



TC05645

Appeal number: TC/2016/04886

PROCEDURE – penalty for failure to pay amount specified in accelerated payment notice – appellant applies for judicial review but no interim relief granted – whether to stay Tribunal proceedings - yes

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ANTHONY SHERMAN

Appellant

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in Chambers on 3 February 2017 having considered written representations from HMRC dated 6 January 2017 and 19 January 2017 (the appellant having declined invitations to make written representations)

DECISION

1. The appellant, Mr Sherman, appealed to the Tribunal against a penalty that HMRC imposed under s226 of the Finance Act 2014 for failing to pay an amount specified in an accelerated payment notice (“APN”). In his Notice of Appeal, he made it clear that he was party to judicial review proceedings in the High Court challenging the legal validity of the APN and requested that his appeal to the Tribunal be stayed behind the judicial review proceedings. The Tribunal initially granted the stay that Mr Sherman requested. HMRC have now applied for that stay to be lifted. They accept that Mr Sherman is party to judicial review proceedings¹ but argue that, since the High Court refused to grant interim relief restraining HMRC from enforcing the accelerated payments (and penalties) at issue, it is not appropriate for Mr Sherman’s appeal to be stayed.

2. Mr Sherman has not made any observations to the Tribunal objecting to HMRC’s application despite being invited to do so. I have, therefore, considered HMRC’s application by reference only to their submissions and such information as is on the Tribunal’s file (including Mr Sherman’s Notice of Appeal which sets out his grounds of appeal).

Discussion

3. In deciding whether to continue to stay Mr Sherman’s appeal against HMRC’s wishes, I will apply 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 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 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.

“Material assistance”

4. If Mr Sherman is successful in judicial review proceedings, HMRC accepted that both the APN and the penalty for failing to pay the amount demanded would fall away. Therefore, if Mr Sherman is successful in the judicial review proceedings, there would be no need for Tribunal proceedings to determine whether the penalty is due.

¹ He is party to the claim judicial review in *Graham & Others v HMRC*. That claim was dismissed by Sir Kenneth Parker sitting as a judge of the Administrative Court, but the claimants have sought permission to appeal to the Court of Appeal.

5. Moreover, Mr Sherman appears to be suggesting in his grounds of appeal that the very fact that he has taken judicial review proceedings (challenging the lawfulness of the APN) means that he has a “reasonable excuse” for failing to pay the amount demanded. The penalty at issue is of a relatively modest amount (£473.85) and in all likelihood this appeal will ultimately be categorised as “basic” and be dealt with at a hearing with minimal exchange of documentary or witness evidence. I do not, therefore, have full details as to how Mr Sherman will wish to put his case. However, I can quite see that, at a hearing, both HMRC and Mr Sherman might wish to refer to the judicial review proceedings in connection with their arguments on “reasonable excuse”. For example, if Mr Sherman is unsuccessful in judicial review proceedings he may wish to argue that his loss was a narrow one; by contrast HMRC might wish to argue that any loss was a resounding one so as to make it unreasonable for him to withhold payment while judicial review is ongoing. In making these points I am not, of course, determining that an unsuccessful judicial review application is necessarily a “reasonable excuse” for not paying a sum that HMRC have demanded in an APN. I am simply stating that, given the way Mr Sherman has put his case, both parties may wish to refer to the judicial review proceedings even if Mr Sherman is ultimately unsuccessful in those proceedings.

6. The points at [4] and [5] have led me to conclude that the outcome of the judicial review proceedings would be of “material assistance” in resolving the issues before the Tribunal.

Expediency

7. HMRC argue that, since the High Court has refused to grant interim relief, it is clear that the court did not believe the accelerated payment regime should be frustrated by ongoing judicial review proceedings. In this context, they relied on the following passage of the decision of Parker J in *Aston v HMRC* [2015] EWHC 3118 at [20]:

I wish also to make it absolutely clear that even if I had been prepared to grant interim relief, I would have done so only on terms that the penalty regime should continue to be operative. That was the position reached by Mrs Justice Simler in *Rowe*, and also Mrs Justice Laing in a further case gave reasons why that was the appropriate course. I would see no reason why the penalty provisions should not continue to operate. If the judicial review were successful then of course no penalty would be collectible. But if it were not it would not seem to me to be right to have deferred the triggering of the penalty provisions pending the determination of the claim. However that is somewhat academic because I do not believe it is in the interests of justice, having regard to the matters I have mentioned, that I should grant any interim relief in this case.

8. HMRC also referred to the decision of Simler J on questions of interim relief in *R (on the application of Rowe) v HMRC* [2015] EWHC 1511 (Admin). HMRC relied specifically on Simler J’s statement (at [41] of that judgment) that:

The scheme introduced by Parliament (contained in primary legislation) ought to continue to take effect unless and until successfully challenged. Even this court, under the Human Rights Act, cannot override that primary legislation.

5 Although HMRC did not refer to it, that statement is put in context by an earlier passage of the judgment at [36]:

10 It is in the public interest that until set aside, HMRC's decision in relation to the operation of the legislation should be respected and should be permitted to take effect. To prevent HMRC from continuing to consider and ultimately from publicly promulgating decisions on written representations received in relation to PPNs will mean that no sum will be payable because only after such representations have been determined by HMRC does any sum become due under paragraph 6 subparagraph 5 of Schedule 32 [of Finance Act 2014]. Moreover, no penalty for late payment can become due until the requisite time after the sum becomes payable has expired.

15 9. Read in context it is clear that both Parker J and Simler J were concerned to avoid a situation where interim relief prevented the amounts claimed under APNs from falling due (which would also have the effect that no penalty notices could be issued). Both Parker J and Simler J considered that the applicable statutory regime could continue to apply unless, and until, the APNs are determined, in judicial review proceedings, to have been unlawfully issued. In this appeal, APNs have fallen due for payment and HMRC have issued penalty determinations that are the subject of an appeal to this Tribunal. Therefore, in this appeal, the statutory provisions applicable to APNs are indeed being operated.

20 10. HMRC's submissions do not give sufficient weight to the fact that the defence of "reasonable excuse" forms a part of the statutory provisions whose operation needs to be preserved in cases where no interim relief is granted. I do not consider that either Parker J or Simler J were saying that the Tribunal should refrain from staying appeals if it felt that the statutory defence of "reasonable excuse" could not be evaluated until the outcome of judicial review proceedings is known. In making such a determination, the Tribunal would be using its case management powers to ensure that the statutory defence is evaluated fairly and justly. It would not be frustrating the application of the statutory provisions; it would be giving effect to them.

35 11. I do not consider, therefore, that it necessarily follows from the decisions referred to above that it is not "expedient" for the Tribunal to stay proceedings. On the contrary, I believe that it is expedient to do so. The application for judicial review in *Graham and others v HMRC* was dismissed in May 2016. A decision as to whether the claimants have permission to appeal cannot be that far away. If permission to appeal is refused the stay will expire and the appeal will proceed towards hearing. If permission to appeal is granted and HMRC consider that the terms on which it is granted make a continued stay inexpedient, it will be open to them to apply again for the stay to be lifted.

12. My overall conclusion is that both limbs of the test in *Revenue and Customs Commissioners v RBS Deutschland Holdings GmbH* are satisfied. The stay will therefore continue.

5 13. 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)”
10 which accompanies and forms part of this decision notice.

JONATHAN RICHARDS
TRIBUNAL JUDGE

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RELEASE DATE: 7 FEBRUARY 2017