[2021] UKUT 81 (TCC)

Appeal number: UT/2020/0050 (V)

STAMP DUTY LAND TAX – follower notice – whether "reasonable in all the circumstances" not to take corrective action – whether actions after the deadline are relevant – amount of penalty – appeal allowed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Appellants**

-and-

COMTEK NETWORK SYSTEMS (UK) LIMITED — **Respondent**

TRIBUNAL: JUDGE JONATHAN RICHARDS
JUDGE ASHLEY GREENBANK

Sitting in public by way of remote video hearing treated as taking place at The Royal Courts of Justice, Rolls Building, Fetter Lane, London on 17 March 2021

Sarah Black, instructed by the General Counsel and Solicitor for Her Majesty's Revenue & Customs for the Appellants

Christine Sheibani, director of the Respondent, for the Respondent

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DECISION

1. Part 4 of the Finance Act 2014 ("FA 2014") permits HMRC to issue a taxpayer a "follower notice" where they consider that there is a final judicial ruling in another case that is determinative of a dispute between HMRC and the taxpayer as to the availability of a particular tax advantage. Where a follower notice is issued, the stakes for the taxpayer become higher because, if the taxpayer fails to take the "necessary corrective action" (broadly, by telling HMRC that they have given up their claim to the tax advantage), the taxpayer can be charged a penalty of up to 50% of the tax in dispute. However, by s214(3)(d) of FA 2014, the taxpayer has a defence to the penalty if it can establish that it was "reasonable in all the circumstances" not to take the necessary corrective action.

2. The Respondent to this appeal (the "Company") entered into an avoidance scheme (the "Scheme") intended to save some £22,000 of stamp duty land tax ("SDLT"). It received a follower notice and did not take the "necessary corrective action" within the relevant timescale and HMRC imposed a penalty. The First-tier Tribunal (Tax Chamber) (the "FTT") concluded, in a decision released on 16 January 2020 (the "Decision") that it was reasonable in all the circumstances for the Company not to take the necessary corrective action and so allowed the Company's appeal against that penalty. HMRC now appeal to this Tribunal against the Decision.

Legislation

3. Section 204 of FA 2014 permits follower notices to be issued either (i) (under s204(2)(a)) while an HMRC enquiry into a return or claim is in progress or (ii) (under s204(2)(b)) after a taxpayer has made or notified an appeal, but the appeal has not been determined or withdrawn. These proceedings concern a follower notice issued under s204(2)(b), after the point at which the Company had made an appeal.

4. Section 208 of FA 2014 deals with liability to a penalty as follows:

> **208 Penalty if corrective action not taken in response to follower notice**
>
> (1) This section applies where a follower notice is given to P (and not withdrawn).
>
> (2) P is liable to pay a penalty if the necessary corrective action is not taken in respect of the denied advantage (if any) before the specified time.
>
> …
>
> (4) The necessary corrective action is taken in respect of the denied advantage if (and only if) P takes the steps set out in subsections (5) and (6).
>
> (5) The first step is that—

(a) in the case of a follower notice given by virtue of section 204(2)(a), P amends a return or claim to counteract the denied advantage;

(b) in the case of a follower notice given by virtue of section 204(2)(b), P takes all necessary action to enter into an agreement with HMRC (in writing) for the purpose of relinquishing the denied advantage.

(6) The second step is that P notifies HMRC—

(a) that P has taken the first step, and

(b) of the denied advantage and (where different) the additional amount which has or will become due and payable in respect of tax by reason of the first step being taken.

5. Thus, ignoring any complexities associated with the definition of the "denied advantage" and the "specified time", the Company could be penalised under s208 if it failed to meet the obligations set out in both s208(5) and s208(6). Since it had received a follower notice after making an appeal (so that s204(2)(b) applied, rather than s204(2)(a)), the Company needed to take the steps necessary to enter into a written agreement for the purpose of "relinquishing" the denied advantage and notify HMRC in accordance with s208(6).

6. Section 209 fixes the amount of the penalty. In the context of this appeal, the amount specified is £11,000, being 50% of the SDLT that the Scheme sought to save.

7. Section 208 deals only with liability to a penalty, namely the preconditions that must be satisfied before HMRC are entitled to impose a penalty. Section 210 of FA 2014 gives HMRC the following power to reduce a penalty below the amount specified by s209 even where the conditions as to liability are satisfied:

210 Reduction of a section 208 penalty for co-operation

(1) Where—

(a) P is liable to pay a penalty under section 208 of the amount specified in section 209(1),

(b) the penalty has not yet been assessed, and

(c) P has co-operated with HMRC,

HMRC may reduce the amount of that penalty to reflect the quality of that cooperation.

(2) In relation to co-operation, "quality" includes timing, nature and extent.

(3) 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.
>
> (4) But nothing in this section permits HMRC to reduce a penalty to less than 10% of the value of the denied advantage.

8. Accordingly, once the conditions for liability are established (i.e. where a taxpayer has failed to take "corrective action" by the due date), "co-operation" can still reduce a penalty. However, "co-operation" has, by s210(3), a limited and specific meaning and not everything that might, in ordinary usage, be referred to as "co-operation" is to count. By s210(3)(b) "counteraction" of the tax advantage in dispute, even if effected after the deadline specified by s208, does count provided that it takes place before the penalty is assessed. The term "counteraction" is not defined and we will consider its meaning later in this decision.

9. By s214 of FA 2014, a taxpayer has a right of appeal against HMRC's decisions to impose penalties under s208. That right of appeal is in the following terms:

> **214 Appeal against a section 208 penalty**
>
> (1) P may appeal against a decision of HMRC that a penalty is payable by P under section 208.
>
> (2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P under section 208.
>
> (3) The grounds on which an appeal under subsection (1) may be made include in particular—
>
> …
>
> (d) that it was reasonable in all the circumstances for P not to have taken the necessary corrective action (see section 208(4)) in respect of the denied advantage.
>
> …
>
> (8) On an appeal under subsection (1), the tribunal may affirm or cancel HMRC's decision.
>
> (9) On an appeal under subsection (2), the tribunal may—
>
> (a) affirm HMRC's decision, or
>
> (b) substitute for HMRC's decision another decision that HMRC had power to make.

10. Therefore, the Company had two distinct bases on which it could challenge HMRC's decision before the FTT:

> (1) First it could exercise its right under s214(1). That is not an appeal against the amount of the penalty but rather as to whether the conditions

necessary to impose <u>any</u> penalty are met. The concept of it being "reasonable in all the circumstances" not to take the necessary corrective action therefore acts as a defence to the imposition of any penalty. By s214(8) the FTT can deal with an appeal under s214(1) only by affirming or cancelling HMRC's decision.

(2) The right of appeal under s214(2) is against HMRC's decision as to the amount of the penalty. The FTT's powers on such an appeal are, by s214(9), either to affirm HMRC's decision or to substitute for it another decision that HMRC had power to make. It follows that the FTT can, on an appeal under s214(2), only reduce a penalty by reference to the provisions of s210. In particular, therefore, the FTT only has power to reduce a penalty to reflect the nature and quality of the Company's "co-operation" (bearing in mind the limited and specific definition of that term used in s210) and it has no power to reduce the penalty below 10%.

The Decision and the grounds of appeal against it

Facts

11. There is no appeal against the FTT's findings of primary fact. We therefore set out the background in summary form with references to numbers in square brackets being to paragraphs of the Decision unless we say otherwise. Our description of the facts will also draw on new evidence, consisting of a transcript of a telephone conversation between HMRC and Bethan Langford, the Company's then company secretary, on 22 January 2018. HMRC made an application for that new evidence to be admitted which we allowed since the Company did not oppose it.

12. The Company is under the control of Mr and Mrs Sheibani who are also its directors. In 2011, it entered into the Scheme that was designed to ensure that the purchase of a property would not be subject to any material amount of stamp duty land tax ("SDLT"). The details of the Scheme are not material to this appeal ([5] to [12]).

13. HMRC enquired into the Scheme, formed the view that it was ineffective and, on 8 July 2015 issued a determination under paragraph 25 of Schedule 10 to the Finance Act 2003 to the effect that the Company was liable to £22,200 of SDLT. The Company appealed against that determination on 7 August 2015. Ms Black's skeleton argument indicates that HMRC have not, to date, issued any "view of the matter", partly because they were waiting for resolution of this dispute and partly because of a general pause on compliance work during the COVID-19 epidemic. The appeal has not been notified to the FTT for determination.

14. On 1 February 2017, the FTT determined the appeal of in *Crest Nicholson (Waiscott) and others v HMRC* [2017] UKFTT 0136 (TC). The *Crest Nicholson* appeal concerned avoidance arrangements similar to the Scheme and the FTT gave judgment in favour of HMRC. No appeal was made to the Upper Tribunal against that judgment and HMRC concluded that it was a "final" judicial ruling, for the purposes of s205 of FA 2004, that entitled them to serve a follower notice on the Company.

15. On 29 September 2017, after sending a precursor letter, HMRC sent the Company both (i) a follower notice and (ii) an accelerated payment notice ("APN"). The follower notice invited the Company to take the requisite corrective action by 3 January 2018 and warned of penalty consequences should it fail to do so. The APN required the Company to make advance payment of the £22,000 SDLT in dispute by 3 January 2018.

16. HMRC spoke to Ms Langford on 13 October 2017. HMRC's note of that call indicates that Ms Langford said that she had received the notices and would take advice on them. HMRC also wrote a further letter, dated 21 November 2017, warning the Company that if it did not take corrective action by 3 January 2018 in response to the follower notice, it would be liable to pay a penalty. HMRC's note also indicates that HMRC stressed that the APN and the follower notice were distinct documents that required distinct responses: the APN requiring advance payment and the follower notice requiring corrective action. The Company did not respond to that letter and, when HMRC telephoned the Company on 13 December 2017, no-one was available to speak to them and HMRC did not follow up that phone call ([20] to [22]).

17. The Company did not take corrective action by 3 January 2018 ([45]). At [46] to [49], the FTT made findings as to the reasons why the deadline was missed. It did not believe the explanation that Mr and Mrs Sheibani advanced to the effect that Ms Langford had failed to tell them of the deadline. It concluded that Mr and Mrs Sheibani were aware throughout of both the follower notice and correspondence relating to it and were giving instructions as to how it should be dealt with. It refused to accept Mr and Mrs Sheibani's "vague suggestions that Ms Langford had been suffering from some personal difficulties which had affected her work performance" ([48]). At [49] it concluded:

> I believe and so find that by far the likeliest explanation for the non-completion of the form by 3 January 2018 is that Mr and Mrs Sheibani decided to ignore it (or, if not to ignore it, decided that it should not be filled in). That also happens to be entirely consistent with their position that the tax was not due.

18. On 15 January 2018, HMRC wrote to the Company stating that it was liable to a penalty of 50%.

19. On 22 January 2018, there was a telephone conversation between Bethan Langford of the Company and HMRC during which it was agreed that the Company would pay £22,000 in two instalments of £11,000 to be paid on 15 February 2018 and 15 March 2018. HMRC did not produce any record of that phone call to the FTT, although, as we have noted, in the absence of any objection from the Company, we gave HMRC permission to put the transcript in evidence in the Upper Tribunal proceedings.

20. HMRC sent the Company a letter on 23 January 2018 to record what was agreed during that call. The FTT concluded ([53], [54] and [67]) that Mr and Mrs Sheibani genuinely believed that, by entering into the agreement to pay £22,000, all outstanding issues arising out of the Scheme, including the follower notice, the APN and the threatened 50% penalty had been resolved. The FTT considered that belief to be reasonable having regard to the text of HMRC's letter of 23 January 2018. Not having

seen the transcript of the call of 22 January, the FTT was naturally not in a position to consider whether that call altered its conclusion that the belief was reasonable.

21. The Company paid both instalments of £11,000 on time but, on 1 May 2018, HMRC wrote to say that they were proposing to make a penalty assessment because of the Company's failure to take the necessary corrective action in time. On 14 June 2018, HMRC followed this up with an actual notice of penalty assessment, imposing a penalty equal to 50% of the SDLT that had been in dispute. Some correspondence ensued with the Company arguing that no penalty should be paid because all outstanding disputes had been settled with the payment of the two instalments of £11,000. HMRC performed a review of their decision to impose the penalty the outcome of which was communicated by letter dated 2 November 2018 and left the penalty unchanged.

The Decision

22. We have already highlighted at paragraph 17 above, the FTT's findings that (i) the Company did not take corrective action by the deadline of 3 January 2018 and (ii) the reason why it did not do so.

23. At [51], it considered an argument that HMRC were at fault in not following up on their call of 13 December 2017. It said that it found that argument "more challenging" and speculated that, if there had been a conversation in mid-December 2017, the Company might either have made representations against the follower notice (which would have resulted in the deadline of 3 January 2018 being extended), or would have "grasped the nettle", as the FTT put it, earlier than it did. However, the FTT seems to have attached little significance to the argument that HMRC should have followed up on this telephone call saying, at [52] that:

> 52. It seems to me that the only ground of appeal which really merits detailed exploration is the one in relation to the alleged agreement to pay and whether this is a relevant circumstance.

24. Although the FTT did not quote any statutory provisions, it clearly approached the Company's arguments as involving an appeal under both s214(1) of FA 2014, against HMRC's decision that the Company was liable to a penalty and under s214(2), against HMRC's decision as to the amount of the penalty.

25. The question of whether it was "reasonable in all the circumstances" for the Company not to take corrective action was relevant to the appeal under s214(1). The FTT directed itself ([64]) by reference to a decision of the FTT in *David Benton and others v HMRC* [2018] UKFTT 593 (TC) that this involved different questions from those that arise when, for example, a taxpayer is late filing a return and the statute asks whether there was a "reasonable excuse" for the lateness. In *Benton*, the FTT concluded that the defence of "reasonable excuse" invited the FTT first to identify the particular "excuse" put forward by a taxpayer and then to consider whether that excuse was reasonable. By contrast, the FTT in *Benton* considered that the question of whether it was "reasonable in all the circumstances" not to take corrective action required a more wide-ranging examination of the relevant circumstances which it expressed as follows:

> The task of the FTT when considering FN penalties is similar, but not identical [to the question of "reasonable excuse"]. It is to decide whether it was "reasonable in all the circumstances" for a person to fail to take corrective action. This has two elements:
>
> (1) the FTT must establish, not the facts which relate to a particular excuse put forward by an appellant, but "all the circumstances" relevant to his failure to take corrective action. Ms Nathan called these facts "the building blocks for the edifice"; and
>
> (2) the FTT must then decide whether, in all those circumstances, the taxpayer's behaviour was reasonable. The approach required here is the same as when assessing reasonable excuse, namely to "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", see *Perrin* at [81(3)].

26. The FTT then expressed its conclusions on the issue of "reasonable in all the circumstances" as follows:

> 66. It is clear that something has gone badly awry here with HMRC's communication in relation to the APN and the FN. Letters coming from different parts of HMRC are inconsistent. The clearest example of that is HMRC's letter demanding payment of the SDLT even though an agreement to pay (on any view, in relation to SDLT) had already been reached, and honoured.
>
> 67. It is also clear to me, on the basis of the information and materials before me, that the Appellant was genuinely labouring under the belief that the matter had been concluded by way of the agreement to pay, including any penalty. It seems to me that belief was reasonable, and credible. That belief was already fully formed in January 2018: several months before the penalty was actually issued. Albeit not without hesitation, I consider that this is an unusual case in which, just about, the Appellants have succeeded in persuading me, on balance, and looking at all the circumstances in the round, that their non-compliance was reasonable.

27. Therefore, the FTT exercised its power under s214(1) to cancel the decision to issue any penalty. That was sufficient to determine the appeal in the Company's favour, but the FTT went on to consider the appeal under s214(2) against the amount of the penalty. We set out its conclusions in their entirety:

> 69. I have no jurisdiction at all in relation to the starting point of 50%. That is the position laid down by Parliament.
>
> 70. But, and as Judge Mosedale remarked in *Hutchinson* (at Para [113]):
>
> > "I accept that 50% of the tax is a harsh penalty where the offending does not involve dishonest behaviour. The offending is to persist (without good reason) in the position that the taxpayer's tax liability is lower than a final judicial ruling in a similar case has indicated that it is. The prejudice to HMRC that it is put to the trouble and expense of defending the appeal

> which, because there is no good reason for the persistence, HMRC considers that it should not have been."
>
> 71. I agree with that succinct summary of the purpose of the 50% penalty.
>
> 72. However, I do have jurisdiction in relation to the deductions applied for disclosure ('telling', 'helping', 'giving'). Had I upheld the penalty, I would nonetheless have applied a modest deduction - from 50% to 40% - to the penalty. The mischief outlined by Judge Mosedale did not happen, in a fully-fledged way, here. The Appellant did adopt a stance which, in my view, was initially somewhat obstructive and uncooperative, but that did change. Mr and Mrs Sheibani did eventually act sensibly, engage with HMRC, and pay the sum in dispute, as opposed (for example) to seeking to advance an appeal against the assessment of the underlying liability - i.e., an appeal seeking to persuade the Tribunal that the arrangements which they had engaged in were materially distinguishable from those which the Tribunal had already disapproved of in *Crest*. No matter how hopeless such an appeal would have been, it is tolerably clear that such conduct is capable of attracting a penalty at the top of the range.
>
> 73. Documents were provided on 25 October 2012, and I was not told of any deficiency in what was given. I consider that a 10% reduction would have been consistent with HMRC's own guidance.

The grounds of appeal

28. HMRC appeal against the Decision on three grounds.

29. Grounds 1 and 2 can be taken together and involve a challenge to the FTT's decision to set aside the penalty altogether on the basis that it was "reasonable in all the circumstances" for the Company not to take corrective action. In essence, HMRC make three points challenging that aspect of the Decision:

> (1) As a matter of principle, the FTT was not entitled to take into account events and correspondence taking place after 3 January 2018, the deadline for the Company to take corrective action, in support of its conclusion that it was "reasonable in all the circumstances" for the Company not to take such action.
>
> (2) Even if the FTT was entitled to look at events or correspondence after 3 January 2018, the FTT had found, at [49], that the Company had decided, either to ignore the follower notice, or if not to ignore it, not to fill in the accompanying form to take corrective action. Given that finding, the correspondence and events after 3 January 2018 were not sufficient to enable the Company to discharge its burden of proof that it was "reasonable in all the circumstances" not to take corrective action.
>
> (3) The FTT's reasoning was vitiated by a reliance on a supposition, not supported by evidence, as to the actions the Company might have taken if HMRC had followed up on the call of 13 December 2017.

30. Ground 3 is concerned with the FTT's approach to reduction of the penalty. The Company was not entitled to credit for the matters the FTT gave credit as they fell outside the meaning of the term "co-operation" in s210 of FA 2014. Moreover, the FTT lost sight of the fact that the Company did not formally withdraw its appeal against HMRC's determination of the amount of SDLT due and indeed even as at the date of the Upper Tribunal proceedings, that appeal remains open. HMRC acknowledge that, under its new policy as to the application of s210, the Company was entitled to a reduction of the applicable penalty percentage from 50% to 42% and ask for the FTT's decision to be remade on that basis. However, they argue that the FTT applied the wrong principles when deciding to allow the Company a greater reduction.

Grounds 1 and 2 – Discussion

31. We will start with HMRC's narrower proposition set out at paragraph 29(2). The FTT made a clear finding, not challenged by way of Respondent's notice in this appeal, that the reason corrective action was not taken by 3 January 2018 was because Mr and Mrs Sheibani had decided to ignore the request in the follower notice to fill in a form to take corrective action or, if not to ignore it, to decide that the form should not be filled in. Ignoring HMRC's request is self-evidently an unreasonable course of action. Deciding that the form should not be filled in by the deadline was capable of being reasonable depending on the quality of explanation the Company gave. For example, the Company could have sought to establish reasonable grounds for believing that its SDLT avoidance scheme would be effective even if that considered in *Crest Nicholson* was not or that *Crest Nicholson* was wrongly decided. However, the Company advanced no such case and, accordingly the only conclusion realistically available to the FTT was that the 3 January 2018 deadline was missed owing to unreasonable conduct by the Company.

32. The FTT considered it was entitled to look beyond the Company's unreasonable conduct because the applicable test was not one of "reasonable excuse". There has been no appeal against this specific aspect of the FTT's self-direction as to the meaning of the "reasonable in all the circumstances" test, as distinct from the broader proposition for which HMRC argue summarised at paragraph 29(1) above. We will, therefore, not express any conclusion on this aspect of the FTT's detailed reasoning. We would, however, observe that the phrase "reasonable in all the circumstances" involves the application of a straightforward test. We do not consider that straightforward test needs elucidation by reference to the wording of different tests applied in different contexts. The concept of a "reasonable excuse" often appears as a defence to a penalty where a taxpayer has failed to meet a <u>mandatory</u> obligation, such as filing a tax return by a specific date. The use of different wording in s 214(3)(d) is explained by the fact that the penalty under s208 is not imposed for breach of any mandatory requirement: taxpayers are lawfully entitled not to take corrective action in response to a follower notice.

33. It follows, in our judgment, that the FTT simply had to consider whether it was "reasonable in all the circumstances" for the 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 "co-operation" 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.

34. Examined in that way, there was only one possible answer. Given the FTT's findings, it was not "reasonable in all the circumstances" for the Company to take no corrective action. In this case at least, the Company's actions after the deadline was missed were of potential relevance to the amount of the penalty that should be charged but did not entitle it to complete exemption from that penalty. HMRC's appeal on Grounds 1 and 2 is accordingly allowed.

35. In the light of that conclusion, we do not need to decide whether HMRC's broader proposition, outlined at paragraph 29(1), is correct and we will not do so. We are conscious that the Company was not represented by a professional advocate or tax practitioner and, understandably, Mrs Sheibani focused her submissions on the Company's circumstances rather than broad statements of principle. We will say only that we consider that it may be possible, in some limited circumstances, for events taking place after the deadline for taking corrective action to have some bearing on the question whether it was "reasonable in all the circumstances" for a taxpayer not to take that action. The only example we have been able to think of, though it may be that with the benefit of full legal submissions from the Company we might have found more, is that of a taxpayer who, having received a follower notice, decides to continue to contest the underlying appeal considering that the "final judicial ruling" on which HMRC rely was either wrongly decided, or not determinative of the taxpayer's appeal. Such a taxpayer could be assessed to a penalty as soon as the deadline is missed. The question whether it was "reasonable in all the circumstances" for the taxpayer to continue to

contest the appeal could, in our judgment, be informed by an analysis of how that appeal ultimately fares. For example, if it is struck out as having no prospect of success, that might suggest that it was not "reasonable in all the circumstances" not to take corrective action; the conclusion might be otherwise if the taxpayer is ultimately successful.

36. HMRC disagree with this reasoning, arguing that the penalty under s208 is a percentage of the "denied advantage" (defined in s208(3)) and that if the taxpayer's appeal is ultimately successful, the denied advantage is nil so that a successful taxpayer is, as of right and independent of any considerations of whether action was "reasonable in all the circumstances", not liable to a penalty. We will not express a view on whether that analysis is correct, but we would note that even if it is, it could apply only to a taxpayer who enjoys complete success. In our judgment, even if HMRC's analysis is correct, there may remain scope for an argument that a taxpayer who continues to contest an appeal and ultimately obtains 80%, say, of a claimed tax advantage should not be liable to any penalty on the basis that its action was "reasonable in all the circumstances".

Ground 3 – Discussion

37. We agree with HMRC that the FTT made an error of law in its discussion at [72]. It approached its discretion as to the amount of penalty that should be imposed as entitling it to consider the Company's activities of "telling", "helping" and "giving", but did not note that the FTT was able only to give credit for "co-operation" as specifically and restrictively defined in s210(3). Accordingly, it applied the wrong approach when deciding how to exercise its power under s214(9).

Remaking the Decision

38. The Decision is vitiated by errors of law. We will, accordingly, exercise our power under section 12(2) of the Tribunals, Courts and Enforcement Act 2007 to set aside the Decision. We asked the parties whether, if we found the errors of law that HMRC alleged in their grounds of appeal, we should remit the Decision back to the FTT or seek to remake it. HMRC positively asked us to exercise our powers to remake the Decision, arguing that we had all necessary factual findings to do so and that this would be a proportionate course in the light of the relatively modest amount of the penalty in issue. The Company made no submissions on this issue, although Mrs Sheibani did ask us, if we concluded that some penalty was payable as a result of HMRC succeeding on their Grounds 1 and 2, to impose a penalty of the least possible amount, which we took as an indication that the Company too wanted us to remake the Decision.

39. We have decided that we will remake the Decision as we agree with HMRC that it is the proportionate course of action. Since our conclusion on HMRC's Grounds 1 and 2 means that some penalty is payable, our task in remaking the Decision is to decide:

> (1) what, if any "co-operation" the Company provided falling within the specific and restricted definition set out in s210(3);
>
> (2) the quality of that co-operation, to include its timing, nature and extent; and

(3) what penalty, falling between 10% and 50% of the value of the denied advantage, should be imposed to reflect the quality of the Company's co-operation.

40. As regards the first question, HMRC's position is that the only co-operation that the Company gave was that falling within s210(3)(a) namely providing HMRC with reasonable assistance in quantifying the tax advantage. They evidently regard the quality of that co-operation as high since they are prepared to give the fullest possible credit which their internal policy permits, namely 20% of the maximum mitigation available. They argue that no other co-operation was given, in particular, there was no "counteraction" of the denied advantage falling within s210(3)(b). Therefore, HMRC argue for a penalty equal to 42% of the denied advantage[1].

41. Since HMRC accept that there was co-operation falling within s210(3)(a), we will proceed on the same basis. We need to decide whether the Company gave any other type of co-operation with the only category advanced by the Company being "counteraction" falling within s210(3)(b).

42. As we have noted, the statute contains no definition of "counteraction". HMRC argue that since the Company's follower notice was issued following an appeal made by the Company, the concept of "counteraction" should be regarded as synonymous with that of "relinquishing" a tax advantage as that is the key ingredient, set out in s208(5)(b) of corrective action, that applies to such a follower notice. Therefore, argue HMRC, there could only be "counteraction" that attracts credit under s210(3)(b) if the Company had, albeit late, complied <u>fully</u> with the requirements of s208(5)(b) between 4 January 2018 and 14 June 2018, the date on which the penalty was assessed.

43. We do not accept that broad submission. In our judgment, "counteraction" in s210(3)(b) embraces a broader category of action than the similar concepts referred to in s208(5). That is readily apparent in relation to follower notices issued during an enquiry. For such follower notices, the action required in s208(5)(a) is to "amend a return or claim to counteract the denied advantage". Therefore, only a specific type of counteraction (amending a return or claim) is to count for the purposes of s208(5)(a), but "counteraction" generally counts for the purposes of s210(3)(b). We see no reason why the position should be otherwise for follower notices issued after an appeal not least since Parliament has not chosen to replicate, in s210(3)(b), the concept of taking <u>all</u> necessary steps to reach agreement with HMRC that appears in s208(5)(b).

44. We are reinforced in that conclusion by the fact that s210(2) requires the "nature" and "extent" of any counteraction to be considered. If, as HMRC submit, there can only be "counteraction" if a taxpayer does <u>everything</u> that is required to take corrective action, albeit late, considerations of "nature" and "extent" would be redundant since the taxpayer's counteraction could only be perfect, or non-existent.

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[1] HMRC reason that a penalty can be reduced from 50% to 10% of the denied advantage, so the maximum total mitigation is 40% of the denied advantage. 20% of the maximum 40% mitigation amounts to 8%, so HMRC argue the penalty should be reduced from 50% to 42%.

45. In our judgment, the concept of "counteraction" needs to be understood purposively. The purpose of the follower notice 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. Therefore, in our judgment, full "counteraction" occurs, in the case of a follower notice issued after an appeal has been commenced, if the taxpayer gives up the appeal and communicates that fact to HMRC. The requirement to consider "timing" means that the amount of credit available for such counteraction will reduce the later it takes place. The requirement to consider "nature" and "extent" means that partial credit may be available for steps on the way to full counteraction.

46. We do, however, agree with HMRC that mere payment of the amount in dispute, or of any APN does not of itself amount to full counteraction. A person paying an APN is doing nothing more than complying with a statutory obligation to pay a particular sum by a particular time on account of that person's overall tax liability. Compliance with that statutory obligation is entirely consistent with continuing to progress an appeal against that liability. In the context of this appeal, therefore, "counteraction" involves surrendering the underlying dispute as to the efficacy of the <u>Scheme</u> and not the payment of amounts demanded under the <u>APN</u>.

47. In this case, the Company's actions which are said to constitute counteraction consisted of (i) agreeing a payment plan in respect of the APN it had received, (ii) honouring that payment plan and so making, within the agreed timescales, the full advance payment required by the APN and (iii) doing so having the subjective belief that it was thereby compromising all outstanding disputes with HMRC including the underlying dispute as to the efficacy of the Scheme. As we have said, on their own, items (i) and (ii) did not involve counteraction. The question, therefore, is whether, in conjunction with the Company's belief at (iii), they amounted to a step on the way to counteraction.

48. The FTT attached significance to the Company's subjective belief that it was compromising the dispute. It also characterised that belief as reasonable. In the light of the transcript of the telephone call on 22 January 2018, which was not made available to the FTT, we are in no doubt that the Company's belief was unreasonable. The whole focus of the call was on setting up a payment plan in relation to the APN. The follower notice was not mentioned. Nothing said by Ms Langford indicated an intention to compromise the dispute as to the efficacy of the Scheme. Nothing said by HMRC suggested that the payment plan compromised any wider dispute and indeed HMRC indicated, on the call, that a penalty for late payment of the APN was likely to follow and the Company would need to appeal against it if it was thought to be unjustified.

49. Nevertheless, we are quite satisfied that the FTT's finding that the Company genuinely thought it was compromising all relevant disputes should stand. Even during the hearing before us it was clear that Mrs Sheibani did not realise that the Scheme, the APN and the follower notice represented three separate, albeit linked, areas of dispute between the Company and HMRC that needed to be resolved in different ways. She was evidently genuinely unaware that the penalty under s208 was imposed for something completely distinct from late payment of the amount demanded by the APN.

The interaction of these regimes is not straightforward. We can understand that it may not be immediately obvious to an unrepresented taxpayer that a payment made under the advance payment notice regime does not affect the status of the underlying appeal. HMRC can, of course, only operate within the confines of the legislation as enacted by Parliament. However, while HMRC's communications with the Company before the issue of the penalty notice, maintained a reasonably clear distinction between the various regimes, its letter of 23 January 2018, which was intended to confirm the payment arrangements for the advance payment, was confusing and cannot have helped the Company's understanding of the implications of the payment.

50. In our judgment, the combination of the three factors set out in paragraph 47 represented a step on the way to counteraction. Since it genuinely believed it had settled the dispute about the Scheme, in practice after 23 January 2018 the Company was not going to require HMRC to progress its appeal relating to the Scheme. The Company's actions certainly fell a long way short of full counteraction, not least since it failed to tell HMRC that it would no longer be progressing the appeal. But in practice public resources were saved by the Company's decision and it would be unduly harsh to deny the Company any credit at all for its steps along the way to counteraction.

51. The final question, therefore, is how much credit to give the Company for the co-operation it gave. We have seen some decisions from the FTT that have approached this as a largely arithmetic exercise: for example allocating a notional 20% amount of maximum mitigation to each of the five categories of "co-operation" specified in s210(3) and then deciding how much mitigation to award in each of those five categories in order to reach an overall penalty total. We consider that such an approach risks losing sight of the holistic nature of the exercise and also the fact that, given the overall purpose of the follower notice legislation to which we have referred, "counteraction" of the tax advantage should in most cases tend to attract greater credit than the other categories. It also gives rise to conceptual difficulties. To take an example, in some cases the "tax advantage" at issue might be so straightforward to quantify that HMRC have no real need of assistance that could constitute co-operation falling within s210(3)(a). If a notional 20% of maximum mitigation was available for that category, the question would arise whether the taxpayer should obtain no credit at all (which might operate harshly since if it provided all necessary co-operation in other categories it could still not obtain maximum mitigation) or whether it should obtain the full 20% of maximum mitigation (which might appear generous when HMRC in fact needed no assistance).

52. We will, therefore, apply the following approach when deciding what level of penalty to impose:

> (1) We will approach the question holistically. Recognising that not all of the categories of "co-operation" set out in s210(3) are relevant in this case, we will not seek to allocate an overall level of discount to each of those categories, but rather will seek to give the Company credit for the overall level of "co-operation" afforded.
>
> (2) We will recognise that the overall purpose of the regime is to discourage taxpayers from pursuing, without good reason, disputes about tax

advantages which HMRC reasonably consider to have been determined in their favour in other final decided cases. Co-operation that comes closest to addressing that purpose should, accordingly, attract the greatest credit and conversely, if the Company's actions, even if technically meeting the definition of "co-operation", have done relatively little to meet the statutory purpose, correspondingly lower credit should be given.

(3) Where the Company took steps falling within s210(3), we will consider the overall effectiveness of those steps in meeting the purpose of the provisions, recognising that even if those steps were not fully effective, and more could reasonably have been done, some partial credit may still be appropriate.

53. Applying that approach, we see no reason to depart from HMRC's conclusion that the co-operation falling within s210(3)(a) would, on its own, justify a reduction in the penalty rate from 50% to 42%. Taking into account the Company's additional imperfect steps on the way to counteraction, we consider that an appropriate penalty rate would be 30% (which involves raising the level of mitigation from 20% offered by HMRC to 50%). That, in our judgment, recognises the Company's genuine attempt to effect some late counteraction, the most significant type of co-operation that could be offered in this case, whose effect was that no more HMRC resources in practice needed to be allocated to the appeal relating to the Scheme, while at the same time recognising that it fell a long way short of what was needed to achieve full counteraction and was based on an unreasonable belief as to the effect of the telephone call with HMRC on 22 January 2018. That puts the Company's penalty exactly half way between the minimum penalty of 10% and the maximum penalty of 50% which we consider appropriate.

Disposition

54. HMRC's appeal is allowed. The Decision is set aside and replaced by a decision that the penalty chargeable is £6,600 being 30% of £22,000.

Signed on Original

JUDGE JONATHAN RICHARDS

JUDGE ASHLEY GREENBANK

RELEASE DATE: 1 April 2021