



**TC05501**

**Appeal number: TC/2016/01758**

*PROCEDURE – penalty for failing to amount specified in accelerated payment notice – whether Tribunal has jurisdiction to consider appeal based on perceived unfairness of accelerated payment notice regime – no - appeal struck out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**KULDEEP DELAY**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JONATHAN RICHARDS**

**Sitting in Chambers on 17 November 2016, having considered written representations from:**

**Kyle Millman of BR Chartered Accountants, for the Appellant**

**Sophie Rhind, of HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. HMRC issued the appellant, Mr Delay, with an accelerated payment notice (“APN”) on 19 May 2015. Mr Delay was, with a number of other taxpayers, a party to judicial review proceedings challenging the validity of that APN. On 26 May 2016, Sir Kenneth Parker, sitting as a judge of the High Court, gave judgment dismissing the application for judicial review in *R (on the application of William Graham and others) v Commissioners for Her Majesty’s Revenue and Customs* [2016] EWHC 1197 (Admin). It is understood that the applicants have sought permission to appeal against that decision to the Court of Appeal.

2. Pending resolution of the judicial review proceedings, HMRC agreed that they would not take steps to enforce payment of the amount specified in the APN. However, since they considered that Mr Delay had not paid the amount specified in the APN by the due date for payment, on 1 September 2015 they issued Mr Delay with a penalty under s226 of Finance Act 2014 (“FA 2014”). Mr Delay appealed to HMRC against that penalty. Following an internal review, on 26 January 2016, HMRC concluded that their decision to charge the penalty would stand.

3. On 15 March 2016 (more than 30 days after the review decision, and so outside the applicable time limit), Mr Delay appealed to the Tribunal against the penalty. His grounds of appeal read as follows:

The decision to apply accelerated payment, upon which the penalty is based, denies the principle of “*Ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum negantis probatio nulla sit*” – or innocence until guilt so proven.

Whilst HRA 1998 specifically excludes application where the matter is a question of tax obligation, such a denial would appear to be supplanted by Article 11 of the United Nations Declaration of Universal Human Rights –

“(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to the law in a public trial at which he has had all the guarantees necessary for his defence.”

Accelerated payment is a presumption that a specific scheme will fail and, therefore, any penalty subsequently applied presumes guilt before such test in law.

4. The decision that HMRC should have taken was, said Mr Delay:

The penalty should not be applied in the absence of the legal test of the underlying scheme.

5. On 8 October 2016, HMRC applied to strike out Mr Delay’s appeal because they argued that the Tribunal had no jurisdiction. They did not take any point that the appeal was notified to the Tribunal late and I will, therefore, permit the appeal to be made late. HMRC submitted that Mr Delay’s grounds of appeal made it clear that he

was seeking to challenge the decision to issue the APN itself, and the legality of the entire accelerated payments regime, neither of which was within the Tribunal's jurisdiction. They pointed out that there was no right of appeal to the Tribunal against a decision to issue an APN. Rather, a taxpayer's remedy if dissatisfied with HMRC's decision to issue an APN is to make representations under s219 of FA 2014 and, if still dissatisfied with HMRC's response to take proceedings for judicial review. HMRC noted that Mr Delay had done this but had, to date, been unsuccessful in judicial review proceedings.

6. On 20 October 2016, having seen HMRC's application for strike out, Mr Delay wrote to the Tribunal as follows:

The application to strike out the appeal is opposed on the basis of the following points:

i. HM Revenue & Customs have speculated that the appeal question the issue of the APN rather than the decision to penalise. That is not the case. It is indeed the decision to penalise that is the subject of appeal, but this appeal stems from the fact that the decision to penalise must be flawed if the underlying mechanism is unsustainable by virtue of human rights considerations.

ii Notwithstanding the lack of an appeal mechanism within the relevant legislation as explained in (i) above, no decision to apply a penalty can conceivably be sustained where the underlying process is so patently flawed by virtue of denial of basic human rights.

iii Judicial review is not sought here, instead application is made to tribunal to direct that HM Revenue & Customs reverse the decision to impose a penalty.

### **The law**

7. The penalty for failure to pay an amount set out in an APN is contained in s226 of FA 2014 which provides as follows:

#### **226 Penalty for failure to pay accelerated payment**

(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.

(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.

(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.

5 (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.

10 (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.

15 8. The effect of s226(7) of FA 2014 is to apply relevant provisions of Schedule 56 of Finance Act 2009 (“Schedule 56”) to any penalty charged. In particular, paragraph 13 of Schedule 56 confers a right of appeal to the Tribunal as follows:

### **13 Appeal**

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

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

9. Paragraph 9 of Schedule 56 gives HMRC a power to make a special reduction to the amount of a penalty if “special circumstances” are present. Paragraph 13 of Schedule 56 provides a defence of “reasonable excuse” to penalties that are charged.

25 10. 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 and conclusion

11. It is clear that Mr Delay is not questioning the amount of the penalty. Rather, his argument is that no penalty should have been charged at all. In those circumstances, the Tribunal’s power is that set out in s15(1) of Schedule 56 namely to “affirm or  
10 cancel” HMRC’s decision. However, that does not confer on the Tribunal an unfettered discretion to cancel a penalty for any reason whatsoever. Our jurisdiction derives entirely from statute and we have no judicial review function (see for example *CIR v Hok Limited* [2012] UKUT 363 (TCC)). Moreover, s226 of FA 2014 is in mandatory terms: if the payment of the amount specified in the APN is late, the  
15 taxpayer “is liable” to a penalty (subject to questions of, for example, “reasonable excuse” and “special circumstances” set out in Schedule 56). Given the mandatory terms of s226 of FA 2014 and the existence of only certain specific defences in Schedule 56, any decision we make to cancel a penalty must be rooted in the statutory provisions that impose, or relieve, the penalty. We would have power to cancel a  
20 penalty if the statutory requirements to levy it are not met (for example if the taxpayer had, in fact, paid the amount due by the due date). We could cancel the penalty on one of the statutory grounds set out in Schedule 56 (for example if there is a reasonable excuse for late payment or following an application of the Tribunal’s limited jurisdiction in relation to the question of “special circumstances” set out in paragraph  
25 15(3) of Schedule 56). We do not, however, have the power to cancel a penalty on the basis that the underlying legislation breaches any fundamental provisions relating to human rights. Those are public law matters in relation to which we have no jurisdiction.

12. It follows that we have no jurisdiction to consider the grounds of appeal that Mr  
30 Delay is putting forward.

13. It is possible that Mr Delay could have brought his appeal within the Tribunal’s jurisdiction if it had been formulated differently. For example, if Mr Delay were given permission to appeal to the Court of Appeal, and the Court of Appeal issued a judgment declaring that the APN was not lawfully issued, it would at least be  
35 arguable that he had a “reasonable excuse” for not paying the amount set out in the APN on the basis that it would be reasonable not to pay an amount that judicial review proceedings had determined was not lawfully demanded. Of course such an argument would depend on Mr Delay being successful in judicial review proceedings: he could not invite the Tribunal to determine that the APN was not lawfully issued  
40 since we have no judicial review function and there is no statutory right to appeal to the Tribunal against the issue of an APN. However, if Mr Delay wanted to make an argument based on “reasonable excuse”, he might have applied to the Tribunal for the appeal to be stayed until a court had finally determined whether the APN was lawfully issued or not. (Of course, a much better course of action might be for Mr Delay to ask

the court dealing with judicial review proceedings to declare both that the APN was not lawfully issued and that, accordingly, the penalty was not lawfully due as, if Mr Delay was successful, this might obviate the need for proceedings before the Tribunal altogether. However, the purpose of this paragraph is to explain possible ways in which the Tribunal's jurisdiction might be engaged and not to speculate on what Mr Delay's optimal strategy in litigation might be).

14. However, the fact that Mr Delay might have brought an appeal on different grounds is not a reason for not striking out the appeal Mr Delay has brought in which the Tribunal has no jurisdiction. Indeed, I have no discretion in the matter. Rule 8(2)(a) of the Tribunal Rules provides that, if the Tribunal does not have jurisdiction, it must strike it out. In any event, having seen HMRC's application for strike-out, Mr Delay has not sought to amend his Grounds of Appeal. On the contrary, as noted at [6], he has made it absolutely clear that, in his appeal against the penalty, he is asking the Tribunal to adjudicate on the lawfulness of the APN regime as a whole.

15. My conclusion, therefore, is that the appeal is struck out.

16. 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: 22 NOVEMBER 2016**