[2017] UKFTT 0467 (TC)

TC05930

Appeal number: TC/2017/01952

INCOME TAX – tax avoidance scheme – partnership payment notices (PPNs) issued – penalties for not paying PPN amounts in time – whether the payment period had ended: held no – penalties cancelled.

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR BALVINDER RAI **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS

Sitting in public at Centre City, Hill St, Birmingham on 1 June 2017

The Appellant in person

Mr Christopher Shea, presenting officer, for the Respondents

DECISION

1. This was an appeal by Dr Balvinder Rai ("the appellant") against three assessments to penalties imposed by the Respondents ("HMRC") for his failure to make three accelerated partner payments by the end of the payment period.

2. I have upheld the appeal on the basis that the payment period had not come to an end by the date of the hearing.

The facts

3. I had in evidence a bundle of documents prepared by HMRC which contained correspondence relating to the case, notes made by HMRC of telephone calls and HMRC's computer log of their contacts and dealings with the appellant (SA Notes).

4. I heard oral evidence from the appellant who was cross-examined by Mr Shea. The appellant gave clear and cogent evidence and presented his own case with skill. Mr Shea's skeleton and his presentation were also a cut above the standard I too often get from HMRC advocates.

5. From the evidence, documentary and oral, I find facts as set out in the following paragraphs of this section. Because much of the evidence, including all of the appellant's, related to the question whether he had a reasonable excuse for being late in paying the amounts in question, I have in this section ignored a lot of the material I had because it became unnecessary to consider it in view of my decision. I mean no disrespect to the parties in doing this. Comments by me are in square brackets and are not findings of fact.

6. In the tax year 2007-08 the appellant entered into a tax mitigation scheme (as he was told) and became a partner in Invicta Film Partnership No 43 LLP.

7. On dates in 2009 and 2010 HMRC gave notice to the representative member of the LLP that they intended to enquire under s 12AC(1) Taxes Management Act 1970 ("TMA") into the LLP's returns for the years 2008, 2009 and 2010. [I cannot tell from the papers whether these years are references to the tax years 2007-08, 2008-09 and 2009-10 – they are what is in the notices]

8. On 3 May 2016 HMRC's Counter Avoidance AP ("CAAP") Teams issued three notices to the appellant, in the top right hand corner of the first page of which were the words "Partner payment notice" ("PPN") and in which the heading of the main text was "Notice issued under Part 4 Chapter 3 of, and Schedule 32 to, the Finance Act 2014". [I have added and removed commas to improve the punctuation]

9. The scheme name is shown as Invicta Film Partnership No 43 LLP and the scheme reference 43331869.

10. The notices specified an amount "due in respect of this notice" of £24,075.72, £18,718.80 and £18,613.20 for the tax years 2007-08, 2008-09 and 2009-10 ("the relevant years"). They also said:

> "Payment due on before 4 August 2016. (Payment may be due on a later date if representations are made under Paragraph 5 of Schedule 32 to the Finance Act 2014.)".

11. On 26 May 2016 a Mr Trahearn from CAAP Team 2 in Birmingham phoned the appellant, who, among other things, confirmed he had received the PPNs

12. On 11 July 2016 Comprehensive Management Consultants Ltd ("the appellant's accountants") sought a copy of the PPNs as they wished to make representations on behalf of the appellant. This letter refers to a letter to them from HMRC of 27 June 2016 which is not in the bundle.

13. The copies requested were sent on 21 July 2016 by HMRC's Birmingham CAAP Team 2 ("CAAP Team 2") who managed to misspell "accelerated" in giving the name of the team. There was no copy signature on this letter or in any other subsequent letters from the CAAP Teams.

14. On 1 August 2016 the appellant's accountants wrote to HMRC making, they said, representations. [This letter is an important one in relation to my decision and the complete text is set out in the discussion section]

15. On 24 August 2016 CAAP Team 2 replied refusing to accept that representations had been made, and pointing out that it was too late to make any. [This letter is also an important one in relation to my decision and the complete text is set out in the discussion section]

16. On 29 August 2016 CAAP Team 2 sent the appellant a notice of assessment of a penalty for failure to pay an accelerated payment on time, that for 2008-09. There was no name of any officer and no copy signature on this notice.

17. On 15 September 2016 the appellant appealed against that penalty assessment.

18. On 17 October 2016 CAAP Team 2 sent the appellant a notice of assessment of a penalty for failure to pay an accelerated payment on time, that for 2007-08. There was no name of any officer and no copy signature on this notice.

19. On 18 October 2016 CAAP Team 2 responded to the appeal in relation to 2008-09 giving their view of the matter, refusing to accept that the appellant had a reasonable excuse for his failure to pay on time and denying that there were special circumstances that would justify a reduction.

20. On 7 November 2016 CAAP Team 2 sent the appellant a notice of assessment of a penalty for failure to pay an accelerated payment on time, that for 2009-10. There was no name of any officer and no copy signature on this notice.

21. On 9 November 2016 the appellant sought a review of the 2008-09 decision and appealed against the assessments for 2007-08 and 2009-10.

22. On 17 January 2017 HMRC's Birmingham CAAP Team 3 [now] responded to the appeals for 2007-08 and 2009-10 giving their view of the matter, refusing to accept that the appellant had a reasonable excuse for his failures to pay on time and denying that there were special circumstances that would justify a reduction.

23. On 27 January 2017 HMRC's Late Penalties Reasonable Excuse Team notified the reviewing officer's conclusions of the review of the decision to assess for 2008-09. This was to uphold the penalties. The letter was signed by Mrs K Barber, Review Officer.

24. On 17 February 2017 the appellant notified his appeals against all three penalties to the Tribunal.

25. In addition in January 2017 HMRC issued three further notices of assessment for the 5 months late penalties for the relevant years and these were appealed by the appellant but were not before me.

The law

26. The law relating to accelerated payments is in Chapter 3 ("Chapter 3") Part 4 Finance Act ("FA") 2014. From s 219 to s 227 Chapter 3 deals with accelerated payment notices ("APN"). APNs may be given to a person (P) if a tax enquiry is in progress into a return made by P or if P has made an appeal.

27. In the case of a partnership an enquiry is normally made of the "representative" partner into the partnership return made by that partner, who would thus count as P. But that return does not itself include a self–assessment of tax that incorporates the effect of a tax avoidance arrangement on any tax payable, unlike a return made by an individual or a company. It is the partners who must individually reflect in their own self-assessment returns the effect of the arrangements and it is on that return that any accelerated payment notice must operate. Thus the person whose return is enquired into is not the same person as the one to whom the notice of payment is to be given.

28. Accordingly s 228 FA 2014 provides for Schedule 32 to that Act ("Schedule 32") to make provision for the case of partnerships and to modify Chapter 3.

29. The relevant parts of that Schedule are:

> "**Circumstances in which partner payment notices may be given**
>
> **3** (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,
>
> …

…

(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").

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

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

…

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

…

Content of partner payment notices

4 (1) The partner payment notice given to a relevant partner must—

(a) specify the paragraph or paragraphs of paragraph 3(5) by virtue of which the notice is given,

(b) specify the payment required to be made under paragraph 6, and

(c) explain the effect of paragraphs 5 and 6, and of the amendments made by sections 224 and 225 (so far as relating to the relevant tax in relation to which the partner payment notice is given).

(2) The payment required to be made under paragraph 6 is an amount equal to the amount which a designated HMRC officer determines, to the best of the officer's information and belief, as the understated partner tax.

(3) "The understated partner tax" means the additional amount that would become due and payable by the relevant partner in respect of tax if—

…

(b) in the case of a notice given by virtue of paragraph 3(5)(b) (cases where the DOTAS arrangements are met), such adjustments were made as are required to counteract so much of what the designated HMRC officer so determines as the denied advantage as is reflected in a return or claim of the relevant partner;

…

(4) "The denied advantage"—

…

(b) in the case of a notice given by virtue of paragraph 3(5)(b), means so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise, …

…

Representations about a partner payment notice

5 (1) This paragraph applies where a partner payment notice has been given to a relevant partner under paragraph 3 (and not withdrawn).

(2) The relevant partner has 90 days beginning with the day that notice is given to send written representations to HMRC—

(a) objecting to the notice on the grounds that Condition A, B or C in that paragraph was not met, or

(b) objecting to the amount specified in the notice under paragraph 4(1)(b).

(3) HMRC must consider any representations made in accordance with sub-paragraph (2).

(4) Having considered the representations, HMRC must—

(a) if representations were made under sub-paragraph (2)(a), determine whether—

(i) to confirm the partner payment notice (with or without amendment), or

(ii) to withdraw the partner payment notice, and

(b) if representations were made under sub-paragraph (2)(b) (and the notice is not withdrawn under paragraph (a)), determine whether a different amount ought to have been specified as the understated partner tax, and then—

(i) confirm the amount specified in the notice, or

(ii) amend the notice to specify a different amount,

and notify P accordingly.

Effect of partner payment notice

6 (1) This paragraph applies where a partner payment notice has been given to a relevant partner (and not withdrawn).

(2) The relevant partner must make a payment ("the accelerated partner payment") to HMRC of the amount specified in the notice in accordance with paragraph 4(1)(b).

(3) The accelerated partner payment is to be treated as a payment on account of the understated partner tax (see paragraph 4).

(4) The accelerated partner payment must be made before the end of the payment period.

(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 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 relevant partner is notified under paragraph 5 of HMRC's determination.

(6) If the relevant partner pays any part of the understated partner tax before the accelerated partner payment in respect of it, the accelerated partner payment is treated to that extent as having been paid at the same time.

(7) Subsections (8) and (9) of section 223 apply in relation to a payment under this paragraph as they apply to a payment under that section.

Penalty for failure to comply with partner payment notice

7 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

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

30. Section 226 FA 2014 provides, before any modification by paragraph 7 Schedule 32:

"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.

…

(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."

31. If one were to incorporate by textual amendment the modifications required by paragraph 7(a) and (b) Schedule 32, s 226 would read (with the substituted words in bold):

> (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 partner payment** is unpaid at the end of the payment period, **the relevant partner** is liable to a penalty of 5% of that amount.
>
> (3) If any amount of **the accelerated partner payment** is unpaid after the end of the period of 5 months beginning with the penalty day, **the relevant partner** is liable to a penalty of 5% of that amount.
>
> (4) If any amount of **the accelerated partner payment** is unpaid after the end of the period of 11 months beginning with the penalty day, **the relevant partner** 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, **and "payment period" has the meaning given by paragraph 6(5) [of Schedule 32].**
>
> …
>
> (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 partner payment** as they apply to a penalty under that Schedule in relation to a failure by a person to pay an amount of tax."

32. It is immediately noticeable that there are some oddities here. The first is that subsection (1) of s 226 is not modified but retains its references to an APN and to s 219(4)(a) FA 2014.

33. There are two possible explanations. One, that the drafter considered that it was not necessary to also non-textually modify section 226(1), because paragraph 7's opening words would do all that was necessary to make it clear that it was PPNs given by virtue of paragraph 3(2)(a) that were in issue, not APNs. The other is that there is a drafting slip.

34. If the explanation is that it was intentional, then it seems to be an unnecessarily elliptical way of expressing Parliament's intention, and not in accordance with the modern style of drafting Finance Acts embodying the drafting approach used in the Tax Law Rewrite.

35. Ellipsis in a statutory provision requires the reader to work out what words are being omitted. I suggest that here they are "given by virtue of paragraph 3(2)(a) as it applies to accelerated payments given by virtue of section 219(2)(a)".

36. Looking for any clue that this rather drastic ellipsis is what was intended, I notice that the Explanatory Notes to the Finance Bill 2014 say that:

> "111. Paragraph 7 makes clear that the late payment penalty rules of clause 219 apply in respect of each partner individually, and applies clause 219 with appropriate modifications."

37. This is itself a little muddled, as the provision that does the clarification is one of the appropriate modifications, and the explanation does not help to indicate why a modification to section 226(1) was not thought necessary. It is the more surprising that no explicit modification was setting out the suggested omitted words given the content of paragraph 2 Schedule 32 which explicitly provides that where there is a partnership APNs do not apply, but PPNs do.

38. If the ellipsis was not intended then I think the omission can be cured by applying the *Inco Europe* principle to paragraph 7 Schedule 32. The principle was very recently explained by the Court of Appeal in a tax case, *Hancock & anor v HMRC* [2017] EWCA Civ 198 where Floyd LJ said at [43]:

> "In cases of plain drafting mistakes, in order to give effect to the obvious intention of Parliament, the court can go beyond resolving ambiguities in language, and can omit or insert or substitute words: *Inco Europe Limited and others v First Choice Distribution (a firm) and others* [2000] UKHL 15; [2000] 1 WLR 586. The court is not thereby exceeding its interpretive role but merely making as much sense of the statutory provision in context as it can. The power to proceed in that way is limited to cases where the court is, as Lord Nicholls explained in that case:
>
> > 'abundantly sure of three matters (1) the intended purpose if the statute or provision in question, (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance.'"

39. Before applying the principle to paragraph 7 the second oddity in paragraph 7 needs some consideration. There is nothing in paragraph 7 that supplies a definition of "the relevant partner" for a reader who mentally makes, or by themselves textually inserts, the amendments deemed by that paragraph to be in s 226. Nor is there a definition of the term "relevant partner" in the general interpretative section for Chapter 3 in s 229: there is a definition in paragraph 1(3) Schedule 32 which applies only for the purposes of Schedule 32, not for the rest of Chapter 3 of which the Schedule forms part. The deeming by "asifism"[1] of s 226 as being textually amended where the condition in the opening words of paragraph 7(1) applies does not go so far as to deem the section to be incorporated into the Schedule.

40. A contrast can be drawn between the lack of application to s 226 of a definition of "the relevant partner" and the requirement in paragraph 7(c) to read into s 226 the

[1] This colourful neologism for the frowned upon technique of non-textual amendment was coined by Francis Bennion in "Bennion on Statute Law".

definition of "the payment period" which is found in paragraph 6(5) Schedule 32 in place of the definition applying to the rest of Chapter 3 found in s 223(5).

41. Applying the *Inco Europe* principle I think that paragraph 7 Schedule 32 requires further words to be inserted, of which this is a possible example:

> "**7** Section 226 (penalty for failure to make accelerated payment on time) applies to accelerated partner payments as if—
>
> (za) the reference in subsection (1) to an accelerated payment notice were to a partner payment notice,
>
> (zb) the reference in that subsection to section 219(3)(a) were to paragraph 3(2)(a) of Schedule 32 to this Act,
>
> (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*]
>
> (c) "the payment period" had the meaning given by paragraph 6(5), and
>
> (d) "the relevant partner" had the meaning given by paragraph 1(3)."

42. I am left wondering after this why the drafter did not think that it would be more helpful and appropriate to set out in Schedule 32, in place of what is there as paragraph 7, the whole of the text of s 226 but modified as appropriate for PPNs.

43. I also need to consider two further matters in relation to s 226(7) FA 2014.

44. First, that subsection applies parts of Schedule 56 FA 2009 ("Schedule 56") dealing with penalties for late payment of tax to the penalties for late payment of amounts shown on APNs "with any necessary modifications" (a further example of not entirely helpful non-textual modification).

45. Secondly, I also have to apply s 226(7) read as modified by paragraph 7 Schedule 32, so I also need to ensure that the modifications made by s 226(7) as unmodified by paragraph 7 also apply to it as so modified.

46. What then are the necessary modifications to be made to paragraphs 9 to 18 of Schedule 56 by s 226(7) as unmodified and as modified by paragraph 7 Schedule 32?

47. Paragraph 10 Schedule 56 allows for the suspension of a penalty where deferral arrangements are in force. This was an issue in the case. The paragraph contains references to "payment of the amount of tax" (sub-paragraph 1(b) and (4)(a)). A modification is required because payment of amounts shown on APNs and PPNs are not payments of tax, but amounts which are to be treated as a payment on account of the understated tax (as defined in s 220(4) FA 2014) in an APN or on account of the understated partner tax (as defined in paragraph 4(3) Schedule 32) in the case of a PPN.

48. The modification that it seems to me is required by s 226(7) FA 2014 is to substitute "stated in the accelerated payment notice" for "of tax" in paragraph 10 Schedule 56, and by s 226(7) as modified by paragraph 7 Schedule 32 is to substitute "stated in the partner payment notice" for "of tax".

49. Paragraph 11(4) Schedule 56 allows for a supplementary assessment of a penalty where an earlier assessment operated by reference to an underestimate of tax which was due and payable. That is clearly a reference to a "tax-geared" penalty, ie one where the penalty is a percentage of some related figure of tax outstanding.

50. The penalties imposed by s 226 FA 2014 are of that variety, so the question arises whether there are circumstances in which an assessment to the FA 2014 penalties might have operated by reference to an underestimate of the APN or PPN amount to pay. It is not easy to imagine in what circumstances the amount payable as a result of an APN or PPN might be underestimated and the underestimate come to light after a penalty has been assessed. The legislation in Chapter 3 does though seem to possibly allow for such a circumstance, in s 227(4) FA 2014, although all the other parts of s 227 dealing with amendments to APNs seem to refer to reductions only. Section 227 is comprehensively modified to suit PPNs by paragraph 8 Schedule 32.

51. Accordingly I consider the necessary modification of paragraph 11(4) Schedule 56 required by s 226(7) FA 2014 is to substitute "stated in the accelerated payment notice" for "of tax" in paragraph 11(4) Schedule 56, and by s 226(7) as modified by paragraph 7 Schedule 32 is to substitute "stated in the partner payment notice" for "of tax".

52. Since, as I have said, s 227 FA 2014 caters for reductions of the amount in APNs it is necessary to modify paragraph 11(4A) Schedule 56 in exactly the same way as any amendment to paragraph 11(4).

53. Paragraph 12 Schedule 56 gives the time limits for making a penalty assessment under that Schedule and so also under Chapter 3. The limit is the later of two dates.

54. Date A is "the last day of the period of 2 years beginning with the date specified in or for the purposes of column 4 of the Table" in paragraph 1 Schedule 56. APN and PPN penalties are not in that Table. Paragraph 12(2) must be modified by s 226(7) FA 2014 (including where that section is modified by Schedule 32) to refer instead to "the penalty day (within the meaning given in s 226(5) of the Finance Act 2014)".

55. Date B refers to times relating to appeals against the tax liabilities to which penalties relate. As there can be no appeal against an APN or PPN, Date B is irrelevant, and the necessary modification is to omit paragraph 12(3) and (4).

56. No other modifications seem necessary.

Submissions

57. For HMRC Mr Shea submitted:

(1) the penalties had been properly imposed in accordance with the legislation

(2) the appellant had not shown that he had a reasonable excuse

(3) HMRC's decision on special circumstances was not "flawed", and even if it was, there no such circumstances, and

(4) if the Tribunal was minded to consider that representations had been made within the legislation, HMRC had determined that no change was to be made to the amount of the PPN, so the payment date was no later than the end of September and penalties were still due.

58. The appellant submitted:

(1) there had been representations to which HMRC had not responded so the payment period had not ended

(2) in any event he had a reasonable excuse for not paying by 4 August or if relevant, the end of September, which was that he had tried to enter an agreement with HMRC to defer payment of the whole sum at once but had been frustrated by them.

Discussion

59. Because penalties are involved in this case HMRC accepted, rightly, that the burden is on them to show that all statutory requirements relating to the penalties are fulfilled. This involves my considering the conditions for the *giving* of a PPN and whether it meets the requirements as to content. But it does not require me to consider, because I have no jurisdiction to do so, whether the conditions for the notice *being* a PPN are met or the amount of it.

60. I also have to consider whether the requirements in paragraphs 9 to 18 Schedule 56 are met so far as relevant.

61. I have considered all the evidence HMRC put before me, and my conclusions on whether HMRC have demonstrated that the statutory requirements are met are set out in the following paragraphs.

62. To put my consideration of this question in its context, I repeat the relevant provisions of s 226 FA 2014 as modified by paragraph 7 Schedule 32 and by me:

> "(1) This section applies where a partner payment notice is given by virtue of paragraph 3(2)(a) of Schedule 32 to this Act (notice given while tax enquiry is in progress) (and not withdrawn).
>
> (2) If any amount of the accelerated partner payment is unpaid at the end of the payment period, the relevant partner is liable to a penalty of 5% of that amount."

63. I must then be satisfied that what was given to the appellant was a partner payment notice, that it was given by virtue of paragraph 3(2)(a) Schedule 32 and that its content was that required by paragraph 4 Schedule 32.

64. I must also be satisfied that the appellant was a "relevant partner" as it is only to such a person that a PPN may be given. This is not as obvious as it appears, at least to HMRC whose Statement of Case did not seek to demonstrate that he was.

65. The entity which the appellant joined when he bought into the "tax mitigation scheme" was the Invicta Film Partnership No 43 LLP. It is a limited liability partnership, a body corporate formed under the Limited Liability Partnership Act 2000. The appellant is a member of the LLP: LLPs do not have partners.

66. By s 863 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") the activities of an LLP are treated as being carried on in partnership by the members, and all references in the Income Tax Acts to a partnership and to partners in a partnership are to include an LLP and its members. Chapter 3 is part of the Income Tax Acts, a term defined in the Schedule to the Interpretation Act 1978 to mean all enactments relating to income tax. Chapter 3 does relate to income tax: see eg the definition of "relevant tax" in s 229 FA 2014 read with s 200(a).

67. There is one proviso in s 863 ITTOIA. The deeming there only applies where the LLP carried on in the relevant tax years a trade, profession or business. In some tax avoidance cases involving film schemes a partnership has been held not to have been carrying on a trade (see eg *Samarkand Film Partnership No. 3 & ors v HMRC* [2017] EWCA Civ 77). But there is no case that I can see where an LLP has been held not to have carried on a business at all, so I am satisfied that s 863 applies to this case.

68. I accept then that HMRC have shown that in accordance with paragraph 3(1) Schedule 32 they gave a notice to the appellant for each of the relevant years, and that the appellant was a relevant partner (or member) for this purpose. "Relevant partner" is defined in paragraph 1(3) Schedule 32 and as modified by s 863(2) ITTOIA to mean a person who was a member of an LLP whose representative member was in the relevant years required to make an LLP return under s 12AA TMA. While I have not seen any evidence to show that a requirement to deliver a return was notified to the members, it is inconceivable that no such requirement was notified, or the case would not have got as far as it has.

69. I accept also that HMRC have shown that in accordance with paragraph 3(2)(a) there was an enquiry into the LLP's return for the relevant years. I saw copies of the letters to the representative member of the LLP of which the appellant was (and is) a member, so as a result of the opening of the enquiry under s 12AC(1), Condition A in paragraph 3(2)(a) is met.

70. It is implicit from the documents I saw that condition B (paragraph 3(3)), that the return was made on the basis that the asserted advantage results from the chosen arrangements, was met and I consider it more likely than not that it was. I would have preferred though to see some more explicit evidence on this point.

71. I accept that HMRC have shown, in accordance with paragraph 3(5), that the arrangements referred to in paragraph 3(3) are DOTAS arrangements. I saw copies of

the PPNs for each of the relevant years which contained an 8 digit number which I was assured (and I accept) was the DOTAS number allocated in accordance with s 311 FA 2004 to the scheme which the appellant entered into.

72. As a result of my decisions set out in §§68 to 71, I consider that HMRC were entitled to give the appellant a PPN in accordance with paragraph 3 Schedule 32, and I turn to paragraph 4 (contents of a PPN).

73. I accept that, in accordance with paragraph 4(1)(a), the PPNs specified a paragraph of paragraph 3(5) by virtue of which the notices were given, namely paragraph (b) (DOTAS arrangements).

74. I accept that, in accordance with paragraph 4(1)(b), each of the PPNs specified the payment required to be made under paragraph 6 (and did not specify two different amounts – see *Graham Pitcher v HMRC* [2017] UKFTT 406 (TC) ("*Pitcher*")).

75. I accept that, in accordance with paragraph 4(1)(c), the PPNs explained the effect of paragraphs 5 and 6 Schedule 32 FA 2014. I saw that the notices exhibited did this.

76. I accept that, in accordance with paragraph 4(1)(c), the PPNs also explained the effect of the amendments made by s 224 and s 225 FA 2014 (so far as relating to income tax, the relevant tax in relation to which the PPN was given).

77. I accept that paragraph 4(1)(d) is not relevant to a notice relating to income tax, which this is.

78. I accept that paragraph 4(5) is not relevant as only one requirement of paragraph 3(5) is relevant in this case.

79. As a result of my decisions set out in §§73 to 78, I consider that the PPNs given to the appellant met all the statutory requirements as to content in paragraph 4 Schedule 32.

80. I therefore hold that s 226(1) FA 2014 as modified by paragraph 7 Schedule 32 FA 2014, itself as relevantly modified by me in accordance with the *Inco Europe* principle, applies in these cases.

81. The next question is whether, in accordance with s 226(2) FA 2014 (as modified by paragraph 7 Schedule 32), the PPN amounts were unpaid at the end of the payment period. By paragraph 6(5) Schedule 32, imported into s 226 by paragraph 7(c) Schedule 32, the end of the payment period is different according to whether representations under paragraph 5 were made or not.

82. If representations were not made, the end of the payment period is agreed to be 4 August 2016. If they were made, the end of the payment period is the later of 4 August 2016 and the date 30 days after the date when the relevant member (partner) is notified of HMRC's determination.

83. The first question in this case is whether the appellant made representations within paragraph 5 Schedule 32. HMRC say he did not. Taking his cue from my questions of Mr Shea, the appellant says he did, and that he did not and still has not been notified of a determination by HMRC. If the appellant is correct then the penalties were not validly assessed.

84. It is necessary to set out in detail the correspondence between the parties on this matter.

85. On 1 August 2016 the appellant's accountants wrote to HMRC (I have quoted it verbatim).

> "Further to our letter of 11 July 2016, please note below the representations of our client in respect of partner payment notice dated 3 May 2016 for the 3 tax years 2007/08, 2008/09 and 2009/10 –
>
> 1. Our client invested £42000 in Invicta Film Nominee in good faith as a legitimate tax deferral investment in January 2008. Tax enquiry has turned this investment into tax avoidance scheme. As a result, our client is going to lose all the tax advantages of this investment and the original investment. Partner payment notice has taken no account of loss of original investment of £42000.
>
> 2. [Not relevant]
>
> 3. Our client is paying loan interest of around £7500 per annum in connection with investment of £42000 in Invicta Film Nominees. Partner payment notice has taken no account of this loan interest.
>
> 4. In the tax year 2014/15, our client declared partnership profits of £10867.00 on his tax return. Further partnership profits will be declared on 2015/16 tax return. Partner payment notice has taken no account of these declared partnership profits.
>
> 5. Our client was unable to contribute into personal pension plan in 2006/07. Our client carried forward unclaimed tax relief of 3 previous years to make this investment of £42000 in 2007/08. As a result of HMRC ruling, pension arrangements of our client have been affected. Partner payment notice take no account of changes affecting pension arrangements.
>
> 6. [Not relevant]."

86. I add that the appellant explained in evidence that the partnership profits referred to in paragraph 4 of the letter were profits from the film partnership in which he invested £42000.

87. On 24 August 2016 HMRC replied (again I quote verbatim):

> "Dear Mr Rai
>
> Thank you for your [*sic*] letter dated 1 August 2016.
>
> You [*sic*] have requested that your [*sic*] letter be treated as containing representations. HMRC must consider any representations made in accordance with Section 222 (2) of the Finance Act 2014. [*sic*]

> To be in accordance with that subsection [*sic*], a representation is required to be made in writing within 90 days of the date the PPN was given and must object on the grounds that one or more of Conditions A, B or C has not been met and/or to the amount specified in the notice. As the contents of your letter do not meet those requirements. [*sic*] I am unable to treat your letter as containing a valid representation as you have not provided enough information.
>
> You would have needed to tell us why the amounts shown in the notices are not correct, what you think the correct amounts are and why.
>
> As your PPN charges [*sic*] were due by 4 August 2016, you have now missed the deadline to make valid representations.
>
> Yours sincerely
>
> [*blank*]
>
> **Accelerated Payments**
> Team 2
>
> To find out what you can expect from us and what we expect from you go to [*website address*] and have a look at 'Your Charter'."

88. I gloss over the fact that the letter was not written by Dr Rai, the appellant, but by his accountants and that the legislation quoted is not the correct legislation for a PPN, only for an APN. I also gloss over the fact that the appellant's accountants did not "request that [the] letter be treated as containing representations". They said nothing of the sort: they said clearly that their letter actually contained the appellant's representations.

89. But I cannot gloss over the contents of this reply. It is nitpicking pedantry to say that the letter being responded to did not make representations objecting to the amount. And that is all that is required by paragraph 5(2) Schedule 32 (and by s 222(2) FA 2014 for that matter).

90. Each of paragraphs 1, 3, 4 and 5 of the letter referred to amounts not being taken into account in the PPN. In paragraphs 1, 3 and 4 figures are given. The clearest example is in paragraph 3 from which it is obvious that the appellant is objecting to the disallowance of loan interest in arriving at the specified amount.

91. I accept that the letter is not quite as clear as it might have been had it been written by a major firm of chartered accountants or solicitors, but the thrust is obvious. The final paragraph of the reply, with its hint of gloating, suggests that HMRC were looking for any possible hook on which to hang a refusal to accept representations made close to the end of the permitted period of 90 days.

92. Where as here no appeal is possible against a PPN or APN, representations are the closest substitute for an appeal. HMRC are enjoined by their own manual (ARTG) to regard as an appeal anything which might conceivably be one, but here where there is a substitute for an appeal which does not given the same rights as an appeal, the opposite approach is being taken.

93. It may well be (I do not have the materials to comment, but I suspect it is the case) that the objections put forward would not have been accepted. But that is not the point. HMRC must consider them and determine the amount of the PPN anew, and then notify the person of their decision. This they have not done, but they should have.

94. Mr Shea argued faintly that the reply of 24 August 2016 was in fact a determination under paragraph 5 Schedule 32. I do not accept this. Far from having considered any representations and then determining the amount, the CAAP Team refused to consider them.

95. Not only did HMRC not treat the representations as representations, they also explained to the appellant what they maintained the law required, ie that the appellant would have needed to tell them why the amounts shown in the notices are not correct, what he thought the correct amounts were and why.

96. That is not what paragraph 5 says, so where did it come from? The Explanatory Notes on Finance Bill 2014 do not say anything on this point.

97. HMRC's Guidance, which is difficult to find as it is not included in the HMRC Manuals list on their website, merely says in relation to APNs:

> 2.6.4 How to make representations
>
> Full information about where to send a representation and what it should contain will be included on the accelerated payment notice.

and for PPNs the guidance says:

> 2.16.9 Partner representations
>
> There is no direct right to appeal against a partner payment notice, but each partner has the right to make written representations to HMRC on the basis that either:
>
> - any of the Conditions A to C (see sections 2.2.3 to 2.2.8 of this guidance) are not met
> - the amount specified in the partner payment notice is not correct

98. If I turn to the PPN in this case it says:

> You can make representations to us objecting to the notice and/or the amount of the accelerated payments if you believe that one or both of the following applies:
>
> …
>
> - 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

99. This is not what the statute says. HMRC are therefore setting their own rules about what should be in representations. This is not the way they should act.

100. I find that the appellant made written representations within the time limit for doing so which objected to the amount of the PPN. I find that HMRC have not determined whether a different amount or no amount ought to have been specified and, accordingly, have not notified the appellant of the confirmed or amended amount as is required by paragraph 5(4)(b) Schedule 32 and the fullout words of the sub-paragraph.

101. Thus the payment period has not ended. The appellant has not failed to pay the unpaid amount by the end of that period and so no penalty is due under s 226(2) FA 2014, or for that matter s 226(3). Since the appellant has, I was informed, paid all the PPN amounts HMRC cannot now remedy their error.

102. In the light of this decision it becomes academic whether the provisions of paragraphs 9 to 18 of Schedule 56 have been complied with.

103. The lack of any names on the correspondence and notices (a point also picked up by Judge Kevin Poole in *Pitcher*) has caused me to wonder whether paragraph 11(3)(a) Schedule 56 has been observed. That paragraph deals with the requirements for there to be a valid penalty assessment. I am satisfied from the evidence of the PPNs that in accordance with paragraph 11(1)(b) and (c) HMRC have notified the appellant and stated the period inspect of which the penalty is assessed. Paragraph 11(3) then says that unless expressly provided for in Schedule 56 an assessment to a penalty is treated for procedural purposes as an assessment to tax, which must mean the tax concerned, ie income tax.

104. The procedural rules for an assessment to income tax which is not a self-assessment are in s 30A TMA. The penalty assessments in this case conform with s 30A(3). But they do not show the name of the officer who issued them. While this is not a requirement laid down in s 30A(3) it seems to me that from s 31A TMA (notices of appeal) it is a requirement to name an officer who made the assessment as otherwise the recipient of the assessment cannot know who to appeal to.

105. However paragraph 14 Schedule 56 provides that an appeal against a penalty assessment is treated in the same way as an appeal against an assessment to the tax concerned unless FA 2009 provides expressly for some other procedure. But Schedule 56 does not lay down any requirements as to the person to whom an appeal may be made, so it seems that s 31A applies. But as I have said the question is moot, and I do not come to any conclusion on this point.

106. I add that this point does not concern the question, touched on tangentially in *Donaldson v HMRC* [2016] EWCA 761, whether an assessment may be made automatically by a computer, as it seems likely that some human intervention was necessary to make the assessment: it is just that the anonymity may be relevant.

107. The assessments were clearly made before Date A in paragraph 12 Schedule 56.

108. Going on to other parts of Schedule 56, the question whether the appellant had a reasonable excuse for not paying the PPN within the time permitted does not arise. Nor is it necessary for me to consider whether HMRC's decision as to special

circumstances was flawed, or if it was, whether there were any to justify a reduction of the penalties.

109. In accordance with paragraph 15 of Schedule 56 to the Finance Act 2009, I cancel the three penalties.

110. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 6 June 2017