No excuse for delay

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Rebecca Sheldon and Jordan Coppin examine whether accelerated payment notices extend to PAYE determinations, and what constitutes a reasonable excuse for their non-payment

Key Points

What is the issue?

Sheiling Properties asks whether an accelerated payment notice (APN) can be issued in respect of tax arising from a PAYE determination; and both the interpretation and

application of the ‘reasonable excuse’ defence.

What does it mean to me?

The Upper Tribunal concluded that there was nothing to suggest that a PAYE determination should fall outside the APN regime.

What can I take away?

Rather than challenging validity and refusing to pay, the best course of action in such circumstances may well be to pay the APN and argue the case at a judicial review hearing (although advice should always be taken).

In the case of Sheiling Properties Ltd v HMRC [2020] UKUT 175, the Upper Tribunal dismissed an appeal against penalties imposed by HMRC in respect of the non-payment of accelerated payment notices (APNs), finding that a PAYE determination is within the scope of an APN charge.

The tribunal also considered both the interpretation and application of the ‘reasonable excuse’ defence. It found that although a taxpayer can hold a reasonable excuse for not paying an APN where they have objectively reasonable belief that an APN is procedurally invalid, this was not a reasonable excuse for the failure to pay in this appeal and the FTT’s conclusion was not overturned.

The facts of Sheiling

In the tax year ending 5 April 2012, Sheiling Properties Ltd made arrangements under which it made payments to two of its directors, in return for which the directors were obliged to subscribe to partly paid shares in the company. These arrangements were notified to HMRC under the Disclosure of Tax Avoidance Scheme regime contained within Finance Act 2004.

On 17 February 2016, HMRC issued a determination that Sheiling owed tax in respect of the payments to the directors. HMRC stated that income tax was owed under Regulation 80 of the Income Tax (PAYE) Regulations 2003, and that NICs were owed under the Social Security Contributions (Transfer of Functions, etc.) Act 1999 s 8. A week later, Sheiling appealed against the determination, and HMRC postponed payment of the tax due.

On 19 July 2016, HMRC issued APNs to the company under Finance Act 2014 s 219, requiring advance payment of the taxes. The first APN required advance payment of PAYE income tax of £118,000; and the second required payment of primary and secondary NICs of £67,452.

On 19 September 2016, Sheiling argued that the conditions in Finance Act 2014 had not been met and refused to pay. HMRC disagreed and demanded the payments due by 9 November 2016. The company did not pay by this date, and had not paid by the FTT hearing in March 2018.

In November 2016, the company and a number of other taxpayers who received similar APNs issued a claim for judicial review challenging the validity of these APNs, on the basis that the statutory conditions for their issue had not been satisfied. (The claim was stayed pending determination of similar proceedings in Rowe and others v HMRC [2015] EWHC 223.)

On 22 December 2016, HMRC issued Sheiling with two penalty notices under Finance Act s 226 for non-payment of the APNs. Sheiling appealed these on the grounds that it was involved in the judicial review. However, HMRC upheld its decision on the basis that that Sheiling did not have a reasonable excuse for its failure to pay the contested tax on time, and that no ‘special reduction’ of the penalty was appropriate. Following non-payment of the tax, on 30 May 2017 HMRC issued Sheiling with two further late payment penalties in relation to the two APNs.

The FTT decision

Sheiling appealed against the penalty notices to the First-tier Tribunal ([2018] UKFTT 247), arguing that:

- it had a ‘reasonable excuse’ in
- the specific drafting of the term ‘disputed tax’ meant that the PAYE APN did not result in the tax becoming ‘unpostponed’, and therefore no penalty could be charged; and
- as a ‘penalty date’ for the purposes of PAYE due under the respective APN had not yet been set, there could not be a penalty for failure to pay.

The FTT acknowledged that Sheiling genuinely believed it had a good prospect of establishing that the APNs were invalid. However, it did not find that this belief was to a ‘sufficiently high degree of certainty’ to justify a ‘reasonable excuse’ for non-

payment.

The company’s predominant reason for non-payment of the APNs was insufficiency of funds; however, this was not attributable to events outside its control and therefore could not be a reasonable excuse.

Finally, the FTT determined that the penalty remained unpaid 30 days after it was due under TMA 1970 s 55. The FTT dismissed Sheiling’s appeal, holding that the taxpayer was liable for the penalties unless the APNs were determined to be unlawful in the related judicial review proceedings.

Upper Tier decision

Sheiling duly appealed to the Upper Tribunal on the grounds that:

- tax arising from a determination under Regulation 80 of the PAYE Regulations could not be ‘disputed tax’, for the purposes of Finance Act 2014 s 221; and
- the FTT had erred in its interpretation of the ‘reasonable excuse’ defence in the penalty legislation.

PAYE as a disputed tax

Where HMRC has agreed that tax may be postponed, TMA 1970 s 55(8C) has the eff ect that when an APN is issued, any postponement ceases in relation to the ‘disputed tax’ specified in the s 221 notice. Sheiling’s case was that tax arising from a determination under Regulation 80 of the PAYE Regulations can never be ‘disputed tax’ (see para 28). As a result, the tax remains postponed, no penalty date arises, and no penalty can be imposed.

That determination is confined to the ‘disputed tax’; and in Sheiling is the ‘tax arising in consequence of the assessment to tax appealed against’. Sheiling argued that a Regulation 80 determination is not an ‘assessment’, and that nothing in the APN code extends the defi niti on of disputed tax to cover such determinations, so the disputed tax in relation to the PAYE APN is nil.

In contrast, HMRC submitted that the relevant condition for the issue of an APN is that Sheiling has made a ‘tax appeal’ in relation to a ‘relevant tax’, but that appeal has not yet been determined. A ‘tax appeal’ includes an appeal under TMA 1970 s 31 by virtue of the PAYE Regulations, which include Regulati on 80(5).

Reasoning of the Upper Tribunal

The Upper Tribunal agreed with HMRC's analysis, stating: 'We have no hesitation in preferring HMRC's construction of the provisions.'

It stated that the relevant question in relation to s 221(3) is broader than that posited by the taxpayer: 'It is whether income tax sought by a Regulation 80 determination and appealed by the recipient is a "charge to tax arising in consequence of [an] assessment to tax appealed against".'

The Upper Tribunal concluded that PAYE is not a tax, but rather a mechanism for the collection of income tax, collecting tax from the employer which would otherwise fall due to the employee.

Income tax is a relevant tax for the purposes of the APN code, pursuant to Finance Act 2014 ss 200 and 219(2).

Tax sought under a Regulati on 80 determinati on is therefore 'tax' within the meaning of s 221(3). An employer's appeal against a Regulati on 80 determinati on is a 'tax appeal' for APN purposes, and the amount appealed against is 'tax appealed against' within the meaning of s 221(3).

Regulation 80(5) treated the determination as an assessment and met the statutory test within s 221(3). The UT concluded that there was nothing to suggest that a PAYE determinati on should fall outside the APN regime. Indeed, it stated that in terms of policy it would be surprising if tax charged through a PAYE determination could not be the subject of an APN.

The 'reasonable excuse' defence Sheiling submitted that the FTT erred in holding that there was no reasonable excuse for non-payment in these circumstances. It held that the FTT erred in its application of R (Vital Nut) v HMRC [2017] EWCA Civ 2105 in holding that Sheiling did not have an objectively strong case that the APNs were invalid. Finally, Sheiling held that that the FTT erred in identifying an insufficiency of funds as the 'predominant reason' why it did not pay the APNs, and in holding that Sheiling accordingly did not have a reasonable excuse for non-payment.

The Upper Tribunal held [para 69] that 'invalidity' can arise in two situations: 'substantive invalidity', where the taxpayer believes the APN is not owed by him;

and ‘procedural invalidity’, where the APN has not been issued in compliance with the statutory conditions imposed by Finance Act 2014. The distinction was material to this decision, as substantive invalidity of the APN cannot be a reasonable excuse, following the Court of Appeal in Beadle v HMRC [2020] EWCA Civ 652.

In considering whether a belief that an APN is procedurally invalid can be capable of being a reasonable excuse, the Upper Tribunal considered the Parliamentary intent expressed in the APN legislation. It also considered whether the FTT is the correct forum to consider the alleged procedural invalidity of an APN.

The Upper Tribunal concluded that the policy considerations in Beadle and other cases to substantive invalidity ‘cannot simply be assumed to apply in undiluted form’. It upheld the FTT’s decision that it was not impossible for a belief in the likely success of the judicial review proceedings to amount to a reasonable excuse, but did ‘not favour some separate test of objective reasonableness’, instead following the guidance in Christine Perrin v HMRC [2018] UKUT 156 and the guidance it sets out, including whether the APN is ‘obviously procedurally invalid, or merely that it is arguable (however strongly) that it is.’

> The tribunal should identify precisely what the taxpayer believes and take into account the reason for the alleged procedural invalidity.

Analysis

Sheiling has re-emphasised the importance of taking a purposive approach when interpreting statutory provisions.

The lack of an express reference within Regulation 80(5) to FA 2014 (and vice versa) does not mean that the draftsman sought to exclude their interaction.

The fact that Regulation 80(5) expressly applies to relevant parts of the TMA 1970 is sufficient in drafting terms to bring the tax under a PAYE determination within the APN regime.

This is also an important case in that it further clarifies the meaning of ‘reasonable excuse’ in this context. Where a tribunal will assess a ‘reasonable excuse’ regarding an APN’s procedural invalidity and objective reasonableness, Sheiling confirms that Perrin should be followed and that all surrounding facts and circumstances should be taken into account – including the foundation of the taxpayer’s belief and any

professional advice he has sought.

The tribunal should identify precisely what the taxpayer believes and take into account the reason for the alleged procedural invalidity. Crucially, where the alleged error that has led to the procedural invalidity is not by definition ‘gross or obvious’, the FTT should not be drawn into a ‘mini-trial’ requiring detailed submissions by the parties on legal argument – where this is so, it is unlikely that the ‘reasonable belief’ held by the taxpayer will be ‘objectively reasonable’.

The decision has outlined that the best course of action in such circumstances may well be to pay the APN and argue the case at a judicial review hearing. This will avoid a multiplicity of litigation and may also ultimately save the taxpayer expense.

Rebecca Sheldon would like to thank Jordan Coppin for his assistance with this article. Jordan has completed a BSc, an accelerated LLB and recently the BPTC, intending to practice at the Tax Bar.