



TC05471

Appeal number: TC/2016/00288

INCOME TAX – partner payment notice – penalty – whether “reasonable excuse” for not making accelerated partner payment on time – no – whether to stay appeal pending Supreme Court’s decision in De Silva – no – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KIERAN O’DONNELL

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice, Strand, London on 17 October 2016

The Appellant in person

Aparna Nathan, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr O'Donnell is appealing against two penalties that HMRC imposed for late payment of accelerated partner payments set out in partner payment notices ("PPNs") issued pursuant to Schedule 32 of Finance Act 2014. The penalties imposed were as follows¹:

Tax Year	Date of PPN	Amount of accelerated partner payment	Date of penalty	Amount of penalty
2004-05	14 November 2014	£300,164	15 September 2015	£15,003
2005-06	28 November 2014	£45,104.68	15 September 2015	£2,255.23

Evidence

2. Very few facts were in dispute. Mr O'Donnell gave oral evidence himself and Ms Nathan cross-examined him. I found Mr O'Donnell to be a reliable and honest witness. HMRC did not rely on witness evidence but produced documentary evidence in the form of a bundle of documents.

Facts

3. From the evidence, I find the following facts.

4. Mr O'Donnell was, at material times, a member of Ingenious Film Partners LLP. On 10 October 2014, HMRC wrote to Mr O'Donnell informing him that, in the next two to four weeks, they would issue him with a PPN in relation to the 2004-05 tax year. In that letter, HMRC notified Mr O'Donnell that the issue of a PPN would trigger an obligation to make an accelerated partner payment within 90 days (although that deadline might change if he chose to make representations on the PPN). HMRC's letter included the following section:

What if you disagree with the partner payment notice

There is no right of appeal against the partner payment notice. However, if you disagree with the notice, you can make representations to us, objecting to the notice.

You can find more information about making representations in the enclosed factsheet.

5. With their letter, HMRC enclosed a copy of factsheet CC/FS24 (the "Factsheet"). The Factsheet was six pages long and included a large amount of information on HMRC's right to require accelerated payment in connection with tax

¹ Mr O'Donnell's Amended Grounds of Appeal referred to an additional penalty for £2,454.50 in relation to the 2006-07 tax year. However, in their Statement of Case, HMRC stated that no such penalty had been issued and Ms Nathan repeated this assurance to Mr O'Donnell and the Tribunal during the hearing. In those circumstances, therefore, both parties were content for the Tribunal not to deal with any appeal against a penalty for the 2006-07 tax year.

avoidance schemes. Mr O'Donnell accepted that the Factsheet was clear and he understood it. The Factsheet included the following sections:

Paying what is due

5 Payment will be due 90 days after the date you receive the accelerated payment notice.

10 If you make representations objecting to the accelerated payment notice, the date the payment is due may change. There is more information about this in the section headed 'What to do if you disagree with the accelerated payment notice' on page 4 of the factsheet.

...

Penalties for not paying the accelerated partner payment on time

15 If you do not pay the full amount shown in your partner payment notice by the date it is due, you will be liable to a penalty. If we charge you a penalty, you will have to pay that as well as the accelerated partner payment.

If your payment is not made in full on or before ... the date it is due, you will be liable to a penalty equal to 5% of the amount you still owe.

...

20 **What to do if you disagree with the accelerated payment notice**

There is no right of appeal against an accelerated payment notice. However, you can make representations to us if you believe that one or both of the following applies:

25 - the conditions for issuing the notice have not been met – these are shown in the section headed 'When we may send an accelerated payment notice', on page 1 of this fact sheet

- The amount shown in the notice is not correct – if this is the case you will need to tell us what you think the correct amount is and why

30 ...

If you make representations, you cannot ask for postponement of the amount shown in the accelerated payment notice.

35 However, if you make representations before the date the payment is due, and we do not withdraw the notice, the deadline for paying may be extended. Payment will be due on the later of:

- The due date shown in the accelerated payment notice
- 30 days after the date on which you receive our decision about the representations you made

6. Mr O'Donnell was also, at material times, a member of Ingenious Film Partners
40 2 LLP. On 14 November 2014, HMRC wrote to Mr O'Donnell in terms very similar to those set out at [4] above to inform him of their intention to issue a PPN in relation

to that LLP as regards the years ended 5 April 2006 and 5 April 2007. That letter also enclosed a copy of the Factsheet.

7. Also on 14 November 2014, HMRC sent Mr O'Donnell an actual PPN in relation to Ingenious Film Partners LLP and the 2004-05 tax year (following up on the precursor letter that they had sent on 10 October 2014). The PPN specified an "amount due in respect of this notice" of £300,164 and "payment due on or before 17 February 2015". Mr O'Donnell accepted that this document was a PPN. The PPN had a section dealing with "surcharges" that read as follows:

Surcharges for not paying on time

10 If you do not pay in full and on time, you will be liable to surcharges. Any such surcharges would be payable in addition to the amount due. If you do not pay in full

- within 28 days of the date it is due, you will be liable to a surcharge of an amount equal to 5% of the amount you still owe
- 15 - on or before 6 months of the date it is due, you will be liable to a further surcharge of an amount equal to 5% of the amount that you still owe – this is as well as the 5% explained in the previous bullet

If we charge you a surcharge, we will send you a notice telling you how much the surcharge is and the period to which it relates. You will then have 30 days to pay the surcharge.

20

This section did not accurately reflect the law and was corrected in the subsequent correspondence referred to at [15].

8. On 28 November 2014, HMRC sent Mr O'Donnell a PPN in relation to the year ended 5 April 2006. This specified an "amount due in respect of this notice" of £45,104.68 and "payment due on or before 3 March 2015". Mr O'Donnell accepted also that this document was a PPN that contained all of the mandatory information set out in paragraph 4 of Schedule 32 of Finance Act 2014. The PPN issued on 28 November 2014 also contained the section on "surcharges" set out at [7] above.

25

9. On 29 December 2014, HMRC sent Mr O'Donnell a reminder that the accelerated payment for the 2004-05 tax year would be due shortly. That reminder set out the amount of the payment (£300,164) and the due date for payment (17 February 2015) which were exactly as set out in the PPN itself (referred to at [7]).

30

10. On 12 January 2015, HMRC sent Mr O'Donnell a reminder that the accelerated payment for the 2005-06 tax year would be due shortly. That reminder set out the amount of the payment (£45,104.68) and the due date for payment (3 March 2015) which were exactly as set out in the PPN itself (referred to at [8]). (Mr O'Donnell appears to have received two such letters, both dated 12 January 2015. In one of those letters, the "amount due" was shown as £49,090.16, although in the section of the letter giving details on how to pay, the amount of £45,104.68 was shown.)

35

11. On 10 February 2015, Mr O'Donnell wrote to HMRC to make representations against both PPNs. The heading of his letter referred correctly to the amounts of

40

accelerated payment that HMRC were requiring as £300,164 and £45,104.68, and the due dates for payment as 17 February 2015 and 3 March 2015. I have concluded, therefore, that even though it does appear somewhat curious that one letter of 12 January 2015 suggested a slightly different amount was due, he was under no misapprehension as to the amounts due or the due date for payment. His representations were short and the essence of them was set out in the following paragraphs:

The above amounts, for which APNs have been issued, both relate to losses that were carried back and set off against previous tax years: 2001/02 (for Ingenious Film Partners) and 2002/03 (for Ingenious Film Partners 2).

I believe there is a time limit requirement for HMRC and that, since you did not write to me advising that you intended to open a Sch 1A enquiry that this time has now passed.

12. Mr O'Donnell spoke to his financial adviser before making these representations. Although he was not himself aware of ongoing litigation in *HMRC v De Silva and others* [2016] EWCA Civ 40, it is clear that the above representations raised issues similar to those arising in that litigation. Mr O'Donnell was seeking to "carry back" losses that he said had arisen from his participation in the two LLPs against taxable income in the 2001-02 and 2002-03 tax years and was arguing that, because HMRC only had an enquiry open in relation to Mr Donnell's tax returns for 2004-05 and 2005-06 (and had not opened an enquiry under Sch 1A of TMA 1970 into the claim to carry back the losses), they were out of time to assess Mr O'Donnell in relation to the 2001-02 and 2002-03 tax years.

13. On 29 June 2015, HMRC wrote two letters to Mr O'Donnell stating that, having considered his representations, both PPNs were confirmed without amendment. Towards the end of HMRC's letters setting out their conclusions was the following section:

Next steps

The amount confirmed in this letter as payable must be made before the end of the payment period, which ends on the later of:

- the period of 90 days beginning on the day on which the partner payment notice was given;

OR

- the period of 30 days beginning with the date of this letter.

Penalties will be charged in respect of payments not made before that date (please refer to the original partner payment notice for further details of penalty charges and payment methods).

What if you have problems paying?

If you think you will have problems paying the amount due, please phone us straightaway on 03000 554635.

14. On 8 July 2015, Mr O'Donnell wrote, and sent, a letter to HMRC but, for some reason that letter was not received. In that letter, Mr O'Donnell referred to HMRC's letters of 29 June 2015 and requested a "review of your demand for payment". In that letter, although not referring to the *De Silva* litigation by name, he set out again his view that HMRC had to open an enquiry under Sch 1A of TMA 1970 in order to challenge his use of the losses and said that it was unreasonable for HMRC to demand money while both sides were awaiting the outcome of that litigation. He also referred to judicial review claims that had been submitted by other members of the two Ingenious partnerships and his understanding that pending the full hearing of those applications HMRC were restrained by the terms of an injunction from collecting amounts specified in PPNs issued to those members. He accepted that he had not himself taken judicial review proceedings (saying that he could not afford the legal fees involved) but argued that he should be given the same rights as people who had taken such proceedings.

15. Since HMRC did not receive the letter of 8 July 2015, they did not reply to it. Instead, on 15 September 2015, they wrote two letters to Mr O'Donnell (one for each of the two PPNs they had issued). Those letters acknowledged that the original PPNs had contained inaccurate information on "surcharges" that would be issued for failures to pay the amounts due. Most significantly, the original PPNs had, as noted at [7] and [8] suggested that a "surcharge" would be due only if Mr O'Donnell did not pay the accelerated partner payment within 28 days of the due date. HMRC's letters of 15 September 2015 explained that this was not correct and, in fact, a penalty was due because Mr O'Donnell had not paid the amount due within 30 days of HMRC's decision of 29 June 2015. So that Mr O'Donnell was not prejudiced, HMRC gave him an additional 28 days in which to pay. When read carefully, it is clear that this letter did not give Mr O'Donnell 28 days from the date of the letter of 15 September; rather, it simply added 28 days to the then applicable due date for payment (which was 29 July 2015 – 30 days from HMRC's letter of 29 June 2015). That was sensible (as it meant that Mr O'Donnell was in the same position he would have been in if the information HMRC gave on "surcharges" in the PPNs was correct). However, the effect of this correspondence was that HMRC sent Mr O'Donnell letters on 15 September 2015 informing him that the revised due date for payment was 26 August 2015 (28 days after 29 July 2015) which was before those letters were sent.

16. It was common ground that Mr O'Donnell had not paid either accelerated partner payment by the extended deadline that HMRC gave. On 15 September 2015, they issued two penalty notices. By that date, HMRC had applied £103.82 (an amount that Mr O'Donnell had paid in excess of his income tax liability in a later period) against the accelerated partner payment of £300,164 due in relation to 2004-05. They therefore calculated that the amount of the accelerated partner payment outstanding was £300,060.18 and that the penalty due was £15,003 (5% of this amount). They determined that the full amount of the accelerated partner payment of £45,104.68 for 2005-06 remained unpaid and that the penalty due was £2,255.23 (5% of this amount).

17. On 22 September 2015, Mr O'Donnell called HMRC. He explained that he had not made any payment in relation to either PPN as he was still waiting for a response

to his letter of 8 July 2015 and would send a further copy of that letter. He also explained that he was likely to have difficulty in paying the accelerated partner payments that were due and was given contact details of HMRC's Debt Management and Banking (DMB) department so that he could discuss "time to pay arrangements".
5 The same day he wrote a letter to HMRC requesting that the penalties be disappplied while HMRC considered the points set out in his letter of 8 July 2015.

18. In October 2015, Mr O'Donnell had a number of conversations with HMRC regarding his financial situation and the steps that he was taking to obtain the funds necessary to pay the accelerated partner payments. Mr O'Donnell had genuine
10 difficulties in raising those funds and had to sell illiquid assets consisting of shares in venture capital trusts. Mr O'Donnell also obtained a "decision in principle" that a financial institution would lend him money secured on his house which would enable him to pay the accelerated partner payments. However, he explained that it would take some time for him actually to obtain those funds.

15 19. On 16 October 2015, HMRC replied to Mr O'Donnell's letter of 22 September 2015. While HMRC acknowledged that Mr O'Donnell should have received a reply to his letter of 8 July 2015, the conclusion that HMRC had reached in the light of his representations (which was set out in their letters of 29 June 2015 referred to at [13]) was final and would not be revisited. The letter also stated that, since Mr O'Donnell
20 had not himself taken judicial review proceedings in relation to the PPNs, HMRC were not precluded by the terms of any injunction from collecting accelerated partner payments from him. HMRC offered Mr O'Donnell a review of the decision to charge penalties.

20. On 30 October 2015, Mr O'Donnell replied to HMRC accepting the offer of a
25 review of the decision to charge penalties. He also explained conversations that he had been having with Officer Johnson-Paul on his financial situation. The essence of Mr O'Donnell's reasons for requesting that the penalties should be set aside were that:

(1) He had received a large number of letters and emails from a number of
30 different HMRC departments. The whole process relating to the PPNs was confusing.

(2) Although the correspondence he had received was confusing he had, throughout, dealt with HMRC in an honest and timely manner. He was not seeking to delay matters.

(3) Until 22 September 2015, he had a genuine belief that he did not need to
35 pay the accelerated partner payments until HMRC had responded to the points set out in his letter of 8 July 2015.

21. Some time between 30 October 2015 and 16 November 2015, HMRC and Mr O'Donnell agreed a "time to pay" arrangement.

22. On 8 December 2015, HMRC wrote to Mr O'Donnell setting out the conclusion
40 of their review into their decision to charge the penalties which was that those penalties should be upheld. The reasons for HMRC's conclusions were broadly that

Mr O'Donnell had not shown any "reasonable excuse" and there were no "special circumstances" to justify a special reduction under paragraph 9 of Schedule 56.

Relevant statutory provisions

Statutory provisions dealing with PPNs

5 23. The circumstances in which a PPN may be issued are set out in paragraph 3 of Schedule 32 of Finance Act 2014 ("Schedule 32"). That provides, relevantly, as follows:

3 Circumstances in which partner payment notices may be given

10 (1) Where a partnership return has been made in respect of a partnership, HMRC may give a notice (a "partner payment notice") to each relevant partner of the partnership if Conditions A to C are met.

(2) Condition A is that—

(a) a tax enquiry is in progress in relation to the partnership return, or

15 (b) an appeal has been made in relation to an amendment of the return or against a conclusion stated by a closure notice in relation to a tax enquiry into the return.

(3) Condition B is that the return or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular arrangements ("the chosen arrangements").

20 (4) Paragraph 3(3) of Schedule 31 applies for the purposes of subparagraph (3) as it applies for the purposes of Condition B in section 204(3).

25 (5) Condition C is that one or more of the following requirements are met—

(a) ...

(b) the chosen arrangements are DOTAS arrangements (within the meaning of section 219(5) and (6));

30 ...

24. Paragraph 4 of Schedule 32 imposes requirements as to the contents of a PPN. Among other information, paragraph 4 requires a PPN to specify the amount of a payment (referred to in the legislation as an "accelerated partner payment") that the recipient of the PPN must make. Paragraph 4(2) of Schedule 32 provides that:

35 The payment required to be made under paragraph 6 [i.e. the accelerated partner payment] is an amount equal to the amount which a designated officer determines, to the best of the officer's information and belief, as the understated partner tax.

40 The definition of "understated partner tax" relevant in the circumstances of this appeal is contained in paragraph 4(3) of Schedule 32. In essence, it is the amount of

additional tax that would become due by the relevant partner if adjustments were made to counteract the tax advantage that is claimed to arise from the planning in question.

5 25. Paragraph 5 of Schedule 32 entitles a person receiving a PPN to make representations to HMRC objecting to the PPN on the grounds that Conditions A to C referred to in paragraph 3 of Schedule 32 are not satisfied, or objecting to the amount of accelerated partner payment that is required. Any such representations must be made within 90 days of the date the notice was given and HMRC are obliged to consider any representations that are made.

10 26. There is no statutory right of appeal to this Tribunal against HMRC's decision to issue a PPN. Since the Tribunal is a creature of statute, it follows that the Tribunal has no jurisdiction to set aside a PPN on the grounds that it was not validly issued (applying the principles set out in *HMRC v Hok Ltd* [2012] UKUT 363 and other cases). As will be seen, however, there is an appeal to this Tribunal against a penalty
15 that is imposed in consequence of a relevant partner's failure (or alleged failure) to make an accelerated partner payment.

27. Paragraph 6 of Schedule 32 imposes the obligation to make the accelerated partner payment (the amount of which is determined pursuant to paragraph 4 of Schedule 32 referred to at [24]). The accelerated partner payment must be made
20 before the end of the "payment period" which is defined in paragraph 6(5) of Schedule 32 as follows:

(5) "The payment period" means—

(a) if the relevant partner made no representations under paragraph 5, the period of 90 days beginning with the day on which the partner
25 payment notice is given;

(b) if the relevant partner made such representations, whichever of the following ends later—

(i) the 90 day period mentioned in paragraph (a);

(ii) the period of 30 days beginning with the day on which the
30 relevant partner is notified under paragraph 5 of HMRC's determination.

28. Paragraph 7 of Schedule 32 imposes a penalty for failure to comply with a PPN as follows:

7 Penalty for failure to comply with partner payment notice

35 Section 226 (penalty for failure to make accelerated payment on time) applies to accelerated partner payments as if—

(a) references in that section to the accelerated payment were to the accelerated partner payment,

(b) references to P were to the relevant partner, and

40 (c) "the payment period" had the meaning given by paragraph 6(5).

29. The penalty for failure to comply with a PPN therefore adopts wording of the analogous penalty that relates to accelerated payment notices (“APNs”) in s226 of Finance Act 2014. That section provides as follows:

226 Penalty for failure to pay accelerated payment

5 (1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while tax enquiry is in progress) (and not withdrawn).

(2) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.

10 (3) If any amount of the accelerated payment is unpaid after the end of the period of 5 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.

15 (4) If any amount of the accelerated payment is unpaid after the end of the period of 11 months beginning with the penalty day, P is liable to a penalty of 5% of that amount.

(5) “The penalty day” means the day immediately following the end of the payment period.

20 (6) Where section 223(6) (accelerated payment payable by instalments when it relates to inheritance tax payable by instalments) applies to require an amount of the accelerated payment to be paid before a later time than the end of the payment period, references in subsections (2) and (5) to the end of that period are to be read, in relation to that amount, as references to that later time.

25 (7) Paragraphs 9 to 18 (other than paragraph 11(5)) of Schedule 56 to FA 2009 (provisions which apply to penalties for failures to make payments of tax on time) apply, with any necessary modifications, to a penalty under this section in relation to a failure by P to pay an amount of the accelerated payment as they apply to a penalty under that Schedule in relation to a failure by a person to pay an amount of tax.

30 30. There is a slight question as to how, if at all, ss226(1) of Finance Act 2014 should be adapted so as to apply to PPNs as distinct from APNs. If s226(1) had some application in relation to PPNs, there would be a logical difficulty, since a PPN is not a species of APN and is not issued “by virtue of section 219(2)(a)” as that section applies only to APNs and not to PPNs. Section 226(1) sets out preconditions that must
35 be satisfied before a penalty can be charged for late payment of an accelerated payment. It sets those preconditions by explaining when s226 “applies” and those preconditions relate to the circumstances in which the APN is issued. By contrast, in paragraph 7 of Schedule 32, Parliament explains that s226 “applies” to accelerated partner payments in a manner similar to the way it applies to accelerated payments.
40 Paragraph 7 does not refer to the PPN at all (and in particular, does not deem the PPN to be an APN which it would need to do if s226(1) was intended to apply to PPNs in a similar way to APNs). Paragraph 7 of Schedule 32, therefore, answers the question of when s226 “applies” in the context of PPNs and there is no need to read s226(1) to decide when it applies. Therefore, I do not consider that s226(1) has any application
45 to PPNs (as distinct from APNs) and, instead the operative provisions set out in

s226(2) to s226(7) are to be applied, with the modifications set out in paragraph 7 of Schedule 32 to accelerated partner payments.

Statutory provisions relating to an appeal against the penalty

5 31. The combined effect of paragraph 7 of Schedule 32 and s226 of Finance Act 2014 is, therefore, that a penalty is imposed for failure to pay the amount of an accelerated partner payment specified in a PPN within the payment period. Paragraphs 9 to 18 (other than paragraph 11(5)) of Schedule 56 of Finance Act 2009 (“Schedule 56”) apply to the penalties so imposed.

10 32. Paragraph 13 of Schedule 56 confers a right of appeal to this Tribunal. Therefore, while there is no appeal to the Tribunal against the PPN itself, there is a right of appeal against a penalty that is imposed for failure to make an accelerated partner payment. The scope of the right of appeal is set out as follows:

13 Appeal

15 (1) P may appeal against a decision of HMRC that a penalty is payable by P.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P.

33. Paragraph 16 of Schedule 56 sets out a defence of “reasonable excuse” as follows:

20 **16 Reasonable excuse**

(1) Liability to a penalty under any paragraph of this Schedule does not arise in relation to a failure to make a payment if P satisfies HMRC or (on appeal) the First-tier Tribunal or Upper Tribunal that there is a reasonable excuse for the failure.

25 (2) For the purposes of sub-paragraph (1)—

(a) an insufficiency of funds is not a reasonable excuse unless attributable to events outside P's control,

30 (b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the failure, and

(c) where P had a reasonable excuse for the failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the failure is remedied without unreasonable delay after the excuse ceased.

35 34. Paragraph 9 of Schedule 56 deals with “special circumstances” as follows:

9 Special reduction

(1) If HMRC think it right because of special circumstances, they may reduce a penalty under any paragraph of this Schedule.

(2) In sub-paragraph (1) “special circumstances” does not include—

- (a) ability to pay, or
 - (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
- 5 (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to—
- (a) staying a penalty, and
 - (b) agreeing a compromise in relation to proceedings for a penalty.

10 35. Paragraph 10 of Schedule 56 provides for penalties to be suspended while “time to pay arrangements” are in place as follows:

10 Suspension of penalty during currency of agreement for deferred payment

- (1) This paragraph applies if—
- 15 (a) P fails to pay an amount of tax when it becomes due and payable,
 - (b) P makes a request to HMRC that payment of the amount of tax be deferred, and
 - (c) HMRC agrees that payment of that amount may be deferred for a period (“the deferral period”).
- 20 (2) If P would (apart from this sub-paragraph) become liable, between the date on which P makes the request and the end of the deferral period, to a penalty under any paragraph of this Schedule for failing to pay that amount, P is not liable to that penalty...

25 36. Paragraph 15 of Schedule 56 sets out the scope of the Tribunal’s jurisdiction on an appeal as follows:

15

- (1) On an appeal under paragraph 13(1) that is notified to the tribunal, the tribunal may affirm or cancel HMRC's decision.
- 30 (2) On an appeal under paragraph 13(2) that is notified to the tribunal, the tribunal may—
- (a) affirm HMRC's decision, or
 - (b) substitute for HMRC's decision another decision that HMRC had power to make.
- 35 (3) If the tribunal substitutes its decision for HMRC's, the tribunal may rely on paragraph 9—
- (a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
 - 40 (b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 9 was flawed.

(4) In sub-paragraph (3)(b) “flawed” means flawed when considered in the light of the principles applicable in proceedings for judicial review.

5

(5) In this paragraph “tribunal” means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of paragraph 14(1)).

Discussion

37. The parties were agreed that the PPNs were validly issued². and that Mr O’Donnell had not paid the accelerated partner payments by the end of the “payment period” (or indeed by the extended deadline that HMRC gave in their letters of 15
10 September 2015). Therefore, both parties were agreed that the sole question which arose in relation to the appeal against the penalties was whether there was a “reasonable excuse” for the late payment or whether the Tribunal could, or should, vary HMRC’s decision on “special circumstances”.

38. At the hearing, I informed Mr O’Donnell that the appellants in the *De Silva* case
15 had been given permission to appeal to the Supreme Court. That prompted Mr O’Donnell to ask for the appeal against the penalties to be stayed pending the Supreme Court’s decision in that appeal. Ms Nathan objected to that request.

Whether to stay the appeal behind De Silva

39. In deciding whether to stay proceedings against HMRC’s wishes, I will apply
20 the approach set out in *Coast Telecom Limited v HMRC* [2012] UKFTT 307 (TC) where Judge Berner stated at paragraph 5:

I start by reminding myself of the proper approach to be adopted in considering whether to grant a stay in the absence of agreement between the parties. Although neither party referred to it, I consider
25 that the correct approach is to be derived from *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* [2007] STC 814 where the Court of Session as the Court of Exchequer in Scotland held (at [22]) that a tribunal or court might sist, or stay, proceedings against the wish of a party if it considers that a decision in another court would
30 be of material assistance (not necessarily determinative) in resolving issues before the tribunal or court in question, and that it is expedient to do so.

40. It may be that the Supreme Court’s judgment in *De Silva* will be of material assistance in enabling a court or Tribunal to decide whether Mr O’Donnell is liable
35 for the amount of tax that HMRC have assessed. Moreover, the issues raised in *De Silva* are of potential relevance to HMRC’s decision as to the amount of accelerated

² In recording that the parties were agreed on this issue, I am not suggesting that the Tribunal necessarily has jurisdiction as to the “validity” of PPNs generally. However, it does seem to me that, in order for a penalty to be payable, the Tribunal must be satisfied that the taxpayer has received a PPN (as opposed to some other document). Therefore, if a taxpayer were arguing that a document is not a PPN (for example because it does not contain some or all of the information specified in paragraph 4 of Schedule 32) I believe that the Tribunal may well have jurisdiction to consider that argument.

partner payment required as Green J noted at paragraph 45 of his judgment in *Walapu v HMRC* [2016] EWHC 658 (as, if there were binding authority that the assessments HMRC had made were not correct, Mr O'Donnell might well be able to challenge the rationality of the calculation of the accelerated partner payment given that paragraph 4(2) of Schedule 32 requires this to be calculated "to the best of the officer's information and belief"). Therefore, if HMRC could not reasonably hold the view that Mr O'Donnell could owe the amount of tax assessed it could certainly be argued that no accelerated partner payment should be required.

41. However, the Tribunal simply has no jurisdiction in relation to the matters set out at [40]. Parliament has made it clear that those matters are to be dealt with by requiring HMRC to consider any representations that are made in accordance with paragraph 5 of Schedule. If a taxpayer is dissatisfied with HMRC's response to those representations, its remedy is judicial review.

42. These proceedings are not concerned with the underlying assessments, but rather with the penalties that HMRC have imposed in relation to Mr O'Donnell's failure to pay the accelerated partner payments by the due date. I do not consider that the merits or otherwise of the underlying assessment are relevant to the appeal against those penalties. Parliament has made it clear that, in cases such as this, HMRC are entitled to require taxpayers to make accelerated partner payments. If they do not pay on time they are subject to a penalty subject to considerations of "reasonable excuse" and "special circumstances". Moreover, Parliament has quite deliberately enacted statutory provisions which mean that any challenge to a PPN has to be made by way of judicial review (assuming that HMRC do not modify the PPN in the light of the taxpayer's representations). Mr O'Donnell has chosen not to make such a challenge and, having made that decision, he cannot argue that a belief, however genuinely or strongly held, in the invalidity or inaccuracy of the underlying assessments is a "reasonable excuse" for not paying the accelerated partner payment that has been determined to be due. Nor can any such belief amount to a "special circumstance".

43. I do not, therefore, consider that the Supreme Court's decision in *De Silva* will be of "material assistance" in determining the appeal in relation to which the Tribunal has jurisdiction – namely the appeal against the penalties. I will not, therefore, stay this appeal behind *De Silva*.

Reasonable excuse and "special circumstances"

44. I accept that, until 22 September 2015, Mr O'Donnell had a genuine belief that he would not be called upon to make an accelerated partner payment until his letter of 8 July 2015 was answered. However, while genuinely held, that belief was not reasonable.

45. The correspondence outlined above demonstrates that HMRC gave Mr O'Donnell accurate and comprehensible instructions at each stage as to the amounts that were due, the dates on which they were due and what Mr O'Donnell should do if dissatisfied with HMRC's decisions. Although Mr O'Donnell clearly felt that he

received too much correspondence, he quite fairly accepted in cross-examination that the information with which he was provided was clear. The Factsheet accurately explained a taxpayer's right to make representations. The "Next Steps" section of HMRC's letters of 29 June 2015 referred to at [13] made it absolutely clear that the process with HMRC had come to an end and that he had 30 days in which to make payment. (That letter did not expressly refer to the possibility of judicial review, but Mr O'Donnell did not need to be told about judicial review as he was clearly aware of that possibility given that he referred to it in his letter of 8 July 2015.) Mr O'Donnell did not provide any evidence that he wrote his letter of 8 July 2015 requesting a "review" following professional advice or that any communication from HMRC had made him believe he was entitled to such a review. He therefore simply made an incorrect and unreasonable assumption that he was entitled to such a review.

46. Mr O'Donnell was initially given incorrect information as to the dates on which penalties would start to accrue. However, quite rightly, he did not suggest that this incorrect information established a "reasonable excuse" since he did not pay the accelerated partner payments by the deadline of which he was originally advised.

47. I accept that Mr O'Donnell has experienced financial difficulties in making the accelerated partner payments. However, he did not suggest that the insufficiency of funds was attributable to events beyond his control and therefore, I am not satisfied that his financial difficulties amount to a reasonable excuse given the provisions of paragraph 16 of Schedule 32. Moreover, in large part those financial difficulties were attributable to the time that was needed to sell illiquid holdings in venture capital trusts and to borrow money against his house. Had Mr O'Donnell not made an unwarranted, and unreasonable, assumption that he was entitled to a review of the decisions set out in HMRC's letters of 29 June 2015 before he had to pay the accelerated partner payments, he could have started the process of selling those assets and borrowing money earlier.

48. I have not accepted Mr O'Donnell's submission that the volume of correspondence that he received from HMRC or the number of departments he had to deal with gives him a reasonable excuse for not paying the amounts due on time. While I have no doubt that Mr O'Donnell found the process frustrating, that is not enough to amount to a reasonable excuse. Moreover, Mr O'Donnell is clearly an intelligent man who, whatever the frustrations he felt, was perfectly capable of understanding the letters HMRC were sending. His mistaken belief that he did not need to pay the sums demanded until HMRC had replied to his letter of 8 July 2015 was of his own making and was not prompted by any unclear or misleading HMRC correspondence.

49. HMRC have considered the question of "special circumstances" and have concluded that there are none. Mr O'Donnell made no suggestion that this decision was "flawed" in the sense set out in paragraph 15(4) of Schedule 56 and I am satisfied that it was not flawed. Therefore, I have no power to alter HMRC's determination on that issue. Even if I had the power, I would not alter that decision since I am not satisfied that there are any "special circumstances" such as to justify a reduction of the penalties charged.

50. Finally, for completeness, I note that Mr O'Donnell has now entered into a "time to pay arrangement" with HMRC. That arrangement was entered into some time between 30 October 2015 and 16 November 2015. However, the accelerated partner payments were due by 26 August 2015 at the absolute latest. Therefore, paragraph 10 of Schedule 56 does not prevent the penalties from becoming due.

51. Therefore, for reasons set out above, Mr O'Donnell's appeal is dismissed. I do, however, wish to make it clear that, while I have not accepted his submission that he had a "reasonable excuse", I am not casting any aspersions as to his integrity. The evidence I saw demonstrated to me that Mr O'Donnell has dealt fairly and promptly with HMRC in relation to both the PPNs and the penalties charged. While he has made a mistake as to his right to request a review of HMRC's decision set out in their letter of 29 June 2015, that was a genuine mistake and was not part of any strategy to protract matters.

52. 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.

JONATHAN RICHARDS
TRIBUNAL JUDGE

RELEASE DATE: 4 NOVEMBER 2016