for Co-Operation

105. The starting point for the amount of an FN penalty is 50% of the value of the denied advantage. The penalty amount can be reduced, under section 210 FA 2014, but only if a person has 'co-operated' with HMRC, within the narrow definition in section 210(3), and HMRC cannot reduce the penalty to less to 10% of the value of the denied advantage, as per section 210(4).

106. The Upper Tribunal in *Comtek*, at paragraph 8 considered that co-operation, in this context, has 'a limited and specific meaning and not everything that might, in ordinary usage, be referred to as "co-operation" is to count.'

107. Section 210(1)(b) FA 2014 provides that co-operation is only relevant to the reduction of the penalty up until the point the penalty has been assessed. In this case, the FN penalties were assessed on 16 September 2019, and so any co-operation after this date is not relevant.

108. In calculating the penalty, HMRC have reduced the FN penalties to reflect RB's co-operation. HMRC consider that the types of co-operation relevant to a case where there is an outstanding appeal against the denied advantage are those detailed in section 210(3)(a), (b), and (d). HMRC consider that items (c) and (e) are not normally relevant where an FN relates to a tax appeal in relation to the relevant tax, because the only action required is to relinquish the denied advantage.

HMRC's internal policy, when considering reductions for co-operation in these circumstances, is to apportion the possible 100% maximum reduction between items (a), (b) and (d) as follows: Item (a): up to 20%; Item (b): up to 70%; and Item (d): up to 10%

109. This policy is not binding on the Tribunal, although it does reflect the view in *Comtek*, at paragraph 51, that some categories of co-operation will attract greater credit.

110. As HMRC did not require any information to help them quantify the tax advantage, they have given RB a 20% credit for co-operation under section 210(3)(a). HMRC submit that no further reduction is appropriate; RB has not counteracted the denied advantage, nor has he provided information enabling HMRC to enter into an agreement with him for the purposes of such counteraction.

111. In *Comtek*, at paragraph 45, the Upper Tribunal considered that even if the tax advantage has not been fully counteracted, a reduction for co-operation 'may be available for steps on the way to full counteraction.'. At paragraph 47, the judgment sets out that, in taking the actions that it did, the [taxpayer] company subjectively believed that 'it was thereby compromising all outstanding disputes with HMRC including the underlying dispute as to the efficacy of the Scheme.'

112. In this appeal, no such belief has been asserted by RB, and he has not stated that he was unaware of the action required to counteract the tax advantage. He understood that the FNs

required him to relinquish his appeal against the closure notices in order to avoid the FN penalties, but he chose not to do so.

113. Although RB states that he has 'always co-operated with the enquires as they progressed' and that he co-operated 'more than is reflected in the review,' HMRC say that the actions taken by RB do not fall within the definition of 'co-operation' in section 210(3) FA 2014.

114. HMRC do not dispute that RB has maintained contact and replied to communications throughout. The following steps were taken by RB between the issue of the FNs and the assessment of the FN penalties: A letter disagreeing with HMRC' conclusions on the representations; phone calls to request payment arrangement in respect of the APNs on 10 November 2017; a letter expressing disagreement with HMRC' position with regards the NICs on 22 March 2019; and a further letter of disagreement with the NICs position on 30 April 2019.

115. RB has not stated in which of the categories of co-operation he believes that his actions fall.

116. HMRC say that RB's actions were not steps on the way to counteraction, nor were they steps to enter into an agreement with HMRC for the purpose of counteracting the denied advantage, and do not, therefore, attract any further reduction of the FN penalty percentage above that which has already been given.

117. Following *Comtek,* the First-tier Tribunal in *Bentley* considered whether it should further reduce FN penalties which had been calculated by HMRC at 42% of the denied advantage. At paragraph 60, the Tribunal held that they were unable to give credit for co-operation, including Mr Bentley's full counteraction, which occurred after the date of the assessment of the penalties.

118. HMRC submit that in the current case, correspondence after the FN penalties had been assessed is not relevant to the matter of reduction for co-operation under section 210 FA 2014.

119. HMRC submit that, when considering the correspondence between RB and HMRC, up until the FN penalties were assessed on 16 September 2019, in the context of the definition of co-operation and the aim of the FN regime, the 20% reduction which has already been provided is entirely appropriate.

120. HMRC request that the Tribunal confirm the FN penalties as varied on review for 2004,2005,2006, and 2007and uphold the FN penalty for 2008, and dismiss the appeal.

TRIBUNAL DECISION

121. The Tribunal considered that despite the errors identified by RB and notwithstanding Montpelier's early contentions that the FNs were invalid, the final FNs, APNs and penalty assessments were correctly issued and served on RB as they met the requirements of section of FA 2014.

122. The litany of errors and careless mistakes made by HMRC identified by RB did not act to nullify the FNs, APNs and penalties as set out in the HMRC's review letters of 09 September and 08 November 2022.

123. The specified date for taking the necessary corrective action was, initially, 18 November 2017 which was varied on 6 March 2019 to 03 April 2019.

124. No corrective action was taken prior 03 April 2019, and RB did not relinquish his denied advantage until his appeal was struck out on 10 March 2021, a date of which RB was unaware until July 2022 as he had not been told this and Montpelier had by then ceased to communicate with him.

125. Under s208(2) FA 2014, RB is prima facie liable to pay the penalties. The issues before the Tribunal, therefore are:

(1) Whether it was reasonable in all the circumstances for the appellant not to have taken the necessary corrective action on or before 03 April 2019, since if so the penalties are not payable; but if they are payable

(2) whether the Tribunal should affirm the amount of the penalties or whether it should substitute for HMRC's decision regarding the amount of the penalties, another decision regarding that amount which HMRC had power to make.

126. The onus and burden of proof is on RB to demonstrate that it was reasonable in all the circumstances not to have taken corrective action and that he has not been given an adequate reduction for co-operation pursuant to section 210 FA 2014.

127. The standard of proof is the civil standard being the balance of probabilities. In considering the evidence the Tribunal noted that there are approximately 1700 taxpayers involved in the Scheme and that the closure notice appeal that was struck out on 10 March 2021 involved 95 appeals presumably from amongst that number.

128. Accordingly, the Tribunal asked counsel for HMRC if, in terms of rule 2 (4) (a) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, to help the Tribunal further the overriding objective to deal with cases fairly and justly, whether there were amongst those taxpayers any cases of the First-tier or Upper Tier Tribunals, other than those specified in skeleton argument, either in favour of or found against HMRC's position which HMRC might wish to distinguish.

129. Accordingly, and only at this point did HMRC, draw the Tribunal's attention to the case FTT of *David Andreae* issued in April 2022 which had also involved the Scheme, and which had been found in favour of the appellant and had not been appealed by HMRC.

Legislation

130. The legislation relevant to the issue of FN's and associated penalties is contained in sections 204 to 218 and Schedule 30 FA 2014.

131. Section 206 FA 2014 imposes the requirements as to the content of a FN and Section 208(2) FA 214 imposes a liability to a penalty if "necessary corrective action" is not taken in respect of the "denied advantage" before the specified time. Corrective action is amending the return and notifying HMRC that this has been done and also the quantum of the denied advantage (the tax that will become due and payable). Section 209 (1) FA 214 states that the penalty under Section 208 FA2014 is 50% of the value of the denied advantage.

132. Section 210 (1) allows HMRC to reduce the amount of the penalty if the person upon whom the penalties imposed has cooperated with HMRC to reflect the "quality" of co-operation.

133. 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."

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

135. RB stated that he did not have a great amount of tax knowledge and relied almost entirely on Montpelier to provide information in relation to the correspondence he received from HMRC, much of which he did not entirely understand.

136. He felt considerably let down by Montpelier but at the initial stages believed they were competent and confident in their defence of the Scheme.

137. This combined with his observation of HMRC's conduct and given his employment background of dealing with complaints and heightened sensibility to errors and their lack of attention to detail confirmed in in him a belief, primarily in relation to the issue of paying tax in relation to the NICs, which he had done 'under sufferance' for APNs, but also within the penalties, that HMRC were inconsistent and made errors. In his words their behaviour was "iffy."

138. He was, particularly concerned, in view of the advice from Montpelier, that if he relinquished his right to appeal, he would be unable to take advantage of what his advisers had led him to believe was a strong case that they would succeed, and that neither tax nor penalties would be payable.

139. The position was, therefore, that he did not wish to give up the right of appeal for fear of losing out and incorrectly assumed that he had an appeal in process with the Tribunal. Although it was incumbent on his advisers to have told him that the appeal had been struck out, they did not do so resulting in a further period where no corrective action was taken. RB did not, consequently, know when the period for his failing to take corrective action had ended.

140. RB represented himself and had filed his notice of appeal which dealt predominantly with the percentage reduction in the penalty he accepted he ought to pay. He had not taken the necessary corrective action in respect of the denied advantage by his failure to relinquish the latter largely because of his position on NICs, which had resulted in the imposition of penalties in the first place.

The Penalty Amount Reduction

141. RB stated in his appeal that he is not denying that he needs to pay a penalty but that the penalty percentage that has been decided upon is unfair and did not take into account all his actions.

142. In relation to the penalties, the Tribunal considered that the percentage amounts were correctly calculated and that RB's understanding of 'co-operation' did not accord to the strict statutory definition at Section 210(3) FA2014.

143. HMRC had correctly interpreted the definition of "co-operation" and applied it correctly.

144. It was in any event only action taken prior to the assessment of the penalty on 16 September 2019 that could be considered and any co-operation after that date was not relevant to the matter of reducing the penalties.

145. Accordingly, if the penalties are due they had been correctly calculated and HMRC had given RB an adequate reduction for co-operation in terms of Section 210 FA 2014.

Reasonable in all the circumstances

146. RB did not submit a skeleton argument and his grounds of appeal went beyond just issues of the penalty percentage. In their Skeleton Argument HMRC stated that the appeal was made under section 214(2) FA 2014, in relation to the amount of penalty and referred to the Tribunal's powers of section 214 (9). At the hearing HMRC confirmed that the appeal could also be considered under section 214 (1) FA 2014 which allows an appeal that a penalty is payable.

147. In his letter of 02 October 2019, RB stated "Section 214(3)(d) states that a permissible ground of appeal is that "in all the circumstances" it was reasonable for the taxpayer not to have taken the corrective action. In that context please note the following: –

> (a) The Notices charge a penalty on unpaid NIC. But in your letter to me dated 13 October 2017 you state under the heading " Next Steps" that you will not enforce Class IV liabilities. This leaves aside the fact that there are no lawful NIC liabilities for the tax year 2003/2004, tax year 2000/2005, tax year 2005/2006, tax year 2006/2007 and tax year 2007/2008 which can be enforced against me" .

148. The words "reasonable in all the circumstances" were considered by the Upper Tribunal in *Comtek* which set out a succinct statement of the approach the FTT should take:-

> "33. It follows, in our judgment, that the FTT simply had to consider whether it was 'reasonable in all the circumstances' for the [taxpayer] Company not to take corrective action, giving that phrase its ordinary and natural meaning. That required the FTT to do the following in this case (which should not be taken as setting out an exhaustive list of the examination required in all cases):
>
> (1) The FTT needed to consider why the Company chose not to take corrective action as its thought process formed part of the relevant 'circumstances.'
>
> (2) The FTT also needed to take into account the fact that the question of whether it was "reasonable in all the circumstances" not to take corrective action operates as a defence to a penalty that applies if corrective action is not taken by a deadline. Accordingly, the fact that the deadline was missed, and the Company's reasons for missing it were highly relevant.
>
> (3) The FTT needed to take into account the structure and purpose of the relevant provisions of FA 2014. Those provisions are designed to ensure that taxpayers who fail to take corrective action by the deadline in response to a follower notice are to suffer a penalty unless, among other defences, they can establish that it was reasonable in all the circumstances not to take the corrective action. Once a taxpayer fails to meet the deadline, even if that failure was not reasonable in all the circumstances, it is not pre-ordained that the maximum penalty of 50% will be charged, since s210 provides for the penalty to be mitigated if there has been 'cooperation' as statutorily defined. But it would be quite contrary to the purpose of the legislation for a taxpayer who misses the deadline for no good reason to enjoy complete exemption from a penalty simply because of actions taken after the deadline has been missed."

149. This statement and the last of these factors was considered by Judge Anne Scott in *David Andreae* at paragraphs 105 -109:-

> "..it was accepted by both parties that the purpose of Part 4 Chapter 2 FA 2014 is to discourage taxpayers from pursuing their dispute in avoidance cases once their arrangement has been shown to fail in another party's litigation. At paragraph 174 of *Onillon*, [2018] UKFTT 33 (TC), Judge Redston made the point that, in light of that, it would not be a reasonable excuse if a taxpayer simply decided to see how

the litigation played out. The decision not to take corrective action must be an informed choice. I agree.

Whilst, of course, I accept that a reasonable excuse for not taking corrective action timeously is not the same as whether it was reasonable in all the circumstances, when looking at the appellant's "thought processes" I agree with my fellow FTT judges that *Perrin v HMRC UKUT* 156 (TCC) provides an excellent guide. At paragraph 81, in so far as relevant, that reads:

> "81. When considering a "reasonable excuse" defence, therefore, in our view the FTT can usefully approach matters in the following way:
>
> (1) First, establish what facts the taxpayer asserts give rise to a reasonable excuse (this may include the belief, acts or omissions of the taxpayer or any other person, the taxpayer's own experience or relevant attributes, the situation of the taxpayer at any relevant time and any other relevant external facts).
>
> (2) Second, decide which of those facts are proven.
>
> (3) Third, decide whether, viewed objectively, those proven facts do indeed amount to an objectively reasonable excuse for the default and the time when that objectively reasonable excuse ceased. In doing so, it should take into account the experience and other relevant attributes of the taxpayer and the situation in which the taxpayer found himself at the relevant time or times. It might assist the FTT, in this context, to ask itself the question "was what the taxpayer did (or omitted to do or believed) objectively reasonable for this taxpayer in those circumstances?.."

In *Corrado v HMRC* [2019] UKFTT 275 (TC), Judge Redston expressly adopted the approach in paragraph 81(3) of *Perrin*. It is indeed an objective test.

As can be seen, the approach gives a wider context to the test in *Comtek* and the two authorities are complementary.

Whilst one factor to be considered is what a reasonable and prudent taxpayer in the position of the appellant might have done if in the appellant's position, the Tribunal must stand back and look at all of the circumstances."

150. The Tribunal found RB to be a straightforward, honest and reliable witness and he was not challenged on his evidence by HMRC.

151. RB did not accept HMRC's statements in relation to NICs based on the advice he received from Montpelier which told him that HMRC were mistaken. He knew that HMRC had made errors and mistakes and that the first FNs were wrong and had been withdrawn by HMRC on 13 January 2017 after an admitted error by HMRC.

152. RB responded to HMRC's letters of 13 October 2017, which had confirmed that Class 4 NICs were correctly included in the FNs in terms of Section 203(a) FA 2014, stating amongst other concerns that HMRC were unlawfully seeking to enforce NIC debts which were statute barred under the Limitation Act 1980.

153. HMRC, on 11 January 2018, then wrote to RB stating that HMRC had considered that enforcement action in relation to the Class 4 NICs for the 2009/10 tax year and earlier could potentially be met by a defence based on the Limitation Act 1980 and confirmed that if RB took corrective action, HMRC would not seek to collect additional Class 4 NICs for 2009/10 and earlier tax years.

154. Consequently, HMRC said that if RB did take corrective action, any penalty to which he became liable would be calculated without reference to the additional Class 4 NICs relating to the 2009/10 tax year or earlier.

155. On 06 March 2019, HMRC told RB that their view had changed and that recovery of and inclusion of NIC amounts would have been enforceable, even although RB had in any event paid them, and that they would issue penalties in relation to NICs.

156. This resulted in RB's view that there was something 'iffy' about HMRC's approach to NIC in the relation to the FNs and Penalties and confirmed his view, which Montpelier had explained to him that he would be prejudiced if he relinquished his right to the denied advantage.

157. For this and a number of other reasons RB was not sufficiently at a stage to relinquish the denied advantage by the then appropriate date originally on 18 November 2017 and then changed to 03 April 2019 since the second and corrective issuance of the FNs on 13 January 2017 and because of the issues over the legality of the Scheme and the computation of the denied advantage and HMRC's resulting actions,

158. In addition, RB had agreed a payment plan with HMRC in relation to the amounts due as set out in the APNs by instalments between 18 November 2017 and 18 October 2018 in relation to both Income Tax and NICs. Notwithstanding this on 22 January 2018, HMRC issued APN penalties in relation to tax years ending 2004 and 2005. These were subsequently withdrawn on 29 January 2018 as HMRC confirmed they had, following representations from RB, been issued incorrectly.

159. The Tribunal, decided that, based on the written and oral evidence; that the facts concerning the issuance of the FN's and the representations made by RB and responses from HMRC relating to the issue of the inclusion or exclusion of NICs; and the other actions of HMRC, had led RB to believe that HMRC's approach was, in his own words "iffy", had consequently resulted in RB being dissuaded, and of his own choice, deciding not to relinquish the denied advantage work.

160. The Tribunal found facts proven and which explained why RB had failed to take corrective action and they represented his thought process for not doing so. The Tribunal considered these form part of the "relevant circumstances."

161. The question was whether it was reasonable for RB not to take corrective action in light of his concerns including that HMRC had not consistently addressed the position of whether or not NICs were inclusive or exclusive in the APNs and then consistently within the penalties. He had agreed to pay the NICs, under sufferance, but was told by his advisers that if he took corrective action then he might lose out in the future if HMRC were proven to be incorrect, again.

162. There were, in any event, a number of other reasons that his advisers had told him that his decision not to take corrective action was prudent and he had a diminishing faith in the competence of HMRC based on their issuing FN, then withdrawing them, issuing APN penalty notices and then withdrawing them. It was the fault of Montpelier that he was not aware that his and their other clients' closure notice appeals to the First -tier Tribunal had been struck out, which brought the matter to an end.

163. Montpelier had advised RB that NICs were not chargeable and that was proven to be correct when HMRC issued their final position.

164. Objectively, the Tribunal considered that RB had no reason to doubt Montpelier and a number of reasons to doubt HMRC. The Tribunal did not consider that RB missed the deadline

for no good reason to enjoy exemption from a penalty simply because of actions taken after the deadline had been missed.

165. In view of his raised consciousness and experience of the effect of errors in his daily working life, the Tribunal believed that this informed his decision-making process that given the multiple errors made by HMRC in dealing with him and the vacillating view of HMRC as against the advice of his advisers, at least whilst they provided it, made it objectively reasonable for RB in those circumstances to fail to relinquish his right to appeal and, therefore, the denied advantage and resulted in his failure to take corrective action.

166. As HMRC expressed doubts in relation to the inclusion of NICs it was reasonable for RB, relying on Montpelier's expertise to also have significant doubt. Towards the end of 2019 Montpelier failed to communicate with him and RB was, thereafter, no longer advised externally.

167. The Tribunal agree with Judge Hellier in *Barlow v HMRC* [202] UKFTT 486 (TC) where he states at paragraphs 69 et seq that:

> "69. I note that section 214(3)(d) specifies as a ground of appeal that it was reasonable for the taxpayer not to take corrective action. Those words do not contain any time limitation and I conclude that they may refer to circumstances both before and after the date specified for corrective action.
>
> 70. I agree with Mr Taylor that a taxpayer who refuses to take corrective action is not necessarily unreasonable. But it depends on the circumstances. I also agree that those circumstances include the experience, knowledge and other attributes of the taxpayer."

168. RB confirmed that he deliberately decided not to take corrective action by the due date and made it clear that he knew his limitations of understanding tax matters. The HMRC review of 27 July 2022 contained incorrect information in respect of FN penalties for 2004 to 2007.

169. In *Corrado* Judge Redston cited with approval the passage in *Onillon,* where the FTT had said at paragraph 73:

> "73. I accept that reliance on the advice of an adviser that a scheme works can mean that a taxpayer acts reasonably in not taking corrective action. Not everyone has the time or expertise to check for himself. If the taxpayer has done his homework and found that the qualification and reputation of the adviser are high and if he has carefully considered the opinion of his adviser in the light of his particular circumstances as they change from time to time, it is likely that he would be held to have acted reasonably in reliance on that advice…".

170. The Tribunal find HMRC are correct to say that their errors and delays both administratively and in written documents are not appealable matters before the Tribunal, if they do not invalidate the legality of their actions, which in this appeal they do not.

171. That does not, however, mean that they do not form part, as the Upper Tribunal referred to in *Comtek,* of influencing RB's thought processes in deciding not to take corrective action.

172. The Tribunal finds that RB acted reasonably in relying on Montpelier's advice and that it was reasonable in all the circumstances for RB not to take corrective action by the due date.

173. HMRC suggested that RB could have brought an appeal to the Tribunal without waiting for the final review from HMRC on 8 November 2022 but accepted that it may be desirable for a taxpayer in these circumstances to wait for such a review.

174. In summary, as can be seen from the findings in fact and the arguments set out above RB was what simply waiting to see how the dispute with HMRC proceeded. He proactively sought

advice and passed this on to HMRC at each stage he was able to do so. It was reasonable for him to rely on Montpelier until late 2019 when they ceased to communicate with him. The Tribunal believe that he genuinely and reasonably believed that he could rely on Montpelier's advice.

175. In this regard, the Tribunal agrees with Judge Anne Scott's statement in at paragraph *David Andreae* 139:-

> "I was not referred to the case, and I am not bound by it but I agree with Judge Berner in *Barrett v HMRC* [2015] UKFTT 329 (TC) where he found at paragraph 161 when considering a taxpayer's reliance on an adviser that:
>
> > "161. The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are differ …."".

176. The Tribunal must stand back and look at the overall picture and the day to day reality of RB. Whilst, at the hearing, RB believed that following the advice of Montpelier was like "sheep", that was not what he thought and communicated at the time and he had every reason to believe that HMRC were incorrect in including the amount of NICs in the FN's and APNs and that it was reasonable to him to have decided not to take corrective action logically before but also after the date for corrective action.

177. For these reasons, the appeal on this issue succeeds and no penalty is due.

178. The Tribunal decided that RB's failure to take the necessary corrective action was reasonable in all the circumstances. The appeal is allowed, and the penalty cancelled.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

179. 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.

WILLIAM RUTHVEN GEMMELL WS
TRIBUNAL JUDGE

Release date: 06th February 2024