WHAT TO DO ABOUT FOLLOWER AND ACCELERATED PAYMENT NOTICES *

by

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***** Updated to reflect the HMRC Guidance on "Follower notices and accelerated payments" published on 21 July, 2014 ("the Guidance").

1 Follower and accelerated payment notices: the basics

1.1 Anyone with an open enquiry (or appeal) concerning a tax avoidance scheme may have to deal with follower notices and accelerated payment notices issued under Part 4, Finance Act 2014 ("the Finance Act" and references in these notes to sections are to those in the Finance Act unless otherwise stated). According to David Gauke (Treasury Secretary) in the Public Bill Committee on 17th June, 2014 at column 485, 43,000 payment notices will be issued. At column 492, he said that the notices will be issued to 33,000 individuals and 10,000 corporates and will cover about £7.1 billion of disputed tax with the mean gross income of the individuals involved being £262,000 (nine times that of the average income tax payer). At column 493, he also said that the vast majority of the notices will be issued over the course of 2014-15 and 2015-16.

A follower notice will be intended by HMRC to bring the enquiry to an end by asking the taxpayer to make the necessary "corrective" amendments to his return (and pay the disputed tax) or face a 50% penalty. Taxpayers will therefore have to consider matters carefully before deciding whether to capitulate or to press on with litigation before the tribunal. There are three main contexts in which litigation may arise in connection with follower and accelerated payment notices.

These three situations each will require careful consideration and pursuing litigation will not always be a sensible strategy depending on any particular situation. They are (1) pursuing a substantive appeal to the tax tribunal on the tax technical merits of the arrangements in question in the face of a follower notice and/or an accelerated payment notice; (2) appealing a penalty imposed by HMRC for an alleged breach of the follower and accelerated payment procedures; or (3) challenging a follower notice or an accelerated payment notice by way of an application for judicial review to restrain HMRC from exceeding or abusing their powers. The effect of Article 6 ECHR (right to a fair trial) should also be considered.

1.2 Of course the prior question of principle of whether to challenge HMRC at all will also have to be considered when clients under an enquiry face a follower and/or an accelerated payment notice. Experience shows that a significant number of clients in the current environment do not wish to experience the hassle, expense and potential stress of litigation involving HMRC and will choose to settle by making the necessary amendments to their return and effectively bringing the enquiry to an end. In such cases the professional adviser will be concerned to ensure that any settlement with HMRC is concluded so as to ensure that no penalty or only the minimum applicable penalty is imposed, any collateral proceedings by way of HMRC investigations (civil or criminal) are

concluded and avoiding the publication of the client's details as a deliberate defaulter under section 94, FA 2009. This latter point requires very careful handling in the case of a professionally qualified client if he is not to risk the fate of the solicitor in *Mr. and Mrs. B v. HMRC* [2014] UKFTT 256 (TC).

2 Pursuing a substantive appeal after receipt of a follower or accelerated payment notice

2.1 If the client has received a follower notice and/or an accelerated payment notice, but after careful consideration and advice, decides to pursue an appeal to the tax tribunal on the substantive merits of his transaction or claim then the context will be one or both of the following:

(a) He has been issued with a follower notice (section 204): either the client will already be under a tax enquiry into a return or a claim made by him or he will have issued an appeal in relation to an assessment or notice but that appeal has not yet been determined or otherwise disposed of; the return, claim or tax appeal relates to a tax advantage from tax arrangements; and, HMRC is of the opinion that there is a judicial ruling which is relevant to the arrangements in question.

and/or

(b) He has been issued with an accelerated payment notice (section 219): either the client will already be under a tax enquiry into a return or a claim made by him or he will have issued an appeal in relation to an assessment or notice but that appeal has not yet been determined or otherwise disposed of; the return, claim or tax appeal relates to a tax advantage from arrangements; and one or more of the following are met:

(i) he has been given a follower notice in relation to the arrangements;

(ii) the arrangements are DOTAS arrangements; or

(iii) a GAAR counteraction notice has been given in relation to the tax advantage where at least two members of the sub-panel opined that the arrangements were not a reasonable course of action.

2.2 According to the explanatory notes issued with the Finance Bill the stated purposes of the follower and accelerated payment notices are (respectively):

> "This measure gives HMRC the power to issue a notice to a taxpayer to the effect that they should settle their case with HMRC once a court or tribunal has concluded in another party's

litigation that the arrangements do not produce the asserted tax advantage."

and

"This measure gives HMRC the power to issue a notice to require an accelerated payment of the amount in dispute, in certain defined circumstances, while an enquiry is in progress or while there is an open appeal."

Follower Notices

2.3 However in relation to follower notices the explanatory notes also acknowledge:

"*Penalties*
17. Clause 201 sets out the steps a taxpayer would need to take in response to a follower notice in order to be regarded as having taken the necessary corrective action. **The taxpayer is not compelled to take these steps**, [*my emphasis*] but the clause sets out the consequences where those steps are not taken."

This is confirmed by the Guidance which at 1.8.2 states that: "The notice does not require corrective action to be taken, but explains the consequences if the necessary corrective action is not taken. These consequences include a penalty under section 208 ..."

2.4 In the case of a follower notice, the "necessary corrective action" means the steps set out in section 208(5) and (6). In the case of an open enquiry or claim this means amending the return or claim to counteract the disputed advantage. In the case of an open tax appeal this means

entering into an agreement with HMRC in writing to give up the disputed advantage and in effect settle the appeal. These steps should be taken within 90 days of the notice or if the taxpayer made representations to HMRC objecting to the notice under clause 200, within 30 days following confirmation of the notice from HMRC. There is of course no right of appeal to an independent tribunal against the issue of a follower notice although there is a right of appeal against a penalty for failing to take the necessary corrective action (see 2.8 below).

2.5 Clearly if a taxpayer were to take the "necessary corrective action" he could not then make (or continue) a substantive appeal. Declining to capitulate in the face of a follower notice and pursue the matter to tribunal will therefore in principle result in the imposition of a financial penalty. The penalty will be 50% of the value of the disputed tax advantage (section 208). In the case of an open enquiry, under section 211(5)(a) the penalty must be notified within 90 days after HMRC close the open enquiry. In the case of an open appeal, under section 211(5)(b) the penalty must be notified within 90 days after the final ruling in the taxpayer's own appeal is made (or the appeal is otherwise disposed of).

2.6 On the face of it then a taxpayer under open enquiry but who has not yet appealed appears to be at a disadvantage to a taxpayer who already has an open appeal because the former may be charged a penalty once his

enquiry is closed even if he were then to appeal but the latter need not be charged a penalty until after his appeal has been finally determined. Unfortunately, the Guidance appears not to deal expressly with the situation where a taxpayer receives a follower notice during an open enquiry, declines to take the necessary corrective action and then issues an appeal against the resulting closure notice. The Guidance states that the taxpayer will "normally" be assessed to the 50% penalty once the closure notice is issued and does not deal with the issue of a subsequent appeal to the tax tribunal on the substantive tax issue (see 1.13.1 of the Guidance). Intriguingly, at 1.14.4 of the Guidance, HMRC state: "Whilst a penalty does not have to be paid pending litigation ..." If a penalty is raised despite a subsequent appeal, this will strike most fair minded people as unfair and undermines the long established principle in UK jurisprudence of equality of arms in civil litigation. HMRC will have loaded the dice in their favour by causing their opponent to suffer a penalty of 50% of the amount at stake if the tax tribunal finds in HMRC's favour and yet HMRC will suffer no such penalty if the taxpayer wins. In the Guidance at 1.10.3, HMRC state:

> "The taxpayer has a choice about how to proceed. **The decision to settle or continue the dispute is entirely theirs**, but the taxpayer takes that decision in the light of the penalty consequences if the dispute continues. The legislation **does not** in any way deny taxpayers access to their full appeal rights to the courts and tribunals about the substantive liability (ie: whether the tax arrangements do give the result which the taxpayer believed they did)."

The hypocrisy revealed by this statement is breathtaking, but the scary thing is that HMRC probably sincerely believe that there is nothing wrong with it.

2.7 Three important questions arise about how HMRC will operate their penalty powers. First, under section 208, the liability for a penalty actually arises normally 90 days after the follower notice was served if the necessary corrective action has not been taken. It appears that section 211(5) merely provides a long-stop date for the notification of the penalty by HMRC to the taxpayer (and requires payment of that penalty within 30 days of notification of it). There is therefore a potential gap between the liability for a penalty arising and the actual notification of that penalty to the taxpayer giving rise to the requirement to pay it. In practice therefore it is possible that HMRC may not actually assess and notify the penalty immediately but wait until closure of the enquiry or determination of the open appeal. This is confirmed at 1.13.8 of the Guidance. Second, in the case of an enquiry that is closed, will HMRC wait for 30 days to see if the taxpayer then notifies an appeal against the closure notice or the amended return and then defer any penalty notification while the appeal is proceeding? The Guidance appears to suggest not at 1.13.1, but HMRC appear to have left the door open if there is to be an appeal (see 2.6 above). Third, in the case of an appeal that is finally determined in favour of the taxpayer, will HMRC

still notify the penalty? The Guidance at 1.14.4 confirms that when the taxpayer is successful in his appeal, the penalty will be discharged as it is a tax-geared penalty and there will then be no disputed tax to form the basis for the penalty.

2.8 It is also noteworthy that the taxpayer may appeal against the penalty under section 214 (either that a penalty is not payable at all or against the amount of the penalty) and that under section 214(6) the taxpayer does not have to pay the penalty before that appeal is determined. In their explanatory notes to the Finance Bill, HMRC stated that the grounds of appeal against a penalty "include an appeal on the basis that there was no judicial ruling relevant to the taxpayer's arrangements". Indeed, section 214(3) sets out the grounds of appeal which include at (3)(b) that the judicial ruling relied on by HMRC is not relevant and at (3)(d) that it was reasonable in all the circumstances for the taxpayer not to have taken the necessary corrective action. It can be seen that by not allowing an independent appeal against the follower notice and only allowing an appeal against the penalty for failing to abide by the follower notice, Parliament has forced the taxpayer who decides not to capitulate to run the risk of a 50% penalty if he loses his substantive appeal.

2.9 In the circumstances therefore it may be that HMRC will not in practice notify a penalty while the taxpayer appeals a closure notice and/or is

pursuing a tax appeal (and see 2.6 above). If HMRC were to notify a penalty before any appeal was finally determined, then that the taxpayer should consider an appeal against that penalty under section 214 and ask the tribunal to consolidate both the substantive and penalty appeals so that they are determined at the same time. Where the taxpayer disputes that there is a relevant judicial ruling then the penalty could be appealed on this ground. In this regard, it might be argued that there are different legal or factual issues or, possibly, that the taxpayer is going to adopt very different legal arguments to that used in the earlier judicial ruling. While this would mean that any penalty was deferred, the disputed tax would still become payable if, as seems likely, an accelerated payment notice was also given by HMRC. Only getting the follower notice withdrawn by way of judicial review (see below) would remove the ability to issue an accelerated payment notice (and then only in cases not involving DOTAS or the GAAR). It should also be kept in mind that interest will run on the amount of the penalty from the original due date for payment, in the event that the penalty is deferred but then confirmed on appeal. It is also worth noting that the aggregate penalties for failing to comply with a follower notice and for an error in the return under Schedule 24, FA 2007 cannot exceed the maximum for the latter penalty.

Accelerated Payment Notices

2.10 An accelerated payment notice effectively requires payment of the disputed tax on account in the case of an open enquiry. In the case of an open appeal, an accelerated payment notice prevents the payment of the disputed tax from being postponed (or in the case of tax already postponed, cancels the postponement).

2.11 The penalty for failing to pay an accelerated payment is 5% of the payment if the payment is not made within 90 days of the notice (or if later, 30 days after the taxpayer is notified of HMRC's determination of any written representations made by the taxpayer about the payment notice). Further penalties of 5% can arise if the payment is unpaid after 5 months and 11 months.

2.12 Under section 227(12) where an accelerated payment notice is eventually withdrawn by HMRC, it is to be treated as never having been made and any accelerated payment made or penalties paid are to be repaid.

Tentative[*] *Conclusions*

2.13 In the light of the above, it is apparent that a decision to pursue a substantive tax appeal following receipt of a follower and/or an accelerated payment notice should take account of the following factors:

[*] "Tentative" until experience and practice in the operation of the new rules is gained.

(a) in the case of a follower notice the taxpayer will have to decline to take the necessary corrective action requested by HMRC (something that some clients may understandably feel anxious about);

(b) the reasons for declining to "follow" a follower notice could include the argument that the judicial ruling relied on by HMRC is not truly "relevant" to the taxpayer's own case in law and/or in fact, or in the case of a tribunal or lower court ruling, that the tax payer is advised that there are good prospects of a different tribunal or court choosing not to follow the earlier ruling;

(c) as a result of not taking the necessary corrective action a penalty of up to 50% of the disputed tax may be charged (although HMRC may possibly be willing to defer notifying the penalty while an appeal takes place against the disputed tax);

(d) this penalty, if notified, can be postponed if an appeal against the penalty is made (although interest will run on the penalty if it is ultimately payable);

(e) meanwhile, (unless the follower notice was successfully challenged by way of judicial review (see below)) an accelerated payment notice may be given by HMRC which prevents postponement and requires the disputed tax to be paid pending

the closing of the enquiry or any appeal ruling, thus removing the cash-flow advantage of a challenge to HMRC;

(f) if the taxpayer is ultimately successful in his substantive appeal, the 50% penalty would not be charged, or if already charged, repaid by HMRC (the statutory rules do not expressly say this but as the penalty is tax-geared, a penalty could not be sustained if there was no tax to pay – indeed, David Gauke (the Treasury Secretary) said during the Public Bill Committee debate on 17th June, 2014 at column 479: "*Clause 207 sets out the taxpayer's right to appeal against a follower penalty. If a tribunal thinks that the basis of a follower notice is wrong, any penalty will be cancelled or reduced.*");

(g) however, if the taxpayer is ultimately unsuccessful, then the 50% penalty will stick (with interest if unpaid) and so represents a very costly disincentive at the outset to challenge HMRC where a follower notice has been issued;

(h) in the case of an accelerated payment notice (including where a DOTAS disclosure or an unfavourable GAAR sub-panel opinion has been given), the taxpayer must pay the disputed tax over to HMRC – in practice, once HMRC have their money, what incentive will there be for HMRC to progress the enquiry or

appeal?

(i) at the risk of stating the obvious, a taxpayer with an open enquiry who decides not to "follow" a follower notice and effectively bring the enquiry to an end should be clear about the need to then launch an appeal once HMRC complete their enquiry – simply letting the enquiry continue, but not having the stomach to appeal will be very costly, ie 50% extra tax!

(j) in the case of an accelerated payment notice relating to the GAAR (or indeed a follower notice relating to a future GAAR judicial ruling) it appears that HMRC may not have realised in this context that section 211(1), FA 2013 requires that HMRC must also show that the tax arrangements are abusive and that the counteracting adjustments are just and reasonable – is this a ground to challenge the issue of a notice without HMRC discharging this additional burden of proof?

3 Appealing a penalty

3.1 There are penalties in relation to both follower notices and accelerated payment notices. The follower notice penalty rules provide scope for some tactical play, while the accelerated payment notice penalty rules are much more straightforward.

3.2 A follower notice penalty *liability* arises under section 208(2) if the necessary corrective action is not taken within the 90 days of the follower notice being given (or 30 days of being notified of HMRC's determination in relation to any representations made against the notice by the taxpayer under section 207). The penalty is 50% of the disputed tax and so is not to be taken without serious thought. However, the penalty is only *payable* 30 days after it is actually assessed and notified to the taxpayer by HMRC. Curiously, section 211(5) then provides a long stop date for the notification of the penalty as 90 days after the completion of the open enquiry, or 90 days after a final ruling in the case of an appeal. As considered above, will section 211 mean that, in practice, HMRC will "wait and see" the outcome of any appeal (including where an enquiry is completed and the taxpayer then starts an appeal) before actually notifying a penalty in cases where the taxpayer ultimately fails?

3.3 Tactically, an appeal against a penalty is available under section 214 and the penalty is not payable before that appeal is determined. In addition, the grounds of appeal can include that there was no judicial ruling relevant to the taxpayer's arrangements or that it is reasonable in all the circumstances not to have taken the necessary corrective action.

3.4 In any substantive appeal the taxpayer should therefore give consideration to an appeal against a penalty and to asking HMRC and the tribunal to agree to conjoining the penalty and substantive appeals.

3.5 The penalties in relation to accelerated payment notices are by their nature more straightforward and are essentially an initial 5% if the payment is not made within 90 days (or 30 days after HMRC's determination in the case of taxpayer representations), followed by further lots of 5% if the payment is not made within 5 months and 11 months.

3.6 These penalties will be repaid in the event of the accelerated payment notice being withdrawn (section 227(12)).

4 Judicial review and follower notices

4.1 In tax there are established appeal procedures for most matters that enable the taxpayer to refer a dispute with HMRC to the tribunals. However in some instances there is no right of appeal to the tribunal and so the taxpayer may have to consider whether an application to the Administrative Court by way of judicial review would be available in order to challenge a decision by HMRC. In principle, judicial review is available to restrain HMRC from exceeding or abusing their powers. In practice, judicial review is often resorted to in the tax context:

(a) where HMRC subsequently say that a taxpayer's return is wrong despite the taxpayer relying on an earlier ruling or published guidance from HMRC ("legitimate expectation"), and

(b) in situations where Parliament has deliberately omitted to provide the taxpayer with a right of appeal eg the issue of third party information notices.

4.2 The FT reported on 22nd January, 2014 that challenges to HMRC by way of judicial review had increased by nearly one-third during 2012, from a typical 39 to 51.

4.3 All judicial review cases (with one exception) begin in the High Court and if permission is granted to bring the case, the hearing may be before either the Administrative Court or the Upper Tribunal. The exception is if a taxpayer requires judicial review of the First-tier Tribunal procedures in which case application is to the Upper Tribunal. The application should be made promptly and in any case within three months of the decision complained of. The First-tier Tribunal does not have any judicial review function: *Noor* [2013] UKUT STC 998 and *Templar Business Centre* (TC03271 29.1.2014).

4.4 The fascinating question to be answered over the next few years is how the issue of follower notices by HMRC will fare in the face of challenges by way of judicial review.

4.5 It is said that the Administrative Court and the Upper Tribunal are bracing themselves for an increase in applications for judicial review in the wake of the issue of follower notices. However the appetite of clients to fund two sets of litigation (the substantive tax appeal and a judicial review plus satellite litigation in the form of a potential appeal against a follower notice penalty) in the new environment where they are also likely to have had to have paid the disputed tax up-front by way of an accelerated payment notice and also to risk the 50% penalty if their substantive appeal fails, can perhaps be questioned. This chilling effect on access to the tax appeals system is doubtless intended by HMRC.

4.6 Can we hazard a guess at how judicial review in the context of follower notices is likely to arise and to fare in front of the judges of the Administrative Court/Upper Tribunal?

4.7 The context is likely to involve section 204(4) which provides:

> "(4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements."

And also, section 205 and 206 which provide:

> "**205 "Judicial ruling" and circumstances in which a ruling is "relevant"**
> (1) This section applies for the purposes of this Chapter.
> (2) "Judicial ruling" means a ruling of a court or tribunal on one or more issues.

(3) A judicial ruling is "relevant" to the chosen arrangements if—

(a) it relates to tax arrangements,

(b) the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage, and

(c) it is a final ruling.

(4) A judicial ruling is a "final ruling" if it is—

(a) a ruling of the Supreme Court, or

(b) a ruling of any other court or tribunal in circumstances where—

(i) no appeal may be made against the ruling,

(ii) if an appeal may be made against the ruling, with permission, the time limit for applications has expired and either no application has been made or permission has been refused,

(iii) if such permission to appeal against the ruling has been granted or is not required, no appeal has been made within the time limit for appeals, or

(iv) if an appeal was made, it was abandoned or otherwise disposed of before it was determined by the court or tribunal to which it was addressed.

(5) Where a judicial ruling is final by virtue of sub-paragraph (ii), (iii) or (iv) of subsection (4)(b), the ruling is treated as made at the time when the sub-paragraph in question is first satisfied.

206 Content of a follower notice

A follower notice must—

(a) identify the judicial ruling in respect of which Condition C in section 204 is met,

(b) explain why HMRC considers that the ruling meets the requirements of section 205(3), and

(c) explain the effects of sections 207 to 210."

4.8 Hence, most disputes are likely to arise over whether a particular judicial ruling is "relevant" to the taxpayer's arrangements such that HMRC are empowered to issue the follower notice. For example is it just the ratio decidendi ie the core point in the judgment that determines the decision and is binding on lower courts through the stare decisis

doctrine, that is relevant? Or is the obiter dicta ie other statements about the law made in the judgment but not necessary for the decision arrived at, also relevant? The reference to a "ruling" in section 205 would seem to restrict the "principles" and "reasoning" referred to in section 205(3) to the ratio decidendi and suggest that comments by the judge that are obiter should not be capable of forming a part of the "ruling" for the purpose of issuing a follower notice. In the Guidance at 1.4 and 1.5, HMRC do not expressly address the difference in this context between the ratio and obiter remarks and seem to suggest both possibilities. At 1.5.2, HMRC state: "It is not about extracting a wide general principle from a case and then applying that to other cases where the context and facts are substantially different." And yet further on at 1.5.3 HMRC refer to the "relevant judicial decision and whether the same principle or reasoning can apply to deny the tax advantage. Again, the important point is to consider critically the principles or reasoning in the **judgement** [*my emphasis*] to see if it can reasonably apply to the follower case." The reference here to a "judgement" is inappropriate given that the legislation uses the term "ruling" and not the wider term "judgement".

4.9 An example of how this issue may arise occurs in the SDLT avoidance case of *Vardy Properties and another v Rev and Customs Commrs* [2012] SFTD 1398. In that case the purchaser of a property which

intended to transfer that property on by way of sub-sale and thereby escape SDLT had failed to comply with section 270 of the Companies Act 1985 to prepare accounts so that the onward transfer was judged to have been unlawful under that act so that the purchaser had not successfully transferred beneficial ownership of the property to the intended transferee. Hence the sub-sale scheme failed for unlawful implementation. From the judgment at [106] and [107] this was clearly the ratio decidendi of the case and the judge dismissed the taxpayer's appeal on the Companies Act point. However the judge subsequently remarked that had the Company Act point not arisen full SDLT would have been payable by the transferee of the property from the purchaser to defeat the scheme.

4.10 It is anticipated that HMRC may wish to issue follower notices to users of similar sub-sale schemes which did not suffer from the *Vardy* Companies Act defect. Users of such schemes who receive a follower notice will therefore wish to know whether *Vardy* will be a "relevant" judicial ruling and whether their follower notice could be challenged and set aside on the ground that HMRC will be relying on obiter remarks by the judge rather than the ratio so that *Vardy* was not a relevant judicial ruling.

4.11 What will be the main issues in bringing an application for judicial

review in this context? Leaving aside an attack under Article 6, ECHR (right to a fair trial) which will probably form a ground for review in most applications in relation to follower notices (and is dealt with below), the main issues are likely to be:

(a) that Parliament has deliberately not provided a right of appeal to an independent tribunal over the validity of a follower notice; and

(b) whether follower notices should be confined to the ratio and facts of the ruling regarded as "relevant" by HMRC or whether broader obiter judicial remarks and looser fact patterns can be regarded as a valid basis for the issue of a follower notice.

With regard to the latter, David Gauke (the Treasury Secretary) said in the Public Bill Committee on 17th June, 2014 at column 476 that:

> "*Clause 198 sets out when a legal ruling can trigger follower notices. If a taxpayer's scheme failed merely because he did not apply it carefully, that cannot trigger follower notices for other users. The ruling needs to be relevant, finding that the scheme was defective regardless of how it was applied and explaining why. If the appeal process has been exhausted, that ruling may be used as a basis for follower notices to be issued.*"
>
> Did he (or more precisely, the HMRC civil servant who wrote his script) have *Vardy Properties* in mind when he said this?

4.12 It will be interesting to see how the judges react to the use of judicial review in this context as an alternative means of appeal in the absence of any formal appeal process.

4.13 Two recent decisions of the Administrative Court may provide some clues. The first is *R (on the application of Derrin Brother Properties Ltd) v Rev & Customs Commrs* [2014] EWHC 4152 (Admin). This case involved a challenge to HMRC issuing third party information notices under para 2, Sch 36, FA 2008. There is no statutory right of appeal against the issue of a third party notice. The challenge was to both HMRC's decision to apply to the First-tier Tribunal for permission to issue the notices and to the judge's approval. The application for judicial review failed and the following points were made by Simler J:

(a) the courts should be careful to avoid giving by way of judicial review what is in reality an appeal against the tribunal's decision – it is only exceptionally or for clearly identifiable reasons that the court will interfere;

(b) there is a presumption of regularity that applies to HMRC's decisions and also to the judge's conclusions; and

(c) article 6 (right to a fair trial) and article 8 (right to privacy) ECHR did not invalidate the notices which were necessary in a democratic society for protecting the taxation system and the

revenue.

4.14 The other relevant decision is *R (in the application of St. Matthews (West) Ltd and others) v HM Treasury and Rev & Customs Commrs* [2014] EWHC 1848 (Admin). This case involved a challenge by the taxpayer to the provisions of FA 2013 which retrospectively killed an SDLT scheme devised by Blackfriars Tax Solutions LLP. The essence of the taxpayer's argument was that only £7m of tax was at stake and was too small to justify the use of retrospective legislation. Not surprisingly Andrews J found that the argument was wholly without merit and dismissed the application for permission to proceed to a judicial review.

4.15 What is interesting about the case is that the decision to refuse permission runs to 25 pages and includes some detailed observations and examinations of HMRC consultation documents, explanatory notes to the relevant clauses of the Finance Bill 2013 and a Parliamentary announcement by the Chancellor along with a discussion about article 6 ECHR (the latter is discussed further below). The overall tenor of the judgment is most unsympathetic to the taxpayer and his tax scheme.

4.16 In an effort to head judicial review applications off at the pass in relation to follower notices, HMRC have published assurances that in the absence of a right of appeal to an independent tribunal, they will take

representations made by taxpayers against follower notices under section 207 seriously. HMRC say they are putting in place strict internal governance and safeguards so that follower notices can only be issued following approval and scrutiny at a senior level. Unfortunately there are some judges who will think: "so that's ok then …".

4.17 The challenges faced by taxpayers seeking judicial review of a follower notice therefore will include:

(a) The deliberate absence of a statutory right of appeal;

(b) The fact that HMRC will point towards a strict and rigorous internal review process at a senior level in relation to taxpayer representations;

(c) The current judicial climate in relation to tax avoidance schemes where 80% to 85% of cases are being won by HMRC; and

(d) The judicial reluctance to apply article 6 ECHR in tax avoidance cases (see below).

4.18 Having said that, follower notices have been widely criticised and represent a clear attempt by HMRC to stifle litigation and appeals by taxpayers in tax avoidance cases by the use of what in effect is a 50% tax premium should a taxpayer challenge HMRC and lose. This premium is penal in nature and it is to be hoped that those judges with a

backbone apply this penal legislation strictly by resolving any uncertainty or ambiguity in the taxpayer's favour and by giving proper weight to article 6.

5 Article 6 ECHR

5.1 Article 6 provides as follows:

> **Article 6**
> Right to a fair trial
> 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
> 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3 Everyone charged with a criminal offence has the following minimum rights:
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
> (b) to have adequate time and facilities for the preparation of his defence;
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

5.2 Arguably the imposition of a penalty of 50% for failing to follow a follower notice and continue with an enquiry or appeal goes to the root of the right to a fair hearing. The tax litigant is being required by the state to risk a 50% uplift in the amount he is liable to pay if he fights and loses. The exercise of the statutory right of appeal is being subjected to a significantly prejudicial financial levy which is intended to deter the exercise of that right and have a chilling effect on access to the tax tribunals. Access to justice against HMRC is being made significantly more difficult and risky. This is being done apparently because there are "too many" potential appellants and dealing with appeals consumes "too much" resources. Justice is being denied because too many citizens require it!

5.3 Many, if not most, lawyers will instinctively agree that article 6 is engaged in principle in the context of follower notices. However, the well advised client will also need to balance this with the following considerations:

(a) The right to challenge an assessment to tax and the imposition of surcharges in the tax tribunal falls outside the civil law element of article 6 save in egregious cases: *R (Totel Ltd) v FTT* [2011] EWHC 652 (Admin); and

(b) Tax imposed by legislation is an example of public law

prerogative and article 6 does not apply because of article 1 of the First Protocol:

> "The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

See *Ferrazini v Italy* [2006] STC 1314 and *Jussila v Finland* [2009] STC 29.

5.4 However article 6 can it seems still apply in the tax field in egregious cases or if the proceedings in question are of a quasi-criminal nature. It is well established that a penalty is quasi-criminal in nature and so article 6 ought to operate in relation to a follower notice penalty and by implication, a follower notice itself. If article 6 does apply it will also be necessary to persuade the court that the follower notice legislation does not meet the higher test of compelling grounds in the public interest ie are follower notices proportionate and justified or not?

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