Let battle commence

Management of taxes | Personal tax



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Michael Avient and Heather Williams consider how the lines have been drawn with the enforcement of accelerated payment notices

Key Points

What is the issue?

The first payment deadlines for APNs and PPN have been reached and taxpayers need to decide whether they are going to pay or challenge the legislation

What does it mean for me?

The first legal challenge to APNs has resulted in HMRC being prevented from enforcing payment; however, similar treatment can be obtained only through launching a judicial review

What can I take away?

If the tax at issue is significant or the substantive case is strong, judicial review may be appropriate. However, it can be expensive to apply for a judicial review and if the eventual substantive case fails it merely delays the payment of tax

Most commentary on the practicalities of accelerated payment notices (APNs) dates to the period of a ‘phony war’, when the legislation was in force but HMRC were still marshalling their troops. These have now been deployed and this year thousands of APNs and partnership payment notices (PPNs) have been issued under the rules included in Finance Act 2014.

Why the war metaphors?

The answer is simple, from day one the course was set and the theatre determined. When announcing their proposals for the legislation HMRC acknowledged that a judicial review was likely to result. And by implementing the legislation, the government and HMRC put themselves on a collision course with taxpayers who would challenge this new law at its most fundamental legal principles.

Moreover, HMRC were aware that they would be engaged in litigation with businesses and taxpayers already battle-hardened through years of tax investigations and legal action. Moreover, they had the resources and legal teams to expertly test the new laws. The large sums of money at stake for the promoters of ‘avoidance schemes’ and their investors made a commercial decision to litigate inevitable.

APN recipients

Taxpayers who participated in any scheme registered under disclosure of tax avoidance schemes (DOTAS), where a registration number has been issued and

where the tax relief has not yet been agreed by HMRC, are likely to receive an APN if the conditions in the legislation are met.

It appears HMRC are not using the discretion allowed by the legislation. Anecdotal evidence suggests that HMRC teams dealing with the substantive issues are often unaware that the pre-cursor APN letters are being issued and are not part of the decision process. It appears that HMRC officers are brought into the scenario only when it is necessary to determine the ‘tax advantage’ being disallowed.

This view is supported by the fact that cases in which the particular ‘tax advantage’ would not be considered as abusive have received APNs. Notices have been issued to taxpayers whose enquiries have progressed to the stage where only 10% of the claims are still under enquiry. These are not the ‘abusive schemes’ commonly quoted to justify the retrospective nature of the legislation.

At a recent Public Accounts Committee meeting, HMRC estimated £7.1 billion would be recovered by issuing APNs: 33,000 to individuals and 10,000 to businesses. It is clear HMRC are trying to maximise collection.

If a taxpayer’s circumstances meet the criteria for an APN/PPN to be given, they should prepare to pay the ‘tax advantage’ to HMRC or decide whether they have the mettle to mount a challenge.

What taxpayers should do

Caught in the middle of this struggle are the taxpayers who receive APNs and PPNs. Most are not well-known personalities as the media portrays, but middle England taxpayers.

In practice, however, the representations that can be made are often limited and, in most cases, are likely only to lead to a delay in payment. In many instances the only long-term remedy may be to seek judicial review.

Before considering whether such proceedings are worthwhile, the taxpayer should bear in mind the strength of their substantive case. With the predominance of the courts’ purposive approach to statutory interpretation and a number of tax arrangements failing to meet the factual requirements for the intended tax relief, the chances of a successful outcome should be carefully considered. These may have changed significantly since the taxpayers first participated in these

arrangements or when HMRC's enquiry started. If the substantive case is unlikely to be successful, judicial review may simply delay the inevitable outcome, namely the 'denied tax' becoming due.

However, taxpayers should bear in mind HMRC's statements that they win 80% of tax avoidance cases. The experience of counsel instructed by HMRC is that, in accordance with the litigation strategy, cases are taken forward only where they believe HMRC are likely to succeed. On the other hand, experience shows that taxpayers often take forward cases that they have significantly less than a 50% chance of winning simply on a cost/benefit basis. This diverging approach suggests that HMRC should be winning considerably more cases.

Payment

In practice, it has been confirmed that the opportunities for 'time to pay' offered by the APN teams at HMRC are limited. The APN team advised that they only have authority to consider 'time to pay' generally up to nine months, 12 months at most. Many might consider this reasonable. However, experience shows that, in numerous instances, taxpayers have participated in a number of arrangements, spanning a number of tax years and have received multiple APNs. Therefore, APNs of £200,000, for example, are not unusual. Based on this 'time to pay' scale, finding £22,222 a month for HMRC may be unrealistic.

Therefore, plans need to be in place to ensure that APN payment is met (but given the 90-day payment deadline, this may be impractical to liquidate such assets in that time period). If this is not possible, taxpayers may consider judicial review preferable to bankruptcy.

Judicial review – practical considerations

The timeframes for bringing judicial review are strict. A claim must be filed promptly and no later than three months after the grounds to make the claim first arose. In respect of an APN, the determining time would be the date the notice is issued.

The procedure is well defined but, unlike substantive litigation, much work is required at the initial stages:

- A pre-action protocol letter must be served on HMRC setting out the grounds for challenge.
- An application must be made to the administrative court, including detailed grounds, witness statements and documents being relied on.
- In the case of APNs, an application will also be made for an interim injunction preventing HMRC enforcing payment of the APNs.
- The court will then consider the application and either grant or deny permission to proceed. If permission is denied, the court can be asked to reconsider the decision at an oral hearing.
- The matter will then either be heard before the administrative court or the upper tax tribunal.

The judicial review process is not one to enter lightly and it should be remembered that, if the taxpayer loses, HMRC may seek costs, something they seem increasingly minded to do. For this reason, many taxpayers are either turning to the promoters or litigation funds to take forward group actions. In these instances it is important taxpayers are parties to any action to ensure they obtain the benefit of any interim relief.

Taxpayers succeed in preliminary stages

The first application for judicial review of APNs has been heard and the outcome has not been beneficial for HMRC. In what was a tactical manoeuvre, HMRC issued APNs to investors in various ingenious structures before litigation started. But, by doing so, the Revenue chose to take on possibly the largest and best resourced group of taxpayers.

It is understood that the court in closed session has granted permission for judicial review and interim relief for the ‘lead case’ and all those listed in the action. It is further understood that permission has been granted to add further parties to the action.

A bridgehead has therefore been gained for further judicial review applications and it is expected a number of other taxpayers will use this to obtain a similar outcome.

Conclusion

The stakes are high for both sides. The government and HMRC have taken on headfirst the constitutional dilemmas of introducing perceived retrospective legislation. Some taxpayers have to make life-changing payments now if their final tax position is yet to be determined.

At a more fundamental level, the very limits of the power of parliament, both in a constitutional and European context, are being challenged. If the government loses, the ramifications will go well beyond the tax world.

What can be guaranteed is neither side will surrender and the matter will end up in the Supreme Court.