[2020] UKFTT 0486 (TC)

TC07958

Appeal number: TC/2019/1595

Income Tax – penalty under s 208 FA 2014 for failure to take corrective action following service of Follower Notice: (a) taxpayer advised that scheme worked – was it reasonable in all the circumstances not to take corrective action, (b) reduction in penalty under s 210.

FIRST-TIER TRIBUNAL
TAX CHAMBER

RAYMOND BARLOW	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting by video link on 12 October 2020 with later written submissions.

Mark Taylor of Buzzacott LLP Chartered Accountants for the Appellant

Rebecca Arnold for the Respondents

DECISION

1. Mr Barlow appeals against four penalties assessed by HMRC under s 208 Finance Act 2014 ("FA 2014") because he did not take 'corrective action' after the service on him of 'Follower Notices'. The relevant Follower Notices were served in respect of the tax years to 5 April 2005, 2006, 2007 and 2008 (I shall call these years '2005' 2006' etc). The second, third and fourth penalties were reduced after their initial assessment; the appeal is against the penalties as reduced.

Background: legislation and uncontentious facts

2. Section 204 FA 2014 provides that HMRC may issue a Follower Notice if four conditions (Conditions A to D) are satisfied.

3. Condition A is that a tax enquiry is in progress in relation to a return (an "Enquiry Case") or that the taxpayer has made an appeal which is yet to be finally resolved (an "Appeal Case"). In relation to 2005 HMRC served the notice when an enquiry was in progress: it was an Enquiry Case In relation to the other three years, the notices were issued at a time when Mr Barlow had appealed against a closure notice: they were Appeal Cases.

4. Condition B is that the taxpayer's tax return or appeal was made on the basis that an asserted tax advantage resulted from particular arrangements. Mr Barlow's return for 2005 and his appeals for 2006, 2007 and 2008 were made on the basis that he had to pay less tax as a result of his use of arrangements suggested to him by his former advisers, Montpelier. The arrangements were intended to reduce the tax Mr Barlow would pay on income derived from work for an overseas partnership.

5. Condition C is that HMRC were of the opinion that there was a judicial ruling relevant to the arrangements. HMRC relied on the decision of the FTT in *Robert Huitson v HMRC* [2015] UKFTT 448 (TC) (*"Huitson").*

6. Section 205 FA 2014 sets out constraints on what is a judicial ruling and whether it is relevant. A Decision of the FTT is a judicial ruling for this purpose if, inter alia, the time for making an application to appeal against it has expired and no application for permission to appeal has been made or permission has been refused. The time for making an application to appeal against the FTT's decision in *Huitson* had expired without such an application having been made on 23 January 2016; Miss Arnold told me that an application to the UT for leave to appeal out of time had been refused on 22 February 2017.

7. A ruling is relevant to arrangements if the principles laid down in the ruling or the reasoning in it would deny the taxpayer the hoped for advantage of the arrangements into which he entered. Mr Taylor did not dispute that this was the case.

8. Condition D is that no previous Follower Notice has been given by reference to the same tax advantage. That was the case in relation to each notice.

9. Section 204 also requires any Follower Notice to be given no less than 12 months after the later of: (a) the date the judicial ruling became final and (b) the day the return was received (in an Enquiry case) or the day the appeal was made (in an Appeal Case). There was no dispute that this condition was satisfied.

10. The object of the Follower Notice provisions is plainly to twist the arm of a taxpayer who has participated in particular arrangements to give in and either amend his return (in an Enquiry Case) or settle with HMRC (in an Appeal Case). The provisions do not require the taxpayer to take either such course but make pursuit of the analysis he proposed on his return less attractive. They do this by imposing a penalty if, within a specified time, the taxpayer does not take "corrective action". This is defined in section 208 which provides that the necessary corrective action is taken *if and only if* :

> (i) in an Enquiry Case the taxpayer amends his return, and in an Appeal Case he "takes all necessary action to enter into an agreement with HMRC for the purpose of relinquishing the advantage"; and
>
> (ii) he notifies HMRC that this has been done and of the additional tax due.

11. Mr Barlow took "corrective action" on 13 June 2018. He did this by submitting a form to HMRC for each year. HMRC accepted the proposals on 9 July 2018. It was common ground that this corrective action was not taken within the specified time. The effect of section 208 FA 2014 was, in Mr Barlow's case, that the specified time in respect of each of the years was 27 April 2017; and thus that he took the action 412 days after the end of the specified time. As a result, section 208(2) made him liable to penalties in respect of each year.

12. Section 209 provides that the amount of the penalty is 50% of the additional tax payable "as a result" of counteracting the denied advantage (para 2 Sch 30). But section 210 provides that the penalty may be reduced where the taxpayer had cooperated with HMRC to reflect the quality of that cooperation. I set out section 210 later in this decision but in brief it provides that a taxpayer may be regarded as having cooperated only if and if he has done one or more of the actions set out. Those actions are: (a) Assisting in quantifying the tax, (b) Counteracting the tax advantage, (c) Providing information for corrective action, (d) Providing information to make a settlement, and (e) giving access to records.

13. Under section 210 HMRC reduced the penalties for each year. After various changes and reconsiderations they reduced the penalty percentage for 2005 from 50% of the tax to 29.6%, and to 37.6% for the other three years.

14. Section 214 provides for appeals in relation to these Follower Notice penalties. Subsection (1) provides for an appeal against the decision to assess the penalty; if successful the penalty is to be cancelled (see ss(8)); on the appeal the tribunal may

affirm or cancel HMRC's decision. Subsection (2) provides for an appeal against the amount of the penalty; under that limb the tribunal may substitute for HMRC's decision any decision which HMRC had the power to make. Mr Barlow makes his appeal under both limbs: he says that it was reasonable for him not to take corrective action, and in the alternative that the level of penalties is excessive.

15. In relation to an appeal against the decision of HMRC that a penalty is payable, subsection (3) sets out four grounds on which an appeal may be made "in particular". They are (a) that the Conditions A,B or D were not satisfied, (b) that the specified judicial ruling is not relevant, (c) that the notice was not given in time, and (d) *"that it was reasonable in all the circumstances for [the taxpayer] not to have taken the necessary corrective action…in respect of the denied advantage".*

16. The Follower Notice provisions contain no right of appeal against the Follower Notice itself. There is no need for them to do so because the only effect of non compliance is a penalty and the provisions of s 214 in relation to appeals against a penalty embrace in the context of such an appeal all the conditions in section 204, varying only the tribunal's enquiry in relation to the satisfaction of Condition C so that the relevant question is not whether HMRC held the opinion that the judicial ruling on which they relied was relevant but whether in the tribunal's view it was relevant. The words "in particular" suggest that an appeal may be grounded on an argument that the decision HMRC relies upon is wrong.

17. Mr Taylor did not assert that Conditions A, B or D were not satisfied, he accepted that *Huitson* was relevant and that the notices were given in time. He based his submissions in relation to the cancellation of the Notices on the ground in para 15(d) above: that it was reasonable in all the circumstances for Mr Barlow not to have taken corrective action at an earlier time.

18. Section 219ff FA 2014 make provision for Accelerated Payment Notices (APN's). Under these provisions HMRC may issue an APN when they issue an FN. The issue of an APN makes the taxpayer liable to pay the additional tax he would have had to pay if he took corrective action on account of the liability HMRC assert he has avoided (whether or not he actually takes such action). Mr Barlow received APNs. They are not disputed in this appeal although they form some of the background to Mr Barlow's actions.

The evidence and further findings of fact

19. I had a large bundle of documents which included a witness statement from Mr Barlow. Miss Arnold did not dispute the evidence in the statement. I did not hear from Mr Barlow.

20. For each relevant tax year Mr Barlow was advised initially by Montpelier. My understanding is that he turned instead to Buzzacott for advice late in 2018. Mr Barlow moved to Australia in October 2015.

21. It appears that at seme time between April and September 2015 Mr Barlow received Accelerated Payment Notices ("APNs") for the years 2006 to 2008. HMRC's

letter indicate that they were sent on 27 April but in his witness statement Mr Barlow says that he received an APN for 2006 dated 9 September 2015 He says, and I accept, that Montpelier advised him that it was invalid and provided him with representations to make to HMRC, which he made.

22. These notices were later withdrawn by HMRC because they concluded that one of the conditions for their issue had not been met.

23. On 14 October 2016 HMRC wrote to Mr Barlow saying that they would shortly be issuing new FNs and APNs. The letter said that *Huitson* had become final on 23 January 2016 and a late appeal application had been rejected by the Upper Tribunal (the "UT") on 5 July 2016.

24. On 26 October 2016 Mr Barlow emailed Montpelier saying that he had received this letter saying "I assume there is nothing further that I should do yet?". Montpelier replied the following day saying that they did not believe that the FNs and APNs were (would be) lawful, and that they would be advising on the making of representations.

25. Mr Barlow sought Montpelier's advice again on the 7th and on the 8th November Montpelier replied saying that they did not consider the notices to be lawful and would revert after reviewing the notices.

26. On 5 November 2016 HMRC issued the FNs which give rise to this appeal for the years 2005 to 2008. together with consequential APNs

27. There was some doubt as to when Mr Barlow received these notices, but I concluded that they had come to his attention by December 2016.

28. On 24 January 2017 Montpelier sent Mr Barlow a draft representation letter in relation to the notices. They said in the covering email "In our view you do not need to take any action until HMRC has responded to the representations. At that time …we will advise of the best course of action for you.". Mr Barlow dispatched the representations the next day. The letter indicated that in the *Huitson* case an application for permission to appeal had been made to the Upper Tribunal which was due to be heard on 9 February 2017

29. HMRC responded to these representations on 22 March 2017 upholding the notices. They said that corrective action would need to be taken before 27 April 2017 if penalties were to be avoided.

30. There was some uncertainty over whether or when Mr Barlow received this response but it appeared that at the latest Mr Barlow or his representatives had received the letter or a copy of it by 8 April 2017.

31. On 13 April 2017 Mr Barlow contacted Montpelier after receiving a copy of this letter. He was provided with another letter to send to HMRC with further representations. He dispatched it on 21 April (it could have been 20 April – the dating is unclear) . I note that this letter said in relation to *Huitson* that "permission to appeal to the Court of Appeal has been sought". The letter also said that Mr Barlow was not

going to take corrective action and that he would “be issuing a Judicial Review challenge by 2 June 2017” and would be appealing any penalties.

32. The specified date for taking corrective action under the new FNs was 27 April 2017.

33. On 8 May 2017 HMRC wrote to Mr Barlow indicating that he was liable to penalties because he had not taken the necessary corrective action before 27 April 2017. The letter invited him to contact them to discuss how he could cooperate to reduce the penalties. The letter contained some details of HMRC’s approach to reduction of the penalties.

34. Mr Barlow emailed Montpelier on 11 May 2017 and received a reply the same day saying that HMRC were trying to frighten people into making payment rather than continuing to fight (not a wholly inaccurate description of the purpose of the legislation). They say that HMRC would not be open to substantive negotiation and note that if Mr Barlow did take “corrective action” and “we are successful with the Huitson case, you will be unable to reclaim any funds from HMRC”. They continue:

> “As we are confident of success with the ongoing Huitson case, therefore we are unable to assist with any sort of negotiations.”.

35. I note that this letter was written on 11 May 2017 but that the Upper Tribunal had declined to permit an appeal in that case by a decision of 22 February 2017. It may be that the writer was hoping that permission to appeal to the Court of Appeal against that refusal would be given, and that this was what was referred to in the letter of 21 April (see para 31 above). On the other hand, the composer of the 21 April letter may have been confusing the substantive appeal with the application for permission to appeal.

36. HMRC responded to the letter of 21 April 2017 on 13 November 2017 after some prompting letters from Mr Barlow. They rejected all the points made in the 21 April letter but indicated that because of a concern over the operation of the Limitation Act in relation to NICs they were withdrawing the penalties relating to Class 4 NICs. This was a concern which had been raised by Montpelier in their draft representation letter they sent to Mr Barlow for him to send on 21 April 2017. HMRC offered a review of their decision.

37. Mr Barlow contacted Montpelier again on 29 November 2017 (there may have been earlier discussion or contact but I was not shown its contents.). He asked whether there was anything else he could do aside from being included in a Judicial Review action.

38. Montpelier replied “not at the moment” but said that once he had been added to the Judicial review action they would provide him with a letter to go to HMRC.

39. Mr Barlow emailed Montpelier again on 1 December 2017 saying that he was considering his options. He continued “To give me more of an idea of success would

it be possible to tell me roughly the number of people going ahead with the JR?" They replied that the number stood at approximately 300.

40. Mr Barlow emailed Montpelier again on 4 December 2017 about HMRC's letter of 13 November 2017. He raised (i) the question of the NICs, (ii) an apparent clerical error and (iii) whether he should accept HMRC's offer of a review – he had only 3 days to respond. Montpelier replied: that the NIC issue was one of the points in the representation letters and the Judicial Review action, that the clerical errors were typos about which nothing could be done, and advised him to accept the offer of review. That, on 8 December 2017, he did.

41. On 5 December 2017 Mr Barlow emailed Montpelier asking whether the judicial review action was to challenge the APNs, the FNs or the late payment surcharge and asked whether there was still "a main action in place for the original tax planning scheme", Montpelier replied that it was challenging the lawfulness of the notices and that "Huitson was progressing via the Court of Appeal".

42. On 19 December 2017 Montpelier emailed Mr Barlow saying that the application made to join him into the existing Judicial Review proceedings had been dismissed but that counsel had recommended a 'multiple joint claim' against HMRC to be issued in a few days' time. They sought his authority to add him to that claim. Mr Barlow replied "Yes please".

43. On 8 January 2018 Mr Barlow emailed Montpelier wanting to know about HMRC's demand for payment of the APN; he was keen to have a quick response as HMRC were expecting a call from him that day (I was not shown the contact or correspondence from which this arose). He said that this was the first time he had not received a timely response from Montpelier. Montpelier replied that day saying that they were waiting to hear from the solicitors about the Joint Claim and that if he completed the corrective action forms he would not get a refund if they were successful 'with the ongoing claims'.

44. In February 2018 Mr Barlow used certificates of tax deposit to pay the APNs.

45. At some time in May 2018 Mr Barlow received a letter from Rathowen Limited (an Isle of Man company) dated 21 May 2018 bearing the name of Dawn Bull – the person with whom he had corresponded at Montpelier – which was to update him on the steps being taken to challenge HMRC. It said: that *Huitson* was decided on narrow facts and that a new "Huitson(2)" challenge was being pursued in the FTT; that a decision on the Judicial Review action was likely to come forth in the summer; that there were other FTT (un-named) challenges under way and concluded that they were still optimistic that they would win.

46. In June 2018 Mr Barlow took corrective action by completing HMRC's forms.

47. On 17 August 2018 HMRC wrote to Mr Barlow indicating the amounts of penalty they intended to assess and explaining how they calculated the relevant reductions.

48. HMRC assessed the penalties on 3 September 2018. The calculations contained an error which was amended on 12 February 2019 as the result of a review.

49. In his witness statement Mr Barlow says that he had no reason to doubt Montpelier's advice: they had been successful in having the original APNs withdrawn and he had no reason to believe they would not be successful.

HMRC's penalty calculations

50. The 2005 penalty allowed for a reduction of the penalty to 29.6% of the tax (the "denied advantage") which would fall due if the scheme did not work. HMRC assessed (after adjustment and review) this thus:

> (1) the maximum reduction available was 40% of the tax. They allocated this 40% between the five headings in section 210(3) FA 2014 to give a maximum reduction under each heading. Having allocated to the headings, they then decided how much of what was so available under each heading should be given;
>
> (2) thus for 2005 they allocated the 40% in the following manner:
>
>> (a) Assisting in quantifying the tax: maximum 20% of 40%; full reduction given: 8% of the tax
>>
>> (b) Counteracting the tax advantage: maximum 50% of 40%; reduction given 1% of 40%: 0.4% of the tax
>>
>> (c) Providing information for corrective action: maximum, 10% of 40%; full reduction given: 4% of the tax ;
>>
>> (d) Providing information to make a settlement: maximum 10% of 40%; full reduction given, 4% of the tax;
>>
>> (e) Access to records: maximum 10% of 40%; full reduction given: 4% of the tax;
>
> (3) thus a total reduction of 20.4% of the tax was given, so that the assessed penalty was 29.6% of the tax.

51. The penalty reductions for 2005, 2006 and 2007 were changed by HMRC after their initial assessment on 3 September 2018. The original assessment allowed a reduction of 0.4% of the tax (so a penalty of 49.6% of the tax). On review the reduction was increased to 4.4% of the tax and, after a policy change notified to Mr Barlow on 15 April 2020, to 20.4% of the tax. Miss Arnold said that HMRC wished only to defend the 15 April 2020 figures.

52. For 2006, 2007 and 2008 HMRC allocated 20% of the available reduction (that is to say 8% of the tax) to category (a) in section 210(3), 70% of the available reduction to category (b), 0% to categories (c) and (e) and 10% to category (d). Of these allocated figures they allowed the full amount of the allocated reduction for categories (a) and (d) and only 1% for category (b). This resulted in the reduction in the penalty by 12.4% of the tax (being (8% + 0.4% + 4%)), so a penalty of 37.6% of the tax.

(The increased allocation of the available reduction to heading (b) was on the basis that for Appeal cases headings (c) and (e) were not relevant.)

53. The proportion of their allocation of the available penalty reduction to category (b) – counteracting the tax advantage – was determined by reference to the time taken before the taxpayer took corrective action. HMRC appended a table to their statement of case setting out their approach. This was to reduce the allocated reduction by 1% for each day the taxpayer delayed in taking corrective action until only 1% remained.

54. The fact that Mr Barlow was 142 days late put him in the 1% category.

A. Section 214(1) and (3)(d): reasonable in all the circumstances

If it was reasonable in all the circumstances for Mr Barlow not to have taken corrective action I must set aside the penalty.

(i) The Parties' arguments

55. Mr Taylor argues first, that in all the circumstances it was reasonable for Mr Barlow not to have taken corrective action. He accepted: (i) that the burden of proof was on Mr Barlow, (ii) that the purpose of the provisions was to discourage a taxpayer from pursuing a dispute, but maintained it was implicit that it was reasonable to pursue a dispute if a taxpayer's case was arguable, and (iii) that a taxpayer's actions had to be objectively reasonable so that a belief held by the taxpayer as to the strength of his case had to be objectively reasonable.

56. He argued that for 214(3)(d) to exculpate the taxpayer, the taxpayer's actions (or inaction) had to be reasonable in *all* the circumstances. In this case he said that that meant that regard should be had to all that happened in the 412 days before corrective action was taken.

57. In and before the 412 days after the date specified for corrective action Mr Taylor noted that Mr Barlow's unopposed witness statement made clear that he had in fact relied on Montpelier. It was clear from the correspondence that Montpelier had advised and Mr Barlow had relied on that advice. That reliance was reasonable: Montpelier had shown their expertise: they had disputed the original APNs which had been withdrawn by HMRC; later they raised the question of the effect of the Limitation Act, and HMRC had withdrawn some NIC late payment surcharges for the APN. Montpelier's advice had been robust – they had not expressed doubt but confidence in success – both in relation to the substantive *Huitson* appeal and in relation to the Judicial Review action. Mr Barlow knew that Montpelier were on the front line in the *Huitson* case. He was told that 300 others were also participating in the Judicial Review action. It was reasonable in those circumstances to rely on Montpelier's advice that he had a good case.

58. Mr Taylor accepted that some of the statements made by Montpelier may have been inaccurate or unclear: their description in May 2017 of the *Huitson* case as ongoing appeared to ignore the fact that time for making an application for permission to appeal had passed; the reference to *Huitson(2)* in the Rathowen letter might have

led a layman to believe that the original case was still not final. But these were not reasons for Mr Barlow, a layman, to doubt the quality of Montpelier's advice.

59. He says that throughout the period Mr Barlow had not buried his head in the sand but had been proactive in promptly seeking advice from those he reasonably thought could provide it. The only time he ignored that advice was when he decided to take corrective action. It was thus objectively reasonable for him not to have taken corrective action until he actually took it.

60. Miss Arnold argues that Mr Barlow did not do enough: his reliance on Montpelier was not in the circumstances reasonable. She points to the description of *Huitson* as having become final in January 2016 (with a late appeal application rejected on 5 July 2007) in the FNs and contrasts it with Montpelier's draft of 24 January in the following year which referred to an application to the Upper Tribunal. Mr Barlow gave no evidence that he had raised with Montpelier the discrepancy between HMRC's statements and those of Montpelier: surely a reasonable person would have done so, particularly where HMRC made the statement on more than one occasion.

61. Miss Arnold notes that Mr Barlow was warned of the possibility of penalties – that she says should have alerted a reasonable person to the need to examine Montpelier's advice carefully. When Rathowen spoke of "Huitson(2)" it would have been the action of a reasonable taxpayer in Mr Barlow's circumstances to ask why they thought they would be more successful second time around. There was no evidence that he had.

62. In relation to the Judicial Review actions. Miss Arnold points to the email of 5 December 2017 in which Mr Barlow asks Montpelier whether the action relates to the FNs, the APNs or the penalties. This email is, she says, some 7 months after the date given for corrective action, and it is a bit late to start asking this question. Then on 19 December 2017 Mr Barlow is told that his application to be joined in that action had been dismissed, but he doesn't ask why. That, she suggests, is indicative of a taxpayer who is not taking reasonable care in the circumstances. Further, she says that a Judicial Review action is one which challenges the lawfulness of HMRC's decision and HMRC should not be taken lightly to have acted unlawfully.

(ii) Discussion: reasonable in all the circumstances

63. The Follower Notice provisions leave it open to a taxpayer who receives a Follower Notice to decide to continue with his assertion that the relevant arrangements "worked" – that is to say had the effect he claims for them. A taxpayer is not bound to alter his return or to agree a settlement with HMRC. It could be the case that, if he pursues his interpretation of the legislation and approach to the facts, a tribunal or higher court might rule in his favour. But if he chooses that course he becomes potentially liable to a penalty at a stage before he gets a ruling finally in his favour. That would be the case for example where he is assessed for a penalty and either does not appeal against it (perhaps because he accepts that the cited ruling is relevant but considers it wrong) or he appeals but the tribunal hearing his penalty

appeal affirms HMRC's decision with the result that a penalty of at least 10% of the "denied advantage" would be due.

64. I asked Miss Arnold what provision, in such circumstances and where the taxpayer eventually gets a final ruling in his favour, provides for the cancellation and repayment of any penalty which had been assessed and paid. It seemed to me that it would be quite unfair if a taxpayer turned out to be right but had to pay a penalty because he had disagreed with HMRC's analysis or the reasoning of a tribunal later shown to have been wrong. She referred me to section 213, which provides that an assessment may be revised if it operated by reference to an overestimate of the denied advantage. That section gives HMRC a power but does not confer a duty, but it may be that failure to exercise the power would permit judicial review of HMRC's action. But I note that since the "denied advantage" is defined in section 208(3) by reference to the operation of the principles laid down in the relevant ruling – rather than any eventual ruling obtained by the taxpayer - it is at best unclear whether there would have been an overestimate on which section 213 could operate.

65. After the hearing I looked at *Broomfield* [2018] EWHC 1966 (Admin) and noted that it was said by counsel for HMRC at [57]:

> "The penalty would be 50% of the value of that advantage and if the taxpayer persisted in appealing on the basis that he was exempt from income tax, that penalty would be payable if the taxpayer lost (and returnable with interest if the taxpayer won)."

66. There was no explanation of why this was the case and the judge said no more about it.

67. If it were right that there is no provision for the repayment of a penalty when the taxpayer wins his argument, the only way I can see for a taxpayer to avoid a penalty *for being right* is to appeal the penalty (having paid it) and ask that the hearing of the appeal be deferred until after the (final) substantive hearing, and then to argue in the resumed appeal against the penalty that because he won the substantive case it was reasonable not to take the corrective action. If that were the case it would to my mind indicate that some latitude should be afforded to the taxpayer in relation to decisions as to whether to set aside a penalty or to reduce it. I have proceeded however on the basis that HMRC would be obliged to repay the penalty in the circumstances I have hypothesised.

68. It seems to me that there can be circumstances in which it would be reasonable to pursue an appeal in the face of a relevant ruling. That could be the case for example where it was clear that the relevant ruling had been overtaken by another case decided by a higher court or tribunal or had relied crucially on an authority which had subsequently been overruled by a higher court. The essence of Mr Barlow's appeal against the decision to levy a penalty is that his inaction was reasonable because he was advised that *Huitson* would be overturned on appeal.

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.

71. In *Corrado* [2019]UKFTT 275 (TC) Judge Redston cited with approval the passage in *Onillon,* where the FTT had said at [173]:

> "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".

72. It seems to me that if a taxpayer is not reasonably well informed and does not take steps to make himself such, his action or inaction may not be reasonable.

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. But if he has done no homework and does not carefully consider the advice given and in the light of any of HMRC's statements it seems to me that not taking corrective action may not be a reasonable response.

74. I had little evidence of Mr Barlow's experience and expertise, but the emails he sent seemed to me to be those of a literate thinking man who was capable of understanding the nature of the disputes with HMRC if he chose to do so.

75. I had no evidence as to how Mr Barlow had chosen Montpelier to advise him – as to whether or not he had enquired into their reputation, qualifications, regulation or tax expertise. Montpelier was a company which appeared to conduct its business in the Isle of Man, and to my mind that would have sparked in the mind of a reasonable taxpayer some curiosity as to its UK tax expertise.

76. There was no evidence before me as to how Montpelier explained the tax scheme to Mr Barlow: what they had initially said about the likelihood of success, whether they had given him a reasoned opinion or the opinion of external counsel.

77. The absence of evidence on these matters means, in an appeal in which the evidential burden of proof is on the Appellant, that I am unable to conclude that, merely because Mr Barlow was advised by Montpelier, his actions were reasonable.

78. I agree with Miss Arnold that the discrepancy between the descriptions of the *Huitson* litigation in HMRC's letters and that in Montpelier's letters would have provoked in the mind of a reasonable person of Mr Barlow's apparent ability a need for an explanation – and a concern that without an explanation reasonable doubts would arise in relation to Montpelier's expertise or abilities.

79. I also agree with Miss Arnold that Mr Barlow's email of 5 December 2017 – written some months after his letter of 21 April 2017 – indicates a period in which he had not sought or obtained a clear grasp of the actions being taken or their effect. A reasonable person faced with fairly substantial penalties would in my opinion have investigated further – and I take Mr Barlow's failure to do so as some evidence that the nature of his relationship with Montpelier involved reliance without audit.

80. I accept that when the APNs were issued Montpelier's draft letters of representation seemed have the effect that they were withdrawn (although I did not see the representation letters and so could not be sure that the representations in them were the cause for the withdrawal) and that this gave Mr Barlow some reasonable comfort in Montpelier's expertise, as did the later issue with NICs and the Limitation provisions, but these matters alone were not enough in my view to be able to say that it was reasonable to rely on Montpelier's advice that he should succeed in the substantive appeal given the doubts raised by the other matters.

81. Overall I conclude that it was not shown in all the circumstances that Mr Barlow acted reasonably in acting on the basis that he had a good or reasonable case that the scheme worked.

B. Reduction in the penalty

(i) the parties' arguments

82. Miss Arnold says that HMRC's policy of allocating the available reduction between the various categories and applying an amortising reduction to the allocation to element (b) (taking corrective action) ensures equality of treatment among taxpayers. She says that the allocation of 50% (in an Enquiry case) and 70% (in an Appeal case) to category (b) reflects the object of the legislation in the importance it attaches to taking such action; and in particular that the amortisation down to 1% after 52 weeks delay reflected the legislative intention to limit the time spent on appeals but left some, albeit small, incentive for a late conversion to HMRC's view.

83. She says that, whereas in an Enquiry case, such as 2005, each of the headings in s210(3) may be relevant – justifying an allocation of 10% of the possible reduction to each of (c) and (d) - in an Appeal case those headings referred to impossibilities or things which were rarely relevant to appeals and HMRC's policy of a weighting of 70% of the available reduction to (b) was warranted.

84. For 2005, 2006, 2007 and 2008 HMRC's penalty reduction calculation allowed a reduction in respect of heading (a) of 100% of the eligible reduction they allocated to that heading. I took this to be acceptance that Mr Barlow had provided reasonable assistance to HMRC in quantifying the advantage and that the quality of that

assistance had been timeous and of a satisfactory nature and extent. Likewise the reduction for 2006, 2007 and 2008 of 100% of the deduction HMRC allocated to heading (d), providing information, indicated that HMRC accepted that the provision of information had been satisfactory in time, nature and extent. Likewise in relation to the deductions under heading (c) and (e) in relation to 2005.

85. Mr Taylor says (i) that HMRC's approach did not consider each taxpayer on his merits, (ii) that it overweighted corrective action: what was relevant was the co-operation of the taxpayer – its quality; the 10% minimum was there to reflect the fact that no response was made in the specified time, the balance rested on the quality of co-operation, (iii) in Mr Barlow's case he was, in all respects other than the taking of prompt corrective action, co-operative: HMRC accepted that he had provided reasonable assistance within (a) and that since they already had the relevant information there was nothing he could do within (c) to (e): his actions or inactions did not put HMRC to any extra work.

86. Mr Taylor relied on *Benton* in which the judge had split the available reduction of 40% of the additional tax equally (20%:20%) between (x) information and help giving co-operation and (y) corrective action. He says that in view of HMRC's acceptance of Mr Barlow's reasonable assistance within element (a) the full 20% should be given for information giving. In relation to corrective action, only the time taken was an issue; there were good reasons for that delay and it put HMRC to no extra work.

(ii) Reduction - Discussion

87. Section 210 provides that:

> "(1) Where -
>
> …(c) [the taxpayer] has co-operated" with HMRC,
>
> HMRC may reduce the amount of the penalty to reflect the quality of that cooperation"

88. There is no time constraint in these words. They do not require consideration to be focussed only on the period after an FN has been issued or only on the period ending with the specified date for corrective action. To my mind they enable consideration to be given to the whole of the taxpayer's conduct in relation to dealings relating to the denied advantage.

> "(2) In relation to co-operation, "quality" includes timing, nature and extent.
>
> "(3) [A taxpayer] has co-operated with HMRC only if [he] 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 enbling HMRC to enter into an agreement with [the taxpayer] for the purpose of counteracting the denied advantage;

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

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

89. Whilst the words "*that* cooperation" at the end of subsection (1) refer back to para (c) of that subsection and so refer to the actual co-operation of the taxpayer with HMRC, the word "extent" in ss(2) indicates that what a taxpayer could have done and did or did not do is relevant in assessing the quality of cooperation.

90. At the hearing I confessed to some difficulty with ss(3)(c). It speaks of corrective action being taken by HMRC. But corrective action is defined by section 208 in terms relating solely to actions of the taxpayer (see s 208(4)): it is only the taxpayer who can amend a return for the purposes of section 208(5)(a) or take steps to enter into an agreement within (5)(b). To give meaning to the statutory words, I construe them as providing information which enables the process envisaged in this Chapter of the Act

91. There is overlap between the five subparagraphs of subsection (3): allowing access to records within (e) may constitute reasonable assistance in quantifying the advantage within (a); providing reasonable assistance in quantifying the advantage within (a) may provide HMRC with information enabling corrective action within (c) or information enabling HMRC to enter into an agreement within (d); providing HMRC with information enabling an agreement within (c) permits and must be part of an agreement with HMRC to counteract the advantage within (b).

92. I also take into consideration that there may be cases where HMRC already have, from other sources, all the information they need for, or to propose, agreement or counteraction and so have no need of the taxpayer's help in relation to the provision of information. It cannot in those circumstances have been intended that as a result the reduction in the penalty should be materially limited.

93. Those overlaps and that possibility indicate that the object of the legislation is not to measure cooperation, or to require it to be measured, by formally allocating the available reduction between the different headings of subsection (3), although those categories may be used as aids to the measurement of the "extent" of any actual cooperation as part of the assessment under ss(2) of the quality of that cooperation. On that basis a taxpayer who freely and promptly provides access and information, but who does not counteract the advantage may not be entitled to a full reduction for cooperation.

94. It seems to me that Miss Arnold is right when she says that an important part of cooperation is taking corrective action: to prompt such action is the purpose of the Follower Notice provisions. The timing, nature and extent of a person's cooperation should therefore be assessed inter alia by reference to whether or not he has taken such action, and if he has, when and how took it. And, on the basis that if such action is not taken and the taxpayer's appeal is eventually successful the penalty will be repaid, the potential penalty for not taking such action or taking it late should be a material part of the whole penalty.

95. But cooperation 'with HMRC' has other important elements. It is important that HMRC's job is made easier and progress faster if the taxpayer willingly, fully, promptly and helpfully provides information and access to records to HMRC. This serves the proper aim of ensuring that the right amount of tax is paid.

96. In *David Benton v HMRC* [2018] UKFTT 593 (TC) at [196], Judge Redston concluded that s210(3) set out two categories of co-operation:

> "(1) providing reasonable assistance to HMRC in quantifying the tax advantage (factor (a)); and
>
> (2) counteracting the denied advantage, either by
>
> > (b) amending the relevant SA return(s);
> >
> > (c) providing the information to HMRC so they can take the relevant corrective action; or
> >
> > (d) by coming to an agreement with HMRC to give up the denied advantage.
> >
> > And where the corrective action is being taken by HMRC, the taxpayer will also "co-operate" if he "allows HMRC to access the relevant tax records to ensure that full reversal of the denied advantage" (factor (e))."

97. In broad terms: (1) information provision and (2) correction.

98. On this basis she concluded that it seemed "reasonable to give 20% for each category, and apply mitigation in the light of the "timing, nature and extent" of a person's co-operation in relation to each element." [212].

99. (Judge Redston went on [215] to allow the appellant in that case "a 20% reduction for cooperation and nil for corrective action" As a result she said that the penalty was to reduced from 50% of the tax to 30% of the tax. Miss Arnold criticises this passage: she says that in "allocating 20% to item (a) Judge Redston did not reduce the penalty to 30% but to 42%, being a reduction of just 20% of the possible range." I think that this criticism is misplaced: I read "a 20% reduction" in [215], not as meaning a reduction of 20% of the possible reduction of 40% of the tax (that is to say of 8% of the tax), but as meaning 20% of the tax: the judge was allocating the maximum reduction of 40% of the tax between the two categories of cooperation she had identified at [196], giving a maximum of 20% of the tax to each category. At [215]

she was saying that the maximum 20% of the tax should be given under her category (1) at [196].)

100.I do not consider that cooperation consisting of taking corrective action is generally clearly more important to the determination of the correct tax liability than that which consists in the provision of information, assistance and records. For that reason I would start any assessment of each of the elements of cooperation – timing, nature and extent - with the 50:50 split of the reduction which may be attributed to that element as suggested by Judge Redston.

101.In setting the penalty reduction I do not consider that the reasons for a taxpayer's behaviour should generally play any part: the reduction is determined by the quality of the cooperation with HMRC –measuring its nature timing and extent – and generally that will consist of an enquiry into what could have been done and was or was not done rather than *why* something was, or was not, done.

102.Mr Barlow delayed for 412 days before he took corrective action. That was a significant delay. Little if any reduction in the penalty by reference to the timing aspect of his eventual corrective action is warranted; I do not consider that the fact that he delayed because he had been advised that the scheme worked is relevant.

103.But, by submitting HMRC's standard forms clearly completed and without any deviation, he was fully cooperative with HMRC in relation the *nature and extent* of his action.

104.HMRC gave Mr Barlow the full amount of their allocation of the reduction in relation to the elements of cooperation they considered applicable – thus they accepted cooperation within the possible elements of Judge Redston's category (1). But Miss Arnold told me that little information was sought from Mr Barlow: there was no need to access his records and the scheme documents had been obtained from another source. Thus the extent and nature of the cooperation he could give was limited. That does not seem to me in this case to be a reason for reducing the reduction in the penalty.

105.I see no reason to distinguish between 2005 and the other years. In each case the issue is what cooperation was given and what its quality was. The fact that an appeal had been made for the later years did not materially affect the timing, nature or extent of cooperation: I do not think that a taxpayer should in effect be penalised for exercising a statutory right.

106.The quality of Mr Barlow's cooperation must be judged by reference to timing, nature and extent. Each element is broadly equally important. I determine the reduction to be given as follows:

> In respect of the timing of Mr Barlow's cooperation: I allocate nothing in relation to the taking of corrective action (category (2)) and 5% of the tax in relation to the category (1) matters;

In respect of the nature of Mr Barlow's cooperation I allocate: a reduction of 5% of the tax in relation to the taking of corrective action and 5% in relation to the category (1) matters.

In relation to the extent of Mr Barlow's cooperation I allocate 5% of the tax to the taking of corrective action (since it was taken in full) and 5% in relation to the giving of information.

107. Thus the reduction to be applied is 25% of the tax.

Conclusion

108. I uphold the charging of the penalties but reduce each of the penalties to 25% of the denied advantage.

Rights of Appeal

109. 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.

CHARLES HELLIER

TRIBUNAL JUDGE
RELEASE DATE: 30 NOVEMBER 2020