Four legs good, two legs bad

Management of taxes



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Michael Avient and *Heather Williams* warn recipients of accelerated payment notices to beware of HMRC’s maxim

Key Points

What is the issue?

An overview of the decision from the first APN judicial review and further insight about HMRC's consideration of written representations

What does it mean to me?

The Rowe decision considered only some of the issues relevant to judicial review of APNs. If an APN recipient is part of a judicial review they should consider settling it within the prescribed timeframes because they can incur penalties

What can I take away?

Judicial review remains the only valid method of challenging APNs through the courts. If an APN recipient wishes to make written representations they should be material and include objections to grounds of the conditions and requests decision of the designated officer

The first judicial review decision on accelerated payment notices (APNs) was in the case of *Rowe and Others v RCC* [2015] EWHC 2293 (*Rowe*), which was handed down in the summer. In recent years HMRC have made it clear that all taxpayers should pay their fair share of tax and, as a result of *Rowe*, stated:

> 'This is an important result and good news for the vast majority of taxpayers who do not try to avoid paying their fair share of tax. Those who use tax avoidance schemes need to know they can no longer hold on to the money while their tax affairs are investigated. They have to pay their tax upfront like everybody else.'

No doubt the substance of the statement conforms to HMRC's new psychological approach in seeking to alter taxpayer behaviour. However, like the maxim chorused by the sheep in George Orwell's *Animal Farm* to drown out debate and dissent, it accepts the existence of only two possible categories; those who use tax avoidance schemes and those who do not.

The problem is that the definition of a tax scheme, as interpreted by HMRC, is too wide. By focusing on disclosure of tax avoidance schemes (DOTAS) registered within the APN legislation, it encompasses investment funds falling within government-sponsored tax reliefs and is well outside those identified by HMRC in their statement.

For instance, partner payment notices (PPNs) have been issued to investors in business premises renovation allowance (BPRA) funds if it has been agreed in principle with HMRC that most of the tax relief is allowable. As a result, PPNs have been issued for only 10% of the relief claimed, even though this is disputed. Like the chickens and geese in *Animal Farm*, the fund investors find themselves on the wrong side of a maxim that is driving public policy.

Court approval of maxim

Mrs Justice Simler, at paragraph 27 of *Rowe*, is clear when reviewing the consultations that were carried out before the APN legislation was introduced:

> 'As the government response makes clear, anyone who enters into a tax avoidance scheme takes the risk that the scheme will fail and ultimately the tax will be payable. The legislation accelerates the requirement to make the "at risk" payment pending determination of the dispute but the risk was always there, and must have been anticipated.'

Therefore, even before Simler J had reached the issues in Rowe the maxim was 'painted large on the barn wall' and the final outcome could be seen from a great distance. The sentiment expressed at paragraph 27 is a theme to which Simler J returns when considering and rejecting each submission made by the taxpayers.

No doubt many will agree with the decision in perceived abusive tax avoidance schemes. However, from the BPRA example above, it can be seen that there are taxpayers who are affected at the other end of the spectrum. If the ingenious schemes in *Rowe* were replaced by the BPRA investment, the foundation of Simler J's reasoning, it is suggested, does not look so solid.

Judicial review – down but not out

Since *Rowe*, HMRC has asked most groups that are seeking judicial review to withdraw their application. The view of HMRC is that *Rowe* decides the matter. However, an appeal in this case is expected and other judicial reviews are raising distinct and different issues that the courts will need to consider.

Currently cases are proceeding to appeal on the validity of HMRC enquiries. The appeal in *R (on the application of De Silva and another) v RCC* [2014] UKUT 170 (TCC) (De Silva) was being heard as Tax Adviser went to press and a win for the

taxpayer would mean that in many cases there may be found to be no valid enquiry. The result of this would also mean that Condition A would not be met for the purposes of the APN legislation.

Other applications raise the issue of whether the simple existence of a scheme reference number under the DOTAS regulations, as opposed to the scheme being notifiable under the legislation, fulfils Condition C of the APN legislation.

Despite the over-optimism of HMRC that Rowe would be the end of the matter, it is likely that many more judicial reviews will follow.

Representations fall on deaf ears

When a taxpayer receives an APN, there is no right of appeal. However, within 90 days of the issue of the APN, the taxpayer may make a written representation to HMRC to object to the grounds or the amount specified in the APN. So far, two types of response to the representation letters have been received, apart from those dealing with the quantum.

The most common is to seek to extend the deadline for a response. Current requests for extensions by HMRC have reached six months with no final response. It therefore appears the better and more detailed the representation, the longer the reprieve from a final determination and payment.

The second type of response is rejection letters. Experience shows these tend to deal with matters generally and not with the specifics relating to the particular taxpayer. If there is any uncertainty on fact or law, the rejection letters simply seem to repeat HMRC’s stated view, although these are open to challenge.

However, the rejection letters constitute a decision in themselves that can be the subject of a judicial review. Therefore, it is now to be seen whether a new wave of judicial reviews will be launched.

If recipients of APNs can draw any succour from *Rowe*, Simler J, at paragraph 65, holds out an ‘olive branch’, stating that the legislation ‘allows representations to be made challenging the rationality of the designated officer’s determination, based on his information and belief, both as to the efficacy of the tax avoidance arrangements and as to the amount’.

Even if a judicial review is not anticipated, it should now be good practice when making a representation to request details of all the information considered during the original decision to issue an APN and copies of all documents (including emails and memos) and internal policies considered by the designated officer when making their determination. Details of the designated officer considering the representations should also be sought.

Most APNs represent significant sums of money. It is reasonable for an individual taxpayer to be satisfied that HMRC's discretion to issue an APN and the review of the representations has been undertaken correctly.

To pay or not to pay?

If no challenge is made to the APN or to a rejection of the representation letter, payment should be settled by the due date. This correlates to within 90 days of the APN being issued or within 30 days of HMRCs representation response being received. Failure to do so will lead to an immediate tax penalty of 5%, with further penalties at five and 11 months.

If a challenge is to be made, HMRC have generally accepted in cases of judicial review that they will not seek collection of the APN. However, attempts to obtain formal interim injunctions have been rejected by Laing J and Simler J at two separate hearings. In practice, this means that those pursuing judicial review will face the issue of penalty notices, notwithstanding the decision being subject to judicial review. Further, Laing J seemed to indicate that any appeal against a penalty would be successful only if the APN was found to be invalid. As a result, taxpayers who do not pay the APN within the prescribed timeframes are gambling on the judicial review being successful.

If the HMRC's rejection of the representations does provide grounds for judicial review, it may be that application for injunctive relief will be more successful. Until the validity of the rejection can be determined, it seems reasonable to believe that the APN is not due.

Conclusion

As a result of *Rowe*, HMRC's view is clear: that the APNs and PPNs issued so far are valid and, as such, it can be expected that most, if not all, of the representation

letters will be rejected.

Rowe considered a well publicised tax avoidance scheme; however, as more schemes come forward for judicial review, it will have to be seen how less controversial schemes and more specific issues fair.

In the meantime, APN recipients will need to decide whether to pay or risk penalties should their judicial review fail.

Further information

Read more about APNs in Michael and Heather's article 'Let battle commence' in the May issue of *Tax Adviser*.