ATTACKING FOLLOWER NOTICES AND ACCELERATED PAYMENTS NOTICES

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1. Finance Act 2014 Part 4

Finance Act 2014 Part 4 is the most pernicious attack on the Rule of Law which the Executive, in this case in the guise of HMRC, has bamboozled an ignorant House of Commons into enacting since the Glorious Revolution of 1688.

It empowers HMRC to issue Follower Notices and Accelerated Payment Notices. A Follower Notice requires a taxpayer who has a dispute with the Revenue either to give up access to justice in the form of his right to have the dispute adjudicated by impartial tribunals and courts, in the normal way, or to pay a penalty, equal to 50% of the tax in dispute, even if the taxpayer eventually wins his dispute!

An Accelerated Payment Notice requires a taxpayer to pay tax in dispute pending the resolution of that dispute, no matter how great his chance of success or how great the hardship caused to him. If he fails to pay, he can be sued for the amount and execution levied on his property and, in addition, non-refundable penalties can be exacted from him.

What both Follower Notices and Accelerated Payment Notices have in common is that HMRC is allowed to by-pass due process in the form of judicial oversight. While in countries with a fascist or other totalitarian heritage, putting the Executive above and beyond the law might be regarded as normal, in the United Kingdom it is flagrant breach of one of the pillars of our constitution, the doctrine of Separation of Powers, which stipulates that the Executive is not above the law and is answerable for its actions in the normal courts.

What makes them even more objectionable is that, in breach of one of the cardinal rules of Natural Justice, HMRC is allowed to be judge in its own cause.

While HMRC trumpets that these provisions are necessary to combat tax avoidance, they contain no limitation to cases of tax avoidance. And in any event, what HMRC regards as tax avoidance may be considered perfectly legitimate tax planning by anyone else.

These measures form part of a much wider attack by HMRC on the constitutional rights of taxpayers. They are part and parcel of other proposals, such as those whereby HMRC should be able to raid taxpayer's bank accounts without any judicial order or to have taxpayers imprisoned for innocent mistakes in their tax returns, which have been so widely and so rightly condemned.

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HMRC's stance is all the more outrageous given the open notorious mistakes it has made in recent years in dealing with taxpayer's affairs. We all know they cannot be trusted. Many suspect that they have an agenda of its own, which regards as the enemy economically productive members of society who contribute the taxes which pay for everything, include incompetent civil servants and the extravagant waste of public money. Many believe that there is something rotten in the state of HMRC and the sooner it is ripped out, the better.

HMRC's stated aims could easily have been achieved by legislation which respected the Rule of Law, the principles of Natural Justice and the Separation of Powers. Indeed, there were already in force statutory provisions whereby HMRC could require tax in dispute to be paid on account - yet the final arbiter was always the independent system of courts and tribunals. So Accelerated Payment Notices were needed only to by-pass the courts. And as regards Follower Notices, rules could easily have been introduced mirroring those in civil proceedings where summary judgment can be given - by a judge, not the claimant! - against a defendant has no arguable case. Yet both of those methods involve independent judicial safeguards, which seem anathema to HMRC.

The enactment of Part 4 is worse than a crime against democratic values: it is a serious error. If the Accelerated Payment Notice system is allowed to operate unchecked, it will destroy the liquidity of many small to medium businesses on which the success of our fledgling recovery depends. And where will we all be then?

2 Scope of this Article

Our judges are not powerless in the face of such monstrous audacity and have not only the means but, I predict, will have the will, to ensure that Part 4 is emasculated. There are plenty of precedents in our law books for their willingness and ability to do so.

While I understand that some "fashionable" Silks have been advising simply that there is nothing to be done and others, who ought to know better, have overlooked means of attacking these provisions, I believe that taxpayers should not be deterred, but that there is a whole raft of weapons which can be used to attack these provisions in the courts, even though Part 4 confers no right of appeal against a Follower Notice or an Accelerated Payment Notice.

In the rest of this article, I shall set out in outline only some promising lines of attack.

Needless to say, this article does not constitute legal advice and is no substitute for legal advice. It is intended to stimulate and inform debate and to give hope and encouragement to the oppressed. Proper legal advice should be taken before any action or omission is contemplated.

3 Attacking Follower Notices

3.1 Are all the Conditions Satisfied?

A Follower Notice can be given only if the four conditions, A, B, C and D, set out in section 204 are satisfied. If they are not, then a purported Follower Notice will be void.

While Conditions A and D will usually be satisfied, should always check to ensure that they are.

I have heard a distinguished Revenue Silk publically that Condition B will always be satisfied. While that may be the view of HMRC, I beg to differ. Condition B is that "the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular tax arrangements ("the chosen arrangements")." If one pursues the paper chase through Part 4 (and other parts of the Tax Acts) to determine the true meaning of Condition B, in my view, while it will be satisfied in some cases, in most cases it will not be.

Condition C is that "HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements." I would imagine that it is unlikely that in the case of any particular Follower Notice "HMRC" will have formed any requisite opinion in relation to it. That will mean that Condition C is not satisfied and the Follower Notice is void. It will also, of course, mean that any Accelerated Payment Notice based on the purported Follower Notice will also be void.

This question breaks down into two further elements. First, it is indeed "HMRC" which holds an opinion (whatever that might be)? And second, even if its "HMRC" which holds an opinion "that there is a judicial ruling which is relevant to the chosen arrangements" (as to which, see below), is it an "opinion" within the meaning of Condition C? If not, the Follower Notice will again be void. It may well be that the Courts will be so hostile to Part 4 and determined to confined its scope within the strictest bounds that they will give "opinion" such an interpretation that will convert the test from a seemingly subjective one to something approaching an objective one.

It is also possible that although there are "particular tax arrangements" and "chosen arrangements", there is no "judicial ruling which is *relevant to*"[2] the "chosen arrangements" in question. While there may be a "judicial ruling" which is relevant to *some* arrangements of which the "chosen arrangements" form part or with which they overlap, that is not the same thing as it being relevant to the "chosen arrangements". It is thus essential to identify for the purposes of Condition C, just as much as for Condition B, what are the "chosen arrangements". A Follower Notice could be void on the grounds that the opinion in question, even if formed by "HMRC" was an opinion as to the wrong matter.

The alleged judicial ruling might not in fact be a "ruling ... on one or more issues". It might not be a "ruling" and / or it might not relate to one or more "issues".

Even if there is a "judicial ruling", it might not be ""relevant" to the chosen arrangements". There is more than one different reason why it might fail to be such.

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[2] Italics added by R.V.

3.2 Have the Revenue Exercised the Power to Issue a Follower Notice Reasonably?

Part 4 confers a power on HMRC. It does not impose a duty. That power is a public law power and thus any purported exercise of the power could be quashed on judicial review if it exercised unreasonably.

While the potential forms of unreasonableness are legion, in this particular context it may well be possible to argue that it is unreasonable for HMRC to exercise the power (assuming it to exist) except in those cases where the taxpayer has no realistic prospect of success and, were he the defendant in civil proceedings, judgment would be given against him without a full trial on that basis. That would confine the scope of Follower Notices to their only legitimate ambit.

Further, there is much useful material in the Guidance on Finance Act 2014 published by HMRC on July 17th 2014 which may suggest that HMRC themselves accept that their powers are narrower than, or should be exercised in a narrower range, than might be gathered simply from reading Part 4. This material could thus be used against them in any argument that they had acted unreasonable in serving any particular Follower Notice.

3.3 Timing of Follower Notice

There are time limits on the issue of a Follower Notice which, if breached, would result in its invalidity. Attention should be paid not only to the basic time limit but to the extended time limit under the transitional provisions.

3.4 Content of A Follower Notice

A Follower Notice must comply with the requirements of section 206 as to its contents.

There are various possible ways in which purported Follower Notices may fail to comply with section 206. Indeed, I would not be surprised if, at least initially, many Follower Notices were void on this ground alone.

3.5 Flaws in Review Procedure

Section 207 confers on the taxpayer the right to object on certain specified grounds to HMRC to a (purported) Follower Notice, in which case, HMRC must conduct a (biased) review. It is possible that the review procedure may not be properly adhered to. Unless and until it is, it is implicit that there will be no valid Follower Notice.

It is also theoretically possible that the result of the review will be that the Follower Notice is withdrawn. While taxpayers might be cynical about the prospect of success on review, it will usually be sensible to ask for one.

3.6 Incompatibility with the Human Rights Acts 1998

It is highly arguable that Finance Act 2014 Chapter 4 Part 2 (Follower Notices) is basically ineffective on account of a conflict with the Human Rights Acts 1998. In my view, some have

dismissed this possibility too cavalierly. Yet, I consider there to be arguments which could be deployed to that effect.

If these arguments are correct, no valid Follower Notice could be issued. This is not a case where the Court would be confined to making a declaration of incompatibility with the Convention but give no relief to the taxpayer.

There is more than one Convention rights which is arguably in point. Those who dismiss the potentially relevant ones have, in my view, either (a) misunderstood the status in United Kingdom law of apparently adverse judgments of the European Court of Human Rights or failed to realise that they are distinguishable or (b) failed to consider the actual wording of the Convention and the First Protocol.

3.7 The Charter of Fundamental Rights of the European Union

It may be possible in an appropriate case to argue that The Charter of Fundamental Rights of the European Union, which, in an EU context, confers rights at least as extensive and in some cases more extensive the Human Rights Acts 1998, prevents HMRC from issuing any valid Follower Notice.

4 Attacking Assessments to Penalties for Failing to Comply with a Valid Follower Notice

4.1 Scope of Section 4 of this Article

In this Section 4, I assume that all other avenues of attack on the validity of a purported Follower Notice have failed and consider what alternative arguments are open to a taxpayer who has been assessed by HMRC to a penalty for failure to comply with it.

Not even HMRC have had the temerity to try to persuade the House of Commons suggest that there should be no appeal against such an assessment, so a right of appeal is given, normally to the First Tier Tribunal. While the taxpayer could on such an appeal raise (for the first time - however unwise that might be) the invalidity of the purported Follower Notice, he clearly could not raise, at least directly, issues such as whether he was correct in his main tax dispute with HMRC.

4.2 Penalty for Non-Compliance

Section 208 (Penalty if corrective action not taken in response to follower notice) imposes a penalty if, in effect, the taxpayer does not capitulate after receipt of a Follower Notice.

Section 211 (Assessment of a section 208 penalty) authorises HMRC to assess the penalty due under section 208. It contains certain requirements and time limits, which may not have been complied with, in which case the assessment is impeachable. However, that does not mean that a fresh assessment based on the same Follower Notice and failure to comply with it might not be valid.

4.3 Appeal Against A Section 208 Penalty

Section 214 (Appeal against a section 208 penalty) confers on a taxpayer the right to appeal to an independent tribunal (normally the First Tier Tribunal).

One ground of appeal, which was inserted only at the very last stage of the passage of the Finance Bill through the Commons is:

> "(d) that it was reasonable in all the circumstances for [the taxpayer] not to have taken the necessary corrective action (see section 208(4)) in respect of the denied advantage."

This ground of appeal is available, somewhat oddly, even though the Follower Notice and the assessment to the penalty were both entirely valid!

If the Tribunal is worth its salt it will in all cases allow penalty appeals in full on the grounds that it was reasonable in all the circumstances for the taxpayer not to have taken the necessary corrective action in respect of the denied advantage except where he had no real prospect of success in his substantive appeal and ought therefore to have thrown in the towel when served with the Follower Notice. However, that, unfortunately, cannot be guaranteed, partly for reasons which cannot be expressed in this public article.

5 **Defending Oneself Against a Follower Notice**

5.1 Courses Other than Seeking Judicial Review

When a taxpayer (P) is served with a Follower Notice, he has several avenues open to him.

First, he may decide he has no option but to capitulate, as nothing is to be gained from prolong the substantive dispute any further.

Second, he could ask for a review (by HMRC). While this will almost always be sensible, I suggest below that, if they are to be brought, judicial review proceedings are brought first.

Third, if he has grounds for alleging that a purported Follower Notice served on him is void, he could do nothing until he is assessed to the penalty and then appeal against the penalty. I would not advise on that course of action in isolation, as the difficulty is that if he loses the penalty appeal, he will be liable to pay the penalty. I thus advise that he brings judicial review proceedings as soon as possible so that, ideally, he will be in a position to know whether or not he should comply with the Follower Notice. See below.

I would advise even more strongly against another possibility, namely doing nothing even when the penalty is assessed but to raise the invalidity of the Follower Notice when sued for the penalty.

5.2 Seeking Judicial Review

In almost every case, the best course of action will be to take the bull by the horns and to apply for judicial review. The principal relief sought would be a declaration that the Follower Notice was invalid and / or an order quashing it, on one or more of the grounds mentioned above.

Ideally, one would want the judicial review proceedings decided before the time limit for complying with the Follower Notice expired. In order the increase the chance of that happening, I suggest the following.

The taxpayer should have all the extensive necessary paper work necessary to make the application prepared at as early as stage as possible. This may even be done before he receives the Follower Notice (subject to its being tweaked on receipt). The extent of the paper work should not be underestimated.

The taxpayer should issue the pre-action protocol as soon as possible.

The taxpayer should make the application for permission to seek judicial review as soon as possible. That application should contain an application for expedition of the hearing and, if thought fit, for a temporary injunction against HMRC.

The taxpayer should request a review by HMRC. The timing of that request is important.

The taxpayer should take all the steps he can to have a determination of his application before the time comes at which he must decide whether or not to comply with the purported Follower Notice.

What precisely is needed to bring proceedings for judicial review is beyond the scope of this article. Legal advice should be sought, ideally from some Leading Counsel with the expertise both in Revenue Law and judicial review proceedings and with a track record of successfully seeking judicial review against the Revenue for his client both before the High Court and the Court of Appeal.[3]

6 Attacking Accelerated Payment Notices

6.1 Preliminary

Many of the observations I have made above (and expansions on them I have not made above) in relation to Follower Notices are also relevant for Accelerated Payment Notices, although there are some differences.

6.2 Power to Issue Accelerated Payment Notice

[3] I am thinking of someone like the Q.C. who successfully represented Unilever plc in *R v Commissioners of Inland Revenue, ex parte Unilever plc* [1996] STC 681.

In some cases, HMRC will simply have no power to issue an Accelerated Payment Notice, so that any purported Accounting Period will be void. It is necessary carefully to consider the empowering section on a case by case basis.

Section 219 (Circumstances in which an accelerated payment notice may be given) provides that HMRC may give an Accelerated Payment Notice if four conditions, A, B, C and D are satisfied.

Condition A will not normally be problematic.

Condition B is identical to that contained in section 204(3) (Condition B) in relation to Follower Notices. See my comments above in that context why it will often not be satisfied.

Condition C has three limbs, (a), (b) and (c).

The first limb of Condition C is:

> "(a) HMRC has given (or, at the same time as giving the accelerated payment notice, gives) P a follower notice under Chapter 2—
>
> (i) in relation to the same return or claim or, as the case may be, appeal, and
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> (ii) by reason of the same tax advantage and the chosen arrangements".

If the Follower Notice is not a valid Follower Notice then limb (a) will not be in point.

Condition C Limb (b)

The second limb of Condition C is

> "(b) the chosen arrangements are DOTAS arrangements".

"DOTAS arrangements" is defined by section 212(5). What is most important in that they must usually be "Notifiable Arrangements" within the meaning of Finance Act 2003 Part 7.

Advice will need to be taken on a case by case basis. **In my view, many arrangements which HMRC consider to be "notifiable arrangements" are not in fact such.**

What is clear from Condition C is that it is not enough that arrangements have in fact been notified: they must also have been "notifiable arrangements". That is important, because most people in the past have taken the view that, as honest citizens, they would disclose too much rather than too little and have been entirely above board with the Revenue about what they were doing.

What is also clear is that it is the "chosen arrangements" which must have been "notifiable arrangements": it is not enough that the "chosen arrangements" were part of larger arrangements some other part of which may have been constituted "notifiable arrangements".

The third limb of Condition C is:

> "(c) a GAAR counteraction notice has been given in relation to the asserted advantage or part of it and the chosen arrangements (or is so given at the same time as the accelerated payment notice) in a case where the stated opinion of at least two of the members of the sub-panel of the GAAR Advisory Panel which considered the matter under paragraph 10 of Schedule 43 to FA 2013 was as set out in paragraph 11(3)(b) of that Schedule (entering into tax arrangements not reasonable course of action etc)."

6.3 Contents of An Accelerated Payment Notice

Section 220 (Content of notice given while a tax enquiry is in progress) contains detailed and highly complex rules for the content of an Accelerated Payment Notice which are not easy even for a tax barrister to understand . What it must contain depends on the precise power under which it is given (see section 6.2 of this article). Thus, it is by no means impossible that a purported Accounting Period will be void for not complying with section 220.

One should always check that the Accelerated Payment Notice complies in particular with the requirements of subsection (2)(a), (b) and (c). If it does not, it will be void. It may well be that, at least initially, Accelerated Payment Notices will fail to do so.

Section 220(2)(b), concerning the payment required to be made, is particularly more complex, so that there is room for Revenue error in interpreting it and applying it.

There is thus a possibility that the Accelerated Payment Notice may not be given by the correct person.

While the "designated officer" may at various points in the process in terms act simply to the best of his knowledge and belief", in my view he is under a duty to do such due diligence as it reasonable in the circumstances. That might even involve taking Counsel's opinion in a complex case. He cannot simply say "I do not have enough information and I am not going to look for any". He must also, of course, understand and apply the correct test (as to which see below).

If the courts are indeed hostile to Chapter 3 (Accelerated Payment Notices) of Part 4 they might even decide that whenever the officer had adopted a view of the law relating to the substantive dispute with which they disagreed, he had not acted reasonably or, at least, that he had to act only on a reasonably tenable view of the law.

6.4 Human Rights Acts 1998 and The Charter of Fundamental Rights of the European Union

I have mentioned under Follower Notices defences based on Finance Act 2014 Part 4 Chapter 2 being incompatible with Convention rights. The same types of arguments could be deployed, *mutatis mutandis*, in the context of Accelerated Payment Notices.

I have mentioned above under Follower Notices defences based on Finance Act 2014 Part 4 Chapter 2 being incompatible with the EU Charter. Where it could be in point, it could apply to an Accelerated Payment Notice.

7 Defending Oneself Against an Accelerated Payment Notice

When a taxpayer (P) is served with an Accelerated Payment Notice, he has several avenues open to him.

First, he may decide to comply with the Accelerated Payment Notice and then take steps to have the hearing of his substantive appeal expedited. He is not in the same position as the recipient of a Follower Notice who must decide once and for all whether or not to continue to fight. He will calculate that if he wins his substantive appeal, he will get his money back, albeit with derisory interest. Of course, he may have been put out business and had to sack his workforce and put them on benefits in the meantime. Yet that will be of little concern to HMRC.

If he decides to pay in the short run, but still to challenge the Accelerated Payment Notice, it would be as well for him to make it clear that he was making it only on the basis of the validity of the Accelerated Payment Notice and with the right to recover it should the Accelerated Payment Notice turn out to be invalid (no matter what the outcome of his substantive appeal).

Second, he could ask for a review. While this will almost always be sensible, I suggest below that, if they are to be brought, judicial review proceedings are brought first.

Third, if he has grounds for alleging that a purported Accelerated Payment Notice served on him is void, he could do nothing until he is sued for the penalty for non-payment. I would not advise that course of action.

In almost every case, the best course of action will be to take the bull by the horns and to apply for judicial review. The principal relief sought would be a declaration that the Accelerated Payment Notice was invalid or an order quashing it, on one or more of the grounds mentioned above. This could in an appropriate case be accompanied by proceedings in respect of an allegedly void Follower Notice.

Ideally, one would want the judicial review proceedings decided before the time limit for complying with the Accelerated Payment Notice expired. In order the increase the chance of that happening, I suggest the same, *mutatis mutandis*, as where he attacks a purported Follower Notice .

8 Conclusion

While the Follower Notice and Accelerated Payment Notice legislation is thoroughly objectionable and represents an attempt by HMRC to by-pass normal judicial due process and be judge in their own cause, the taxpayer is not without his remedies.

Judicial review is open despite the general lack of formal appeal processes.

My prediction is that the Courts will not be slow to defend the Rule of Law and the Separation of Powers and to reduce to an acceptable minimum the scope of this legislation, which is more suited to North Korea than to the United Kingdom.

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29 July 2014