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Case No: CO/5901/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2015

Before

MRS JUSTICE SIMLER DBE

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Between

NIGEL ROWE, ALEC DAVID WORRALL & OTHERS	**Claimant**
- and -	
THE COMMISSIONERS FOR HM REVENUE & CUSTOMS	**Defendant**

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- -

Mr David Southern QC , Ms Jessica Simor QC and Ms Rebecca Murray (instructed by Pinsent Masons LLP) for the Claimant

Mr James Eadie QC, Mr Sam Grodzinski QC and Mr David Yates (instructed by HMRC Solicitors Office) for the Defendant

Hearing dates: 14,15,16,17 July 2015

INTRODUCTION

1. These claims for judicial review seek to challenge the legality of partner payment notices ("PPNs") given by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") to the claimants in exercise of new powers under the Finance Act 2014 ("FA 2014").

2. The grounds for the claims have changed over time, and some arguments are no longer pursued. In particular, the claimants were at pains to make clear (whatever is said in the Grounds and Skeleton Arguments) that there is and can be no challenge to the provisions themselves which are contained in primary legislation (save in one narrow, potential respect). Rather, they say, the challenge is and can only be to the exercise of powers under the legislation in this case. They no longer say that PPNs can never be lawfully issued. Nevertheless HMRC contend that some of their arguments come close to challenging the efficacy of the legislation itself, and are in substance, an attack on the primary legislation contained in FA 2014 itself.

3. In broad summary the claimants contend that the notices issued in their cases are unlawful and of no effect because:

   (a) They were issued in breach of the principles of natural justice because they were never afforded the opportunity to make representations as to why in all the circumstances, they should not have been issued. In particular, they had no opportunity to explain why the sums demanded under the notices are not due and owing; and that it was not reasonable to require payment prior to resolution of the parallel appeals on the underlying substantive tax dispute.

   (b) The notices are ultra vires because Condition B is not satisfied. The amounts claimed do not result from the chosen arrangements since they do not result directly from an increase or reduction of an item in the partnership return. Further, absent legitimate enquiries, no tax will ever become "due and payable" within the meaning of FA 2014.

   (c) The notices were given in breach of the claimants' legitimate expectation that they would not have to pay any tax in dispute until after the 'First-tier Tax Tribunal ("FTT") had decided all relevant issues, HMRC having not exercised the right to postpone repayment.

   (d) The decision to give notices was unreasonable/irrational in all the circumstances of their cases.

   (e) The exercise of powers under the legislation involves an unlawful interference with property rights under 'Article 1 of the First Protocol (the right to protection of property) ("A1P1") and in breach of Article 6 of the Convention for the Protection of Human Rights' involving the retrospective imposition of a payment obligation the claimants could not have predicted when they joined the partnerships referred to below.

4. HMRC's case in summary is that the exercise of discretion in issuing PPNs to the claimants was in accordance with the express language and purpose of FA 2014, and did not breach natural justice or their legitimate expectations. The decisions to give PPNs were not unreasonable or irrational and nor was there any breach of such Convention rights as they assert are engaged.

5. There are now 154 claimants in total, with two claimants identified as lead cases, Nigel Rowe and Alec David Worrall. All are or were members of Ingenious Media Plc schemes (members of one or more of three partnerships: Ingenious Film Partners ("IFP"); Ingenious Film Partners 2 LLP ("IFP2") and Ingenious Games LLP ("IGames")). None of the LLPs was structured so as to take advantage of the statutory reliefs which Parliament expressly established for film acquisition and production expenditure in sections 138 and 140 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005"). Rather, the LLPs were set up to carry on a trade of producing films and it was intended that under generally accepted accountancy principles, each LLP would have large losses in its first year of trading given that expenditure on film production is all up-front. Those losses would, for tax purposes, be allocated to the individual partners who could obtain sideways loss relief by offsetting the losses against other income and gains in the year of the loss or carry back the loss to the earlier year, or both, thereby reducing their liability to income tax that would otherwise have been payable.

6. The substantive tax dispute in relation to those LLPs (namely whether the schemes were effective to achieve the result contended for) is currently being litigated in the FTT in three lead appeals brought by the managing partners of IFP2, IGames and a third LLP, Inside Track Productions LLP on behalf of a wider group of Ingenious LLPs. The appeals are against closure notices issued by HMRC following enquiries into the partnership tax returns of the Ingenious artnerships. The closure notices concluded HMRC's enquiries, reflecting HMRC's conclusions that the arrangements did not achieve the tax result contended for and that the LLPs did not have relievable losses that could be allocated to individual partners to set-off against their income and gains in the relevant years. The hearing of those appeals commenced in the FTT in November 2014 but is still continuing. I am not concerned with and have formed no view of the underlying merits of the substantive tax dispute. I have little doubt that the appeals raise questions of complexity and accept that there are arguments to be made on both sides.

7. Mr Nigel Rowe was a member of IFP. He explains that he had to retire early (age 43) on health grounds. He was aware of the tax incentive of putting money into the LLPs. He states that this was critical to his decision to become a partner, since film production is a high risk enterprise. He states that he was aware that the Labour government encouraged investment in the British film industry and believed that his involvement would contribute to generating employment and tax revenues in excess of the original relief granted.

8. So far as concerns the PPN in his case:

   (a) In the tax year 2004/2005 Mr Rowe contributed £750,000 to IFP (made up of a cash sum of £270,000 and a full recourse loan of £480,000).

(b) He made a claim for relief for tax in respect of his share of partnership losses for 2004/2005 (£675,370) on a carry back basis to set off against income and gains in the year ending 5 April 2002.

(c) HMRC did not open an enquiry into that claim and in June 2005 HMRC made a tax repayment of £270,148 to Mr Rowe. Thereafter, Mr Rowe was aware of discussions between HMRC and the Ingenious partnerships about the trade losses, but had no direct discussions himself. He says his expectation was that the relief agreed was final.

(d) By letter dated 17 October 2014, HMRC gave Mr Rowe advance warning that they would be issuing a PPN in respect of his IFP loss claim in the following 2 to 4 weeks (referred to below as a "precursor letter"). The letter explained the effect of the PPN and identified the tax avoidance scheme the partnership had used by reference to its scheme reference number. Under a heading "Problems Paying" it invited Mr Rowe to contact HMRC straightaway if he thought he might have problems paying. The letter also invited him to let HMRC know if there was anything in his health or personal circumstances that might make it difficult for him to deal with the matter. He did not respond to that offer.

(e) By letter dated 14 November 2014, HMRC enclosed a PPN in the sum of £270,147.60 together with a computation explaining how that amount had been calculated. The letter stated that payment was due on 17 February 2015, unless representations under FA 2014 Schedule 32, paragraph 5 were received before that date, in which case (unless withdrawn) the sum would become payable 30 days after the date on which HMRC notified their decision in respect of such representations.

(f) Mr Rowe states that payment of the PPN will cause him hardship because he "did not plan [his] finances on the basis that HMRC could require the whole sum upfront and retrospectively, several years later. Instead, I had an expectation that HMRC could only recover any disputed tax loss following a decision in their favour on all the relevant issues from an independent court or tribunal. In particular I have had to sell shares … and keep the cash available in case it is needed to pay the PPN … The sum in question is enormous as my gross income is in the region of £125,000 which ….does not allow me to save the sort of sum demanded by the PPN."

9. Mr Alec David Worrall was a member of IFP2 and IGames. He explains his business activity in the film and media industry. He states that he joined the partnership because of his knowledge of and business interest in the film industry. He too was aware of the Labour government's policy of promoting investment in the British film industry by offering tax incentives to do so. He would not have put money into the partnerships without the tax incentives. He states that he regarded this as a business venture, not as a tax-saving exercise.

10. In his case

(a) In 2005/2006 he contributed £267,638 to IFP2 and IGames: IFP2 with a cash sum of £48,750 and £86,666 by way of full recourse loan; IGames with £47,600 cash and £84,622 full recourse loan.

(b) He made claims for relief of tax using his share of partnership losses for 2005/2006 partly on a carry back basis to 2004/05 (IFP2, £122,000) and partly on a sideways loss relief current year basis (IGames, £119,017).

(c) HMRC did not open an enquiry into the carry back claim. As with Mr Rowe, HMRC repaid the carry back claim, making a tax repayment of £48,800 (i.e. £122,000 x 40%) on 26 April 2007. On the current year claim he received immediate relief of £47,606.80.

(d) Mr Worrall received a precursor letter dated 3 October 2014, followed by a PPN dated 17 October 2014 in respect of the IFP2 loss claim.

(e) On 21 November 2014 he received a further pre-cursor letter relating to the IGames loss claim, followed by a PPN dated 5 December 2014.

(f) Mr Worrall sets out the financial impact of the PPNs in his case at paragraphs 26 to 29 of his witness statement (both for him and his wife). He says that he believed that he could use the money represented by the PPNs subject only to the possibility that the FTT could determine some potential liability. He says that he was entitled to and did make financial plans on that basis, investing his tax repayments in his business. It would cause him economic loss and hardship to have to raise £96,406 at short notice.

BACKGROUND TO FA 2014

11. Julie Elsey, Deputy Director (Policy and Technical) of HMRC's Counter Avoidance Directorate, explains the background to the introduction of FA 2014 in her witness statement of 5 March 2015. She describes the particular problem created by marketed tax avoidance schemes, which because of their complexity, take many years in enquiries, investigations and litigation, and during this time the majority of the taxpayers involved retain the use of the tax they seek to avoid. She estimates the total value of tax under dispute by HMRC related to marketed avoidance cases at around £14 billion.

12. She explains that an important tool in helping deliver HMRC's anti-avoidance strategy was introduced in 2004 (see Finance Act 2004, Pt 7, sections 306-318) in the Disclosure of Tax Avoidance Schemes ("DOTAS") regime, which has since been amended in 2006 and subsequently). Broadly, DOTAS requires promoters of avoidance schemes to inform HMRC of 'notifiable arrangements' or 'proposals' to enter into notifiable arrangements, namely:

"s. 306…any arrangements which –

(a) fall within any description prescribed by the Treasury by regulations,

(b) enable, or might be expected to enable, any person to obtain an advantage in relation to any tax that is so prescribed in relation to arrangements of that description, and

(c) are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage."

13. Prescribed information explaining how the tax advantage arises must be given. By s.315 penalties are imposed for failure to disclose a notifiable arrangement. Notification of an arrangement results in the allocation of a scheme reference number (or SRN) which must then be included by a user of the scheme on his or her tax return.

14. In July 2012 the Government consulted on proposals to improve and strengthen the DOTAS regime and for tackling tax avoidance ('*Lifting the Lid on Tax Avoidance Schemes*'). This was followed by a further consultation paper published in August 2013 ('*Raising the Stakes on Tax Avoidance'*). A set of proposals made in *Raising the Stakes* was directed at taxpayers who use avoidance schemes that are defeated in litigation involving another party. The proposal was that such taxpayers should be subject to a penalty, if without any reasonable basis for concluding that the litigated case was not relevant to their circumstances, they refuse to follow its result by making appropriate amendments to their tax returns (known as "follower penalties").

15. In his Autumn Statement of 5 December 2013, the Chancellor announced that he would act on those proposals and in addition, would remove the "cash advantage from sitting and waiting during a tax avoidance dispute by issuing new 'pay now' notices to taxpayers". The Statement made clear that such notices would initially be issued to taxpayers using tax avoidance schemes that had already been defeated, but that the Government would consult on the scope for widening the criteria for 'pay now' notices.

16. A Summary of Responses to the *Raising the Stakes* consultation was published in January 2014. It contained draft provisions for accelerated payments and follower notices, limiting accelerated payments to cases where a follower notice had been given. In the Foreword, the Exchequer Secretary to the Treasury said:

> "For many tax avoidance schemes one of the key attractions of the scheme is not necessarily the actual tax saving, but the opportunity to retain the tax saving during the course of the investigation and any subsequent legal challenge. In order to bear down on this advantage and to demonstrate our continued commitment to fight tax avoidance we are consulting on how users of avoidance schemes can be made to pay the tax in dispute upfront."

17. A further consultation document known as '*Tackling Marketed Tax Avoidance*' was published at the same time and Ms Elsey explains that it was this proposal that led to the accelerated payment regime which is the subject of this judicial review challenge.

18. Considerable reliance was placed by both sides on this consultation document and the response to it. Both documents need to be read carefully and as a whole, rather than isolating single sentences. I summarise below some of the paragraphs where particular sentences were emphasised in argument.

19. *Tackling Marketed Tax Avoidance* proposed extending the accelerated payments regime to cases other than those which were the subject of the *Raising the Stakes* consultation on the basis that there were then around 65,000 open cases involving marketed tax avoidance schemes, 85% dating back to 2009/10 or earlier, and "no inherent presumption that the tax should remain with the taxpayer during a dispute." The proposed extension of the accelerated payments regime is addressed in section 4, setting out two areas for extension: (i) to cases involving schemes disclosed under the DOTAS regime; and (ii) to cases being challenged under the general anti-abuse rule ("GAAR"). At paragraphs 4.7 and 4.8, the consultation document said:

> "This will apply in relation both to existing cases which have not yet been settled and to new cases. The same principle is relevant to both old and new cases: at present, users of avoidance schemes can delay their tax bills no matter how tenuous the likelihood of their ultimate success. It is this economic enticement to use avoidance schemes that the Government wants to remove.
> Linking the Payment Notices to users of DOTAS arrangements appears to the Government to be the right step because:
>
> > (a) most structures that are notified under DOTAS have characteristics or 'hallmarks' of avoidance; and
> > (b) DOTAS provides a clear and objective criterion for this policy which can be readily operated by taxpayers and their advisers. "

20. There were 847 responses to the Consultation from a wide range of businesses, representative bodies, trade associations, professional bodies, firms and individuals. Some of the respondents made points similar to the arguments advanced by the Claimants in this case. The Government published a Summary of Responses document in March 2014, setting out the position in the Introduction as follows:

> "2.1 The Government has made clear that it will take a robust approach to tackling tax avoidance.
>
> 2.2 To this end, the Government has taken a number of major steps, including the introduction of the General Anti-Abuse Rule (GAAR), new rules to tackle 'disguised remuneration' and closing down a number of loopholes. All of this is expected to bring in several billion pounds worth of revenue to the Exchequer that might otherwise have been lost to tax avoidance.

> 2.3 However, as this consultation and the consultation 'Raising the stakes on tax avoidance' show, there is more to do; particularly to tackle behaviours involving marketed avoidance schemes. Promoters devise schemes, often complex and contrived, that attempt to exploit certain features of the tax system – for example by trying to generate a claim for tax relief for far more than the expenditure incurred – and, at their most extreme and abusive, look for loopholes to no other purpose than to avoid paying the tax that should be due.
>
> 2.4 The high level of complexity and contrivance inevitably means that these schemes are difficult to analyse and challenge, but despite this HMRC has a very successful record. Around 80% of cases that have been decided by the tax tribunals and courts in recent years have been won by HMRC, and many others settle without litigation, but this often follows several years of enquiry, investigation and litigation, during which time the majority of the taxpayers involved have been able to enjoy the use of the tax that they were trying to avoid.
>
> 2.5 The Government's view is that this position is unacceptable. The current system of self assessment, enquiries and appeals, and the ability to apply for postponement of tax while an appeal is resolved, was not designed to assist those who contrive complex arrangements with the purpose of avoiding tax, retaining the cash advantage in the meantime.
>
> 2.6 The Government's proposals therefore have the simple objective of changing the presumption of where the tax sits, so that anyone who enters into an avoidance scheme will have to pay over the tax in dispute. This already happens where the taxpayer claims a repayment – HMRC can under current legislation deny some or all of a claimed repayment while a dispute is resolved. The new proposals put all taxpayers involved in tax avoidance on the same footing."

21. At paragraphs 2.17 to 2.23 the contention that HMRC's existing powers are adequate is examined and the conclusion reached is that further measures are necessary. At paragraph 2.24 a significant criticism of the "retrospective" nature of the proposals is recorded, namely "their application to disputes already in progress at the time that the legislation will pass into law, particularly in relation to schemes disclosed under DOTAS". This is answered at paragraph 2.25:

> "The Government does not agree that the proposals are retrospective. They do not change the underlying tax liability. Where an accelerated payment is made and the taxpayer subsequently wins their dispute the tax will be repaid with interest – no different to the situation where, currently, a repayment is denied whilst the dispute is resolved. Application of the proposals to existing disputes will ensure that all taxpayers in an avoidance dispute after Royal Assent will be in

> the same position, irrespective of when their dispute began."
> (See also paragraphs 3.50 and 4.7).

22. In relation to specific consultation questions about the grounds for objecting to an accelerated payment notice and whether there should be additional grounds for objection (Questions 3 and 4) the Government response to the many objections was to reject the introduction of formal appeal rights which "would in practice involve arguing the substantive issue of the dispute itself", and commit to "applying clear and strong governance to the use of this measure" with "only designated officers" to be authorised to calculate the tax due for the payment notice (paragraphs 3.31 and 3.32).

23. Section 4 summarised responses to the proposed extensions of the accelerated payments measure as covering principal concerns, including:

    (a) that DOTAS was designed to gather information, not to lead to resolution of cases;

    (b) that DOTAS was broad and covered unobjectionable arrangements, which were not differentiated from objectionable arrangements; and

    (c) that the measures were retrospective and would adversely impact on taxpayers who had disclosed and used certain types of arrangement in good faith: (paragraph 4.3).

    The Government rejected these objections, stating that "DOTAS provides an objective criterion to apply the measure and, in the majority of cases, is an indicator of avoidance activity. There are no other legislative criteria that could provide the same level of certainty and objectivity. " (paragraph 4.4)

24. This is criticised by the claimants who say that whilst 'objective' in the sense of 'certain', the criterion is nevertheless arbitrary in its blanket effect, including within it many thousands of perfectly lawful arrangements. But as to that, at paragraph 4.8 the Government recognised that disclosures under DOTAS may have been made on a precautionary basis and that in many of those cases there was likely to be little or no additional tax liability so that an accelerated payment was unlikely to arise. The response states that HMRC would work with taxpayers and advisers to identify and agree these cases as quickly as possible. Similarly at paragraph 4.19 the Government recognised the possibility of DOTAS covering unobjectionable schemes and said it was "working to manage any impact this may have on taxpayers who use [tax reliefs and incentives] in the way intended."

25. Addressing and rejecting the contention that the legislation was retrospective, the Government accepted that taxpayers who invested in arrangements declared under DOTAS or declared their tax arrangements under DOTAS could not have predicted that an advance payment regime would be introduced when entering into these schemes, stating:

    > "Whilst it imposes a new obligation on certain taxpayers that they did not expect when they entered into these schemes, the government is not changing the legislation that determines whether the scheme used is effective": paragraph 4.7.

The Government rejected the charge that the measures were retrospective: there was no change to or determination of the final tax liability, and all that was altered was the interim obligation to pay on account, albeit by reference to arrangements entered into in the past.

26. In relation to the criticisms of the requirement to pay within 90 days of the notice, the Government stated that:

> "… 90 days is an ample period in which taxpayers… can raise any issues about the quantum of the payment and consider its financial impact upon them. Prudent taxpayers should have considered the risks associated with entering an avoidance scheme and made financial provision. For those who have not done so, the 90 days period is an opportunity to consider how payment will be made and, if necessary, commence discussions with HMRC debt management staff." paragraph 4.15

27. The claimants criticise the statement at paragraph 4.18 that "It is simply not acceptable for taxpayers to reach the end of the dispute and then contend that they never expected to have to pay over the money". They argue that this wrongly suggests that payment of the accelerated payment amount is at the end of the dispute, that is, at the point when liability is decided (whether by the FTT or by settlement), whereas the accelerated payment may be required before the dispute is even fully articulated by HMRC, still less determined. This criticism seems to me to miss the point. As the Government response makes clear anyone who enters into a tax avoidance scheme takes the risk that the scheme will fail and that ultimately the tax will be payable. The legislation accelerates the requirement to make the "at risk" payment pending determination of the dispute but the risk was always there, and must have been anticipated.

28. In his Budget speech of 19 March 2014, the Chancellor announced that those who had carried out disclosed tax avoidance schemes would be required to pay their taxes upfront and that this would also apply to schemes covered by the GAAR. Ms Elsey explains at paragraph 18 of her statement that the fiscal impact of the changes was assessed by the Office for Budget Responsibility and set out in the Budget Report. The extension of the accelerated payments regime to DOTAS schemes and the GAAR results in an expected yield of £235 million in 2014/15 and higher amounts in 2015/16 and 2016/17.

29. The estimated revenue gain from the use of Accelerated Payment Notices ("APNs") is set out in the Budget Costings document exhibited to Ms Elsey's statement. This shows that the Government expected to issue APNs to a value of £7.1 billion. The Government estimated that following litigation it would have to pay back 20% of that sum. On these figures the claimants say that the Government will obtain a beneficial cash flow of £1.2 billion for an unspecified interim period, depending on how long HMRC take to complete enquiries and the length of delays in bringing appeals to a conclusion. This is criticised on the basis that there will be no incentive for HMRC to complete enquiries or for the Government to fund the Tribunal service sufficiently to reduce the significant backlog of cases. This point was addressed in the Summary of Responses document in answer to a similar point raised at paragraph 3.47: "HMRC has no

interest in "sitting on the money" and delaying cases. HMRC will be judged on its ability to significantly reduce the existing stock of avoidance cases, as well as the continuing flow of new cases. HMRC will be resourced to implement this measure and deal with cases in the most efficient manner." (paragraph 3.51).

30. The Finance Bill was introduced to Parliament on 27 March 2014. It contained the draft provisions as amended after the consultation. Provisions in the Bill introducing the APNS regime were debated in Committee on 17 June 2014 and at Report Stage on 1 July 2014. Shortly before the Bill received Royal Assent on 17 July 2014, HMRC drew up and published on its website a list of those DOTAS schemes which may be subject to accelerated payment notices.

THE ACCELERATED PAYMENT LEGISLATION

31. Before summarising the critical provisions in FA 2014 itself, it is helpful to summarise broadly the tax management scheme into which it fits so far as relevant for the purposes of these judicial review claims:

(a) Where an LLP "carries on a trade, profession or business with a view to profit" (s.863(1) ITTOIA 2005) the LLP is treated as "transparent" for income tax purposes, and its activities are treated as carried on in partnership by its members, the individual partners. The profits or losses of the LLP are allocated between the partners and treated as their profits or losses for tax purposes. The LLP has no income tax liability in these circumstances.

(b) Both the LLP (by a nominated partner) and each partner must file a self-assessment return (under s.12AA Taxes Management Act 1970 ("TMA") and s.8(1) TMA respectively). Every return under s.8 TMA must include a self-assessment of the amount of income and capital gains tax payable after taking account (among other things) of any relief, or allowance claimed in the return: s.9(1) TMA.

(c) The LLP's return must include a "partnership statement" stating the amount of income or loss sustained by the LLP for the period covered by the return and the amount of income or loss attributable to each partner: s.12AB(1). The individual partner must also include in the return any amount of profit or loss allocated as his or her share in the partnership statement for a period which includes (or includes part of) the year of assessment to which the return relates: ss.8(1B) and 8(1C) TMA.

(d) HMRC can enquire into an individual return under s.9A; and a partnership return under s.12AC.

(e) An enquiry under s.9A is brought to an end by a closure notice which must state whether or not any amendment to the return is required. There is a right of appeal under s.31 (1)(b) TMA against "any conclusion stated or amendment made" by a closure notice. The appeal lies to the FTT which can increase or reduce a self-assessment or other assessment and allow or disallow a claim or election (see generally s.50 TMA).

(f) Any enquiry into the LLP's return and partnership statement under s.12AC TMA is deemed to constitute an enquiry into each individual partner's return under s.9A: see s.12AC (6) TMA. An enquiry under s.12AC is brought to an end by a closure notice under s.28B and if an amendment is made to entries in the return that have consequential effect for each individual partner, HMRC is required to make consequential amendments to each partner's return so as to give effect to the amendments made to the LLP's return: s.28B(4) TMA. The same rights of appeal under s.31(1)(b) TMA apply to the partnership closure notice, with similar effects.

(g) The statutory machinery that governs the making of claims for loss relief (etc) permitted by the Taxes Acts is found in s.42 and Schedules 1A and 1B to the TMA.

32. Before FA 2014 came into force, where a repayment of tax by HMRC to the taxpayer was claimed, it was not required to be made in a case where an enquiry was open under s.9A until after the enquiry has been completed, although a provisional repayment could be made earlier at HMRC's discretion: ss.59B(4A)(b), 59B(5) and Schedule 3ZA, para 5 TMA. Where there was an appeal to the FTT in respect of an amendment of a self-assessment or against a conclusion stated or amendment made by a closure notice, the appellant had a right to postponement of the payment obligation where he had grounds for believing that the amendment or assessment overcharged him to tax: s.55(3) TMA. Where a claim made outside a return (for example to carry back losses to an earlier year) sought repayment of tax, and HMRC enquired into the claim, HMRC was not required to but could give effect to the repayment on a provisional basis pending the enquiry. At the end of the enquiry, HMRC could amend the claim and, if a provisional repayment was made, assess to recover the repayment. The taxpayer had no right of postponement in the case of appeals regarding claims made outside returns.

33. FA 2014, Part 4 has 4 chapters. Chapter 1 sets out the main defined terms used in Part 4. Chapter 2 makes provision for 'follower notices' (ss.204-218) and Schedule 31 (for partnership returns). A follower notice informs a taxpayer that some or all of the issues in dispute regarding his tax liabilities have been determined in HMRC's favour in another case; directs the taxpayer to take 'corrective action'; and provision for penalties is made if account is not taken of relevant judicial rulings. Chapter 3 makes provision for APNs and PPNs to be given (ss.219-229) and Schedule 32 (for partnership returns). This chapter also makes provisions restricting the circumstances in which payments of tax or repayments can be postponed. Chapter 4 makes provision for particular circumstances not relevant here and amendments consequential on the FA 2014.

Accelerated payment notices

34. Section 219 FA 2014 provides HMRC with a discretionary power to give an APN where three conditions are met. The same three conditions (with minor modifications) must be met for a PPN to be given. Section 219 provides:

"(1) HMRC may give a notice (an "accelerated payment notice") to a person ("P") if conditions A to C are met.

(2) Condition A is that –

(a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or
(b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been –

(i) determined by the tribunal or court to which it is addressed, or
(ii) abandoned or otherwise disposed of.

(3) 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 arrangements ("the chosen arrangements").

(4) Condition C is that one or more of the following requirements are met –

(a) HMRC has given (or, at the same time as giving the accelerated payment notice, give) P a follower notice under Chapter 2 –

(i) in relation to the same return or claim or, as the case may be, appeal, and
(ii) by reason of the same tax advantage and the chosen arrangements;

(b) the chosen arrangements are DOTAS arrangements;

(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.).

(5) "DOTAS arrangements" means –

(a) notifiable arrangements to which HMRC has allocated a reference number under section 311 of FA 2004

(b) notifiable arrangements implementing a notifiable proposal where HMRC has allocated a reference number under that section to the proposed notifiable arrangements, or

(c) arrangements in respect of which the promoter must provide prescribed information under section 312(2) of that Act by reason

of the arrangements being substantially the same as notifiable arrangements within paragraph (a) or (b).

(6) But the notifiable arrangements within subsection (5) do not include arrangements in relation to which HMRC has given notice under section 312(6) of FA 2004 (notice that promoters not under duty imposed to notify client of reference number).

(7) "GAAR counteraction notice" means a notice under paragraph 12 of Schedule 43 to FA 2013 (notice of final decision to counteract under the general anti-abuse rule)."

35. In all cases to which these claims relate, PPNs were issued by HMRC on the basis that Condition C was satisfied by reason of the fact that all the 'chosen arrangements' were DOTAS arrangements notified to HMRC and to which a SRN (or scheme reference number) had been allocated: s.219(5)(b). There is no dispute that Condition C is satisfied here (and no dispute that Condition A is also met because enquiries into the LLPs' tax returns have been opened and amendments made to those returns).

36. The scheme of the legislation is first to require an open enquiry into a return or claim or an unresolved appeal in relation to the relevant tax (Condition A). Next it requires that the return or claim or appeal is made on the basis that a particular tax advantage ('the asserted advantage') results from particular arrangements ('the chosen arrangements') (Condition B). Then it identifies that part of the asserted advantage effect to which is to be denied ('the denied advantage').

37. 'Tax advantage' is a defined term: see s.201; and includes 'relief or increased relief from tax' and 'repayment or increased repayment of tax'. 'The denied advantage' in the case of a notice given by virtue of notified DOTAS arrangements (s.219(4)(b)) is:

"so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise" (s.220(5)(b)).

38. APNs and PPNs operate by requiring the recipient to pay the amount stated in the relevant notice. Where there is a tax enquiry in progress, the notice must specify the amount required to be paid under s.223. The amount under s.223 is defined in s.220 as:

"(3) an amount equal to the amount which a designated HMRC officer determines, to the best of that officer's information and belief, as the understated tax.

(4) 'the understated tax' means the additional amount that would be due and payable in respect of tax if…

(b) in the case of a notice given by virtue of section 219(4)(b) (cases where the DOTAS requirements are met), such adjustments were made as are required to counteract what the designated HMRC

officer determines, to the best of that officer's information and belief, as the denied advantage; .."

39. The APN must provide the recipient with prescribed information and must accordingly contain information as set out in s.220(2). It must state:

(a) which part of Condition C in s.219(4) applies: (a), (b) or (c);

(b) the payment amount required and due date of payment, as set out in s.223;

(c) the ability to make representations under s.222 and their effect;

(d) the effect of the removal of any ability to postpone pursuant to s.55 TMA in the case of a pending appeal under s.224; and

(e) the effect of the penalty provisions in s.226.

40. Within 90 days of the date of the notice the taxpayer may make written representations to HMRC in relation to the notice under s.222(2):

"(a) objecting to the notice on the grounds that Conditions A, B or C in section 219 was not met,

(b) objecting to the amount specified in the notice…"

HMRC must consider any representations made in accordance with s.222(2) and having done so, must determine whether to confirm or withdraw the notice, and/or determine whether a different amount (or no amount) ought to have been specified, and then confirm, vary or withdraw the notice: s.222(4).

41. By s.223 payment of the amount stated in the notice ("the accelerated payment") must be made to HMRC and

"the accelerated payment is to be treated as a payment on account of the understated tax:" s.223(3).

It must be made before the end of the 'payment period'. Where no representations are made under s.222, the payment period is 90 days beginning with the day on which the notice was given. Where representations are made, the payment period is extended to the period of 30 days beginning with the day on which HMRC's determination of the representations are notified, if that is later than the 90 day period: s.223(5).

42. Under s.226, if the taxpayer does not pay before the end of the payment period there is an automatic 5% penalty. A further 5% penalty accrues at the end of a further five months and another 5% at 11 months from the end of the payment period.

43. As already noted, APNs can also be issued where an appeal is pending. In such circumstances, unlike in the case of an open enquiry, HMRC have made an assessment of the tax believed to be due. An APN given during an appeal must specify the 'disputed tax', which is defined in s.221 as:

> "(3) .. so much of the amount of the charge to tax arising in consequence of –
>
> (a) the amendment or assessment to tax appealed against, or
>
> (b) where the appeal is against a conclusion stated by a closure notice, that conclusion,
>
> as a designated HMRC officer determines, to the best of the officer's information and belief, as the amount required to ensure the counteraction of what that officer so determines as the denied advantage."

44. The appeal based APNs are otherwise the same as enquiry based APNs, except that:
    (a) no payment on account is created (since the assessment is payable under s.55(5), TMA 1970);
    (b) s.226 penalties do not apply (since penalties for non-payment arise under legislation applying to amounts due under s.55); and
    (c) the form of the APN is modified to take these two matters into account.

Partner Payment Notices

45. These claims concern PPNs only. Schedule 32 applies where a PPN is given to a partner member of an LLP. Where a partnership return has been made in respect of an LLP by the representative partner, HMRC may issue a PPN to each partner, in the same circumstances as they could have issued an APN. The PPN is issued to that individual or 'relevant partner' (para 1(4)) and not to the representative partner: Schedule 32, para 2(2).

46. The conditions for the issue of PPNs under Schedule 32 para 3 follow those for the issue of APNs in s.219. Condition A requires that a tax enquiry in relation to the LLP's return is in progress or an appeal has been made in relation to an amendment of the partnership return or a conclusion stated by a closure notice in relation to a tax enquiry into the partnership return. 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"). Condition C includes the chosen arrangements being DOTAS arrangements (as here).

47. In the case of a PPN issued on the basis that the chosen arrangements are DOTAS arrangements, the payment required of "understated partner tax" (determined by the designated HMRC officer to the best of his information and belief) is defined in Schedule 32 para 4(3) as being:

> "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; …"

The 'denied advantage' is defined in para 4(4)(b) in the case of a DOTAS based notice as:

> "so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise; …."

48. Accordingly, the understated tax is the additional amount that would be due and payable on the basis that the tax advantage has been denied. This is determined by the designated officer. The denied advantage is so <u>much of the</u> amount which the taxpayer has asserted as a tax advantage but which HMRC considers will not ultimately be a tax advantage once the tax dispute is finally resolved. What the taxpayer is expected to pay under the PPN is accordingly the disputed tax resulting from the chosen arrangements. The legislation requires this to be determined by a designated officer to the best of his information and belief.

49. Where a PPN is validly issued, the relevant partner has 90 days beginning with the day on which the PPN is given, to make written representations to HMRC: Schedule 32 para 5. The relevant matters on which written representations can be made, as with APNs, are limited to: (i) objecting to the PPN on the grounds that Conditions A, B and/or C not met; or (ii) objecting to the amount specified in the notice. Upon considering such representations, it is open to HMRC to confirm, amend or withdraw the relevant PPN.

50. If and insofar as a PPN is not withdrawn, the relevant partner must pay the amount specified in the notice: Schedule 32 para 6(2). This is "to be treated as a payment on account of the understated partner tax": Schedule 32, para 6(3) (irrespective of whether the PPN is based on a partnership enquiry or a partnership appeal). The payment must be made before the end of the payment period: para 6(4). Where no written representations are made, payment is within 90 days of the PPN being given. Where written representations have been made, payment is to be made either at the end of that 90 day period or at the end of the period of 30 days beginning with HMRC's determination of the relevant partner's written representations, whichever is the later. The same penalty provisions as are set out in s.226 apply to PPNs: para 7.

Provisions restricting circumstances in which payments of tax can be postponed pending appeal

51. As already indicated, prior to amendment by FA 2014, s.55(3) TMA provided that in the case of an appeal to the FTT or Upper Tribunal ("UT") against an amendment of a self-assessment or a conclusion stated or amendment made by a

closure notice the appellant had a right to postpone payment of the disputed tax where he had:

> "(3) ….. grounds for believing that the amendment or assessment overcharges the appellant to tax, or as a result of the conclusion stated in the closure notice the tax charged on the appellant is excessive"

HMRC could agree to the postponement sought; but if refused, the decision whether or not to order postponement was made by the tax tribunal: s.55(6). There was a right to postponement where "there are reasonable grounds for believing that the appellant is overcharged to tax".

52. Section 224(1) FA 2014 amends the TMA to remove the right of postponement where an APN/PPN has been issued. Section 55 as amended, now provides:

> "(8B) Subsections (8C) and (8D) apply where a person has been given an accelerated payment notice or partner payment notice under Chapter 3 of Part 4 of the Finance Act 2014 and that notice has not been withdrawn.
> (8C) Nothing in this section enables the postponement of the payment of (as the case may be)-
> (a) the understated tax to which the payment specified in the notice under section 220(2)(b) of that Act relates,
> (b)the disputed tax specified in the notice under section 221(2)(b) of that Act, or
> (c) the understated partner tax to which the payment specified in the notice under paragraph 4(1)(b) of Schedule 32 to that Act relates.
> (8D) Accordingly, if the payment of an amount of tax within subsection (8C)(b) is postponed by virtue of this section immediately before the accelerated payment notice is given, it ceases to be so postponed with effect from the time that notice is given, and the tax is due and payable…[in accordance with the relevant time limits applicable to PPN/APNs]."

THE ISSUES

GROUND 1 – NATURAL JUSTICE

53. It is common ground in this judicial review that public body decision making (whether executive or judicial) must be fair and must accord with the principles of natural justice; and if unfair, falls to be quashed. It is also uncontroversial that what fairness demands in a particular case is critically dependent on the context of the decision being taken. In R v Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, Lord Mustill, with the agreement of the rest of

the Committee of the House of Lords, summarised the relevant principles as follows:

> "(i) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
>
> (ii) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.
>
> (iii) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.
>
> (iv) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.
>
> (v) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.
>
> (vi) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer".

54. It is the claimants' case that these PPNs are peremptory demands for payment of money (that may or may not at some future time be established or assessed as equivalent to tax owed) within short time limits, backed by penalties. In that context they say that HMRC acted unlawfully by failing to give them a right to make representations before the PPNs were issued, and "the failure both to explain the basis for the asserted liability and provide the taxpayer with a proper opportunity to rebut such claims, constituted a serious breach of the fundamental principles of fairness rendering the decision unlawful".

55. Mr Southern QC (on behalf of the claimants) submits that there is nothing in s.219, Sch 32 paragraph 3(1) or the statutory scheme as a whole, that prevents the discretion to give PPNs from being exercised in accordance with general principles of natural justice. Moreover, Parliament must be assumed to have intended that HMRC should exercise its powers in accordance with those principles given the invasion of property rights that is involved. He relies on <u>Bank Mellat v Her Majesty's Treasury</u> [2014] AC 700 where Lord Sumption

(with whom Lady Hale, Lords Kerr, Clarke, Neuberger and Dyson agreed) said (at [29]):

> "The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB (NS) 180, the Defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. "I apprehend", said Willes J at 190:
>
> > 'that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application and founded upon the plainest principles of justice.'
>
> (See to similar effect, Lord Neuberger at [178]).

56. Given the absence of any right of appeal, or any of the 'normal' taxpayer safeguards, Mr Southern contends that it was critical that HMRC exercise the statutory discretion properly, including taking account of all relevant considerations, ignoring all irrelevant considerations and complying with the principles of fairness and natural justice. That was not done. The 'post-decision' reconsideration rights were limited; the grounds on which representations could be made were too restricted, involving no opportunity for any examination of the merits; the internal review was accordingly insufficient. The discretion was in effect operated as a rule, with PPNs given automatically on an industrial scale, and judicial review was inadequate to secure natural justice.

57. In deciding what natural justice or fairness demands, the starting point is the statutory scheme within which the PPNs were given. Fairness can be achieved (as the many authorities to which I was referred demonstrate) using different models and no hard and fast rule as to its content applies. The appropriate model will depend on the particular context and nature of the rights involved.

58. The essential features of the statutory framework here include the following:

    (a) The statutory scheme identifies carefully defined pre-conditions that must be satisfied before a PPN can be given: conditions A to C, Schedule 32 para 3(2) to (5). These conditions are in broad terms, objective conditions.

    (b) There must be a tax enquiry in progress in relation to the partnership return, or an appeal in relation to that return (Condition A). The partnership return (or appeal) must be made on the basis that a particular tax advantage results from particular arrangements, here DOTAS arrangements. In the case of a partnership return, that will only be so if the partnership return is made on the basis that profits or losses result from the tax arrangements and

the same profit or losses result in the same tax advantage for the relevant partner (Schedule 31 para 3(3)(a) and (b)). Arrangements will only be tax arrangements if "having regard to all the circumstances it would be reasonable to conclude that the obtaining of a tax advantage was [at least] one of the main purposes, of the arrangements" (s.201(3)).

(c) The PPN itself must specify which statutory basis is relied on to show Condition C is satisfied (para 4(1)(a)) and the payment that is required to be made (para 4(1)(b)). It must also explain the effect of Schedule 32 paras 5 and 6, which deal with the right to make representations and the obligation to make payment within specified dates; and the effect of ss.224 and 225 which deal with restrictions on postponing tax pending appeals.

(d) The payment required to be made is determined by a designated HMRC officer to the best of the officer's information and belief: Schedule 32 para 4(2). In a DOTAS arrangements case, the officer must determine what the "denied advantage" is by determining how much of the relief, repayment etc. as is claimed by the partner to result from the tax planning, does not result from the tax planning (para 4(4)(b)). The officer determines the additional amount that would become due and payable by the relevant partner if such adjustments are made as would counteract the denied advantage reflected in the return or claim of the relevant partner. This is the "understated partner tax" that must be paid.

(e) The right to make representations in Schedule 32 para 5 is a right to object on the basis that the statutory requirements for the lawful issue of a PPN have not been met (i.e. Conditions A to C are not satisfied), and also enable the recipient of the PPN to object to the amount specified in the PPN.

(f) Although a PPN requires payment 90 days after it is given, that time limit is suspended automatically if written representations are made to HMRC following receipt of the PPN. The obligation to pay only arises again after HMRC have responded to those written representations.

59. The question in light of the statutory framework is whether the common law requires the imposition of any additional non-statutory obligations on HMRC to "explain the basis for the asserted liability and provide the taxpayer with a proper opportunity to rebut such claims" before the PPN is served. Where Parliament has prescribed a set of procedural protections, the courts should generally be slow to impose a further set of obligations as a matter of common law and "before this unusual kind of power is exercised it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation": Wiseman v Borneman [1971] AC 297 at 308C (Lord Reid).

60. I do not consider that the statutory scheme for giving APNs (including PPNs) is unfair or insufficient to achieve justice. I reach that conclusion for the following reasons.

61. First, the accelerated payment does not involve any determination of final liability, but rather, addresses where the tax should be held pending resolution of the dispute. So far as that question is concerned, Parliament has specifically addressed procedural fairness, and prescribed a procedure whereby there is a right to make representations before any payment obligation arises.

62. Secondly, the PPNs do not deprive the claimants of their statutory right to challenge the underlying tax liabilities, by way of appeal to the FTT (and such appeal rights have in fact been exercised here). Instead, their effect is that the claimants do not have the benefit of keeping the money pending resolution of the underlying appeal. In other words, the situation created by the PPN is temporary, and does not finally determine any tax obligations. That is not to diminish the potentially significant consequences for an individual, who might have to sell his or her house in order to fund the payment. However, that hardship was always a risk that might materialise in the case of a taxpayer entering a tax avoidance scheme without making provision for payment of the tax if the scheme failed. Moreover it is a feature that cannot have been lost on Parliament when enacting the statutory scheme. In any event, to the extent that hardship arises, that is relevant to the mechanics of payment, rather than to the fairness of the statutory scheme.

63. The impact of the PPNs in the present case is not comparable, both in terms of seriousness and immediacy with the effect of the statutory direction in Bank Mellat v HM Treasury [2014] AC 700 relied on by the claimants, and the statutory and overall context is significantly different too. Even if property or assets will ultimately have to be sold in order to make the payment, since the payment obligation is suspended pending consideration of representations, no immediate damage is likely to be suffered.

64. In Bank Mellat a statutory direction was made prohibiting all persons operating in the financial sector in the UK from entering into any transaction with Bank Mellat, a major Iranian commercial bank, on the grounds that HM Treasury believed that the development or production of nuclear weapons in Iran posed a significant risk to the UK's national interests. The direction was described by Lord Sumption in terms that make clear why prior opportunity to make representations was necessary. He said at [37]: "A direction to financial institutions to cease business with a designated person is apt to achieve serious and immediate damage while it remains in effect, extending well beyond transactions related to nuclear proliferation. Even if it is set aside, the impact on the designated person's goodwill may be substantial and in some cases irreversible." Lord Sumption also noted in the same passage that "the recognition of a duty of prior consultation would not frustrate the purpose of the statutory scheme, nor would it cut across its practical operation."

65. Moreover the scope of representations (extending to the statutory basis for the PPN and the amount, as identified in Schedule 32 paragraph 5) is adequate to ensure that fairness is preserved. This allows representations to be made challenging the rationality of the designated officer's determination, based on his information and belief, both as to the efficacy of the tax avoidance arrangements and as to the amount. For example, as Mr Eadie QC submitted, if

there was clear judicial authority (at whatever level) that a particular tax scheme was legally effective to produce the tax advantage asserted, that would be a basis for challenging the rationality of the officer's determination in relation to a PPN involving the identical tax scheme. However, it does not allow representations on the wider basis contended for by the claimants, in effect challenging the merits of the decision by reference to the efficacy of the tax avoidance scheme itself. The merits of the underlying tax dispute is a matter to be dealt with in the statutory appeal. I agree with Mr Eadie that affording such a right would be inconsistent both with the purpose of the preserved statutory appeal rights, and the limited nature of the representations allowed under FA 2014. It is no part of the statutory scheme that before giving a PPN, there must be some final determination of the merits of the underlying tax avoidance scheme itself.

66. I do not accept Mr Southern's submission that the requirement to make an accelerated payment acts as a disincentive to exercising appeal rights. To the extent that the tax scheme is regarded as legally effective by the taxpayers involved, the incentive to pursue an appeal in order to obtain the relevant tax advantage on a final basis will remain, whatever may be the interim position pending judicial determination. To the extent that a tax avoidance scheme is regarded as high risk, the position may be different but in those circumstances there could have been no certainty about retaining the tax advantage in any event. Moreover, this is precisely what the legislation was designed to address: the cash flow advantage obtained while tax disputes are investigated and resolved over a lengthy period.

67. Thirdly, protection is afforded by the statutory scheme to the taxpayer who succeeds in an underlying appeal to the FTT in relation to the disputed tax liability. If the appeal succeeds, the money paid under the PPN is refunded with interest. On the other hand, if the LLPs fail in the appeal, there would have been no justification for the claimants having had the cash flow benefit of holding the money. The claimants criticise the rate of interest afforded in this regard, but that cannot affect the fairness of the scheme. The relevant rate of interest is fixed not by FA 2014, but by Regulation 4 of the Taxes and Duties, etc (Interest Rate) Regulations 2011 ("Regulations"), made by HM Treasury pursuant to the powers given by s.103 Finance Act 2009. There is no direct challenge to that secondary legislation here.

68. Fourthly, there is also protection available to a recipient of a PPN in the availability of judicial review to challenge the lawfulness of the decision to give a PPN. Just as in Runa Begum v Tower Hamlets LBC [2003] AC 430, where a judicial review jurisdiction, albeit exercised by a specialist tribunal was regarded as sufficient to satisfy the requirements of Article 6 of the Convention, the same is true here. Having regard to the subject matter of the decision to be reviewed (who holds the money on a temporary rather than a final basis, pending judicial determination of the underlying tax dispute); the manner in which the decision is arrived at by a designated officer reaching determinations to the best of his information and belief (and not on any final basis by determining the merits of the avoidance scheme); and the content of the dispute (whether the statutory

conditions are met and as to amount), judicial review provides an entirely adequate safeguard.

69. So far as the designated officer is concerned, some criticism was made by Mr Southern of the absence of any evidence about the designation process or whether officers have in fact been designated. He argued that the duty of candour required an explanation and evidence about the whole PPN process including in relation to designated officers, irrespective of the scope of the judicial review challenge. I disagree. Nothing in the grounds for judicial review as initially advanced or by reference to the skeleton argument for this hearing raised any question as to this issue and it is unsurprising in those circumstances that there is no evidence from HMRC in this respect. In any event, Mr Eadie explained, on instructions, that officers have been designated and must be senior officers with approximately 10 years' experience. There are internal governance processes ensuring that judgments made by designated officers are properly overseen. This accords with what was said by the Government during the consultation process, and there is no basis for doubting its accuracy.

70. Finally, Parliament has enacted a statutory scheme intended to operate broadly across a wide range of tax avoidance schemes to remove the cash flow advantage pending enquiry and appeal. Unlike in Bank Mellat, in my judgment the recognition of additional common law requirements as contended for by the claimants would frustrate the purpose of the statutory scheme and would cut across its practical operation. Given the nature of what is at stake when a PPN is issued, the existence of a right of appeal concerning the underlying tax liability, and Parliament's intention in creating a procedural regime allowing representations to be made before any money is payable but only on the statutory conditions that must be met for lawfully giving the PPN and the amount, there is no justification for imposing on HMRC additional procedural protections of the kind alleged by the claimants. This ground of challenge accordingly fails.

GROUND 2 – CONDITION B

71. In relation to Ground 2, the claimants challenge the lawfulness of the PPNs on the basis that Condition B, contained in Schedule 32 para 3(3) FA 2014, has not been satisfied:

> "(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")."

72. By reference to Schedule 32 para 3(4) and Schedule 31 para 3(3), they contend that it will only be satisfied if (a) the return is made on the basis that an increase or decrease in an amount stated on a partnership return results from those tax arrangements and (b) the increase or reduction 'results in that tax advantage for one or more of the relevant partners'.

73. Schedule 32 para 3(4) provides that:

> "(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)."

Paragraph 3(3) of Schedule 31 adapts the legislation in the main body of FA 2014 concerning follower notices (as opposed to APNs/PPNs) and provides:

> "For the purposes of Condition B in section 204 a partnership return, or appeal in respect of a partnership return, is made on the basis that a particular tax advantage results from particular tax arrangements if –
>
> (a) it is made on the basis that an increase or reduction in one or more of the amounts mentioned in section 12AB(1) of TMA 1970 (amounts in the partnership statement in a partnership return) results from those tax arrangements, and
>
> (b) that increase or reduction results in that tax advantage for one or more of the relevant partners."

74. As indicated above, under s.12AB TMA, the partnership return must include a statement of "the amount of income or loss from each source". This result is then allocated to the individual partner members, who can in turn set this loss off against their other income, either in the current year (known informally as "sideways" loss relief) or in the previous year ("carry back" loss relief).

75. Mr Southern contends that in a case where the 'tax advantage' for the relevant partner does not result in an increase or reduction in his income in the current year, it does not result from the increase or reduction of an item in the partnership return. Rather, the advantage results from the use which he makes of the share of partnership losses allocated to him, if and when he chooses to do so, by making a claim to carry back the loss relief.

76. In his submission, FA 2014 recognises the difference between returns and claims and makes a basic structural distinction between the two types of enquiry available under the TMA: enquiries into claims and enquiries into returns. Partnerships can only make returns; they cannot make claims that are not included in returns. Whereas partners can make claims that are not included in returns. He submits that Schedule 32 para 3(3) recognises this. The particular arrangements giving rise to the asserted advantage are those contained in the partnership return and transmitted to the relevant partner's self-assessment tax return. The legislation anticipates that a tax advantage for the relevant partner may arise from the partnership loss but that is only for current year claims. A carry back claim cannot be included in the relevant partner's self-assessment tax return and the chosen arrangements in the partnership return cannot therefore feed through into the individual partner's return in such a case. The tax advantage accordingly, only results from the partnership arrangements in the case of current year claims. In the case of carry back or stand-alone claims, it results from the separate claim made by the individual partner. He submits that

there are good policy reasons for this distinction: it respects the integrity of the tax system and the structural principles on which it is based.

77. I do not accept this argument. As Mr Grodzinski QC submitted, it ascribes an artificially narrow interpretation to the concept of "results in" that leads to an incoherent interpretation of the legislation for which there is no policy justification.

78. So far as these claimants are concerned, it was only necessary to issue a PPN if they had either used their purported trading losses to obtain (i) a refund of tax for an earlier year or (ii) a set-off against a current year liability to tax. In both cases they had a choice whether to do so or not. But after the filing date for the tax return, claimants who received a repayment and those who received a set-off were in the same economic position. Both received a tax advantage whether the share of losses was used in a carry back claim or in a current year claim. It is difficult to see any reason or policy justification why the legislation should exclude from its scope the right to issue a PPN where one rather than the other is used.

79. There is nothing in FA 2014 that differentiates between these two situations for the purposes of deciding whether the statutory pre-conditions are met. The PPN simply requires an amount to be paid which is equal to the amount identified in Schedule 32 para 4 as the "understated partner tax", determined to the best of a designated officer's judgment (para 4(2)). Further, Parliament defined "tax advantage" in s.201 FA 2014 to encompass both relief from tax as well as repayment of tax. By defining tax advantage in this way, it is evident that Parliament intended the PPN to operate regardless of the mechanics in which a taxpayer obtains the tax advantage (i.e. whether by way of repayment claim or set-off). Accordingly, Parliament cannot have intended to limit the concept of "results in" in the way contended for, so as to limit it to direct results only. That is too narrow and incoherent an approach.

80. In writing but not pressed orally, it was also contended by the claimants that under s.201 FA 2014, a "tax advantage" includes relief from tax but does not include being responsible for a share of a loss which, even on its ordinary meaning, cannot be seen as an advantage. Since the relief must be claimed or may not be claimed at all, it does not result from the partnership arrangement. Again I do not accept that argument. It is manifestly inconsistent with s.201(2) which defines "tax advantage" very broadly and as including a relief or increased relief from tax, a repayment or increased repayment of tax, avoidance or reduction of a charge for tax, etc.

81. Mr Southern also submitted that the PPNs determine an amount which does not fall within Schedule 32 para 4(2) because para 4(2) requires the officer to determine the amount of the 'understated partner tax', and under para 4(3), this is the amount:

> "(3)… that would become <u>due and payable</u> by the relevant partner if…

(c) 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 a claim of the relevant partner."

Mr Southern contends that no tax could ever become 'due and payable' on carry back claims where HMRC has not opened enquiries because HMRC is not able to assess to recover the repaid tax, whatever the outcome of the Ingenious appeals. This is because the only correct mode of enquiry (leaving aside discovery assessments) into carry back claims made outside a return (as the majority of these claims were) was an enquiry into the claim under Schedule 1A TMA, and no such enquiries were opened in these cases. He submits that this approach is supported by the decision of the Supreme Court in HMRC v Cotter [2013] UKSC 69, STC 2480 (SC).

82. Mr Southern's argument has been rejected by Sales J (as he then was) in De Silva and Dokelman v HMRC [2014] UKUT 0170, as he recognises. Nevertheless, he submits that it is inconsistent with HMRC v Cotter and that the UT was wrong, and should not be followed. In any event, the decision has been appealed and will be heard by the Court of Appeal in October 2015.

83. It is common ground that the approach to be adopted in these circumstances, as a matter of judicial comity, is that I should follow the judgment of another judge of coordinate jurisdiction, which extends in this case to Sales J sitting in the UT exercising a judicial review jurisdiction, and that I should only depart from his judgment if I am convinced that it is wrong.

84. HMRC v Cotter concerned an individual self-assessment return. The issue was whether HMRC could enforce a tax debt in the county court based on Mr Cotter's 2007/08 tax return. Mr Cotter had filed a tax return for 2007/08 on 31 October 2008 and, as he was entitled to, had left it to HMRC to calculate the tax due. HMRC did so on 24 December 2008 and the sum of £211,927.77 was calculated as the tax owed. After HMRC had carried out Mr Cotter's tax assessment on his behalf, he wrote to HMRC in January 2009 seeking to carry back losses which he claimed arose from a tax avoidance scheme carried out in 2008/09. As a result, Mr Cotter claimed that no tax was payable for 2007/08. HMRC rejected the suggestion that the carry back claim was relevant to the year of assessment 2007/08 and left the figure due of £211,927.77 undisturbed. HMRC brought collection proceedings in the county court to enforce the tax debt for 2007/08 when this payment was not made by the due date, together with the amount due as the first payment on account for 2008/09. Separately, HMRC also opened an enquiry under Schedule 1A TMA in respect of Mr Cotter's carry back claim and elected not to give effect to the claim until the end of the enquiry.

85. The issue before the Supreme Court was whether HMRC should have opened an enquiry into the 2007/08 return or whether HMRC were correct to have opened an enquiry under Schedule 1A into the carry back claim. This is addressed at [19] to [26] in the Supreme Court's judgment, where it held that the carry back

claim could not and did not purport to affect the tax due for 2007/08 and therefore HMRC were entitled to open an enquiry under Schedule 1A; and entitled to bring the action in the county court without giving effect to the carry back claim. The critical point determined is that a carry back claim, properly understood, does not affect the tax year to which it is carried back. Rather, pursuant to Schedule 1B it relates to the year of the loss and by Schedule 1B para 3 (2) TMA gives a credit for the year in which the loss arises, computed by reference to what tax would have been saved had the earlier year's figures been adjusted by reference to it.

86. In De Silva, which unlike Cotter, concerned a partnership loss sought to be carried back by the individual partners, Sales J concluded that an enquiry into the partnership return for the year of loss, because it gave rise to a deemed enquiry into each of the partners' returns under s.12AC(6) TMA, was sufficient to challenge any claims for loss relief flowing from such a loss (whether sideways or carry back). The critical paragraphs in De Silva are [55] to [66]. Far from being convinced that the judge was wrong, I am sure that he was right, and that the deemed s.9A enquiry into each relevant partner's self-assessment return identifying (as required) his share of the loss claimed, is both an appropriate and sufficient means of challenging the loss relief utilised by the partner, both by way of sideways relief or as a carry back claim to the earlier year. I reject Mr Southern's submission that such a challenge could have no practical effect. To the contrary, once included in the self-assessment return to which the loss relates, if enquired into whether directly or by means of a deemed partnership enquiry and subsequently disallowed, the disallowance of the loss relief is a disallowance for all purposes.

87. This ground of challenge accordingly fails.

GROUND 3 – LEGITIMATE EXPECTATION

88. Under this heading the claimants contend that because HMRC did not open enquiries into their carry back claims under Schedule 1A para 5, and instead met the carry back repayment claims at the time, they reasonably assumed that they could postpone payment of any disputed tax until the appeal had been determined at first instance. In other words, they had accrued s. 55 TMA postponement rights based on HMRC's conduct, and the PPNs given in 2014 breached their legitimate expectation that those accrued rights would continue until the underlying appeals were determined. That was a regular practice, enshrined in the legislation, and they were entitled to expect that it would not be taken away retrospectively.

89. The applicable principles in this area are well established, and not in dispute. A legitimate expectation may arise from "the existence of a regular practice which the claimant can reasonably expect to continue": see Council for Civil Service Unions v Minister for the Civil Service [1985] AC 374 at p.401 (Lord Fraser). However, in order to found a legitimate expectation, in most cases the promise or representation (whether based on practice or otherwise) relied on must be "clear, unambiguous and devoid of relevant qualification." (see R v Inland

Revenue Commissioners Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 at p.1570B and Davies & Anor v Revenue and Customs [2011] UKSC 47).

90. It is only in an exceptional case that a claim that a legitimate expectation has been defeated will succeed in the absence of a clear and unequivocal representation. An example of such an exceptional case is R v IRC ex p. Unilever plc [1996] STC 681 where the Revenue's clear and consistent pattern of conduct, on 30 occasions over 20 years, of allowing Unilever's claims irrespective of whether they were in time or late and in circumstances where strict compliance with the time limits was "a technicality utterly devoid of advantage to anyone", made the circumstances, literally exceptional and justified the conclusion that, despite the absence of an unambiguous and unqualified representation, the Revenue had acted so unfairly in resiling from that approach that its conduct amounted to an abuse of power.

91. In Davies & Anor (see above) Lord Wilson explained at [49] that to elevate a *practice* into an assurance to taxpayers from which it would be abusive for HMRC to resile and to which HMRC should therefore be held by virtue of the legitimate expectation so created "the promise or practice…must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured": R (Bhatt Murphy) v The Independent Assessor [2008] EWCA Civ 755, per Laws LJ at [43]. The result is that the "appellants need evidence that the practice was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a group of taxpayers including themselves of treatment in accordance with it."

92. Mr Southern emphasised that the repayment claims were substantial in many cases (Mr Rowe received £270,148 and Mr Worrall received £48,800) and that the claimants were entitled to assume that in taking the decision not to open enquiries but rather to make the repayments, HMRC had exercised their discretionary powers properly and by reference to all relevant considerations. The claimants have a procedural and substantive legitimate expectation that the statutory right to postponement having been exercised, it would not be removed by the retrospective application of a subsequently enacted discretionary power, as happened in this case.

93. Moreover, he submits that there was no overriding public interest that could justify HMRC resiling from these legitimate expectations. The FTT appeal will be determined in the near future, and the underlying tax liability will be determined finally. No 'accelerated' payment can be justified in the circumstances. Indeed given that the twin purposes of FA 2014 (namely to provide a disincentive for investing in tax avoidance schemes and to prevent taxpayers from using proceedings as a means of delaying payment) do not apply to the claimants (both because investment in the Ingenious LLPs occurred too long ago for any disincentive to act and because the appeals are so close to a conclusion) the discretionary power to give PPNs should not have been exercised in relation to the claimants in breach of their legitimate expectations.

94. I do not accept these arguments. First there is simply no evidence of a practice that was so unambiguous, so widespread, so well-established and so well-

recognised as to carry within it a commitment to the claimants of continued treatment in accordance with it. Even if HMRC made "carry back" repayment claims in circumstances where it was open to HMRC not to do so, this did not prevent HMRC from opening (either then or subsequently) actual or deemed (by virtue of s.12AC(6) TMA) s.9A TMA enquiries into those losses contained in partner returns to challenge the efficacy of the tax planning. I have already concluded that such enquiries are sufficient to challenge any claims for loss relief flowing from such losses (whether sideways or carry back). Indeed, as recognised at paragraph 14(6) of Appendix II to the claimants' skeleton argument, simply because the claimants received a set-off or a repayment of tax did not give rise to any expectation that this was conclusive. Rather as they accept they "understood that the relief claimed could be disputed if enquired into". The position in relation to the tax represented by the repayment remained open to challenge, and there is no evidence of anything said or done by HMRC to suggest otherwise.

95. Secondly, since the new powers are contained in primary legislation, even if the claimants could have identified an expectation, based upon previous legislation or the practice adopted by HMRC, this cannot give rise to a common law right, enforceable in the Courts, constraining Parliament's constitutional power to enact primary legislation which changes the previous position: see Wheeler v Office of the Prime Minister [2008] EWHC 1409 (Admin), per Richards LJ at [41]. Once FA 2014 came into force following the democratic processes entailed in the passing of primary legislation, no common law "legitimate expectation" could trump that legislative power.

96. As to Mr Southern's argument that the statute itself did not prevent HMRC from honouring the expectations in this case given the existence of the statutory discretion which could have been exercised consistently with the legitimate expectations of these claimants, the difficulty with that argument is that a statutory discretion must be exercised consistently with and not running counter to, the primary legislation. The legislation, on its face, makes clear that it was intended to apply to existing as well as post-enactment schemes. FA 2014 expressly removes rights that previously existed under s.55 TMA in respect of all appeals (whenever made); and expressly extends the accelerated payment regime to all DOTAS schemes, irrespective of when those schemes were adopted, notified or when investments into them were made. The definition of "tax appeal" makes clear that it is not limited to appeals post enactment (see s.203 and Schedule 32 para 3(2)(b)). Similarly so far as the definition of DOTAS arrangements is concerned, there is nothing in FA 2014 to restrict its application to DOTAS arrangements invested in only after enactment: see ss.219(5) and (6). The definition extends for example to "notifiable arrangements to which HMRC has allocated a reference number" save for the express carve out in subsection 6. Parliament has accordingly legislated for taxpayers such as the claimants, who have chosen to participate in DOTAS arrangements (likely to be tax avoidance schemes), so as to remove the cash flow advantage of holding onto the disputed sums during a dispute concerning the efficacy of the avoidance scheme. The statutory discretion cannot be exercised in the manner suggested by Mr Southern consistently with the terms of the legislation

97. For all these reasons accordingly, this ground of challenge fails.

GROUND 4 – IRRATIONALITY

98. Although advanced in writing by reference to a series of different matters, the nub of the claimants' contentions on Ground 4 is that the discretion to give PPNs was treated by HMRC as a rule so that there was in fact no exercise of discretion in these cases, and no consideration given to the reasonableness of giving a notice to an individual on the particular facts of his case. Instead, as Mr Southern described it, "all participants in schemes are being issued with notices; it is a mechanical exercise it is done on a blanket basis and on an industrial scale". Consistently with that point, Mr Southern submits that there is no evidence to show that discretion was even exercised. He points to Ms Elsey's statement at paragraphs 20 to 24 and criticises it as second-hand evidence and opaque. It reflects a prioritisation exercise (as does the Steering Group document to which she refers), and neither has anything to do with the exercise of any discretion. Instead he submits, HMRC adopted an approach where there was a presumption that participants in schemes would receive a notice and it was just a question of when they would do so rather than whether they should do so. This was an improper and unlawful approach to the legislation and failed to have any or proper regard to materially relevant considerations that applied in the claimants' cases.

99. The question how a discretionary power should lawfully be exercised where the legislation is silent as to the matters to be treated as relevant by the decision-maker was considered in Khatun v Newham LBC (CA) [2004] EWCA Civ 55 by Laws LJ. He held that in such circumstances:

> "it is for the decision-maker and not the court to conclude what is relevant subject only to *Wednesbury* review. …it is for the decision-maker and not the court, subject again to *Wednesbury* review, to decide upon the manner and intensity of enquiry to be undertaken into any relevant factor accepted or demonstrated as such."

100. The FA 2014 identifies no "lexicon of the matters to be treated as relevant" once the statutory pre-conditions are met, and accordingly Parliament has conferred a discretion on HMRC to decide (subject only to rationality review) what factors to take into account.

101. Moreover as Mr Southern accepts, there can be nothing unlawful or inappropriate, in the decision-maker developing and applying a policy as to the approach to be adopted in the generality of cases, provided that the policy does not preclude the decision-maker from departing from the policy in an exceptional case: see British Oxygen Co v Minister of Technology [1971] AC 610; and see Assisted Reproduction and Gynaecology Centre v Human Fertilisation and Embryology Authority [2002] EWCA Civ 20 at [54]. This is a legitimate means of achieving consistency and certainty in decision-making.

102. Here, the claimants are correct that the approach adopted by HMRC as reflected in Julie Elsey's statement, demonstrates that in the overwhelming majority of cases where HMRC consider that the statutory conditions are satisfied, HMRC will exercise the powers conferred by FA 2014 by giving APNs or PPNs, and the question is generally one of when, not whether, they will be given. However, that does not mean that HMRC's discretion has been unlawfully fettered or turned into a rule without exception. In my judgment it has not.

103. A fair reading of Ms Elsey's witness statement demonstrates recognition by HMRC of the statutory discretion conferred by the legislation, the adoption and application of a policy to be applied to the generality of cases, and express consideration as to whether users of the Ingenious scheme in particular, should be treated as falling into an exceptional category so as to justify not issuing notices in their cases.

104. Ms Elsey explains that HMRC excluded from the list of DOTAS schemes liable to be affected, schemes which HMRC accepted were effective and obsolete schemes with no users: [20]. The remaining schemes were ranked in terms of priority for issuing notices: [21] and [22]. The question whether notices should be issued when litigation and/or settlement was imminent was considered by the Accelerated Payments Steering Group at a meeting on 10 June 2014. The paper put to the Steering Group addressing the implications of issuing notices in such cases recommended, for the reasons set out, the issue of notices regardless of when the scheme would be litigated and where potential settlement was imminent. The Steering Group approved the recommendations: [23].

105. At paragraph 24 Ms Elsey states:

> "Following the prioritisation exercise I have described above each scheme identified was subject to a detailed review by the technical lead, with input from other officers, for example those responsible for the particular specialist issues raised by the challenge to a scheme. The purpose of that review was to identify any reasons why notices should not be issued to users of an identified scheme. No such reasons were identified for the Ingenious schemes. I note that the Claimant suggests that the notices ought not to have been issued because the hearing of the Ingenious tax appeals was imminent. Consistently with the decision of the Steering Group to which I have referred above, HMRC decided that this was not a reason to delay issuing notices. "

106. Given the nature and purpose of PPNs (namely to accelerate the payment of tax considered to be due, by removing the cash flow advantage and requiring a payment on account of the disputed tax to be made before resolution of the underlying dispute), there is nothing wrong in my judgment, with a general rule that when the statutory criteria are met, the discretion will be exercised by issuing the notice, save in exceptional circumstances.

107. So far as the asserted materially relevant considerations contended for by the claimants are concerned, as Mr Eadie submits there is a danger in circumstances where HMRC have an obligation to treat like cases consistently, that the suggested consideration if accepted becomes a mandatory one and undermines the legislation. If Parliament had intended to limit the APN/PPN regime to new investments in tax avoidance schemes made only after the enactment of FA 2014, it could easily have done so; but it did not. The prior existence of the claimants' scheme was not a relevant consideration within the "statutory lexicon" (Khatun, above). The same point is true in relation to the fact that HMRC met repayment claims some years ago. There is nothing in the legislative scheme to justify a conclusion that FA 2014 was intended to work differently depending on whether carry back, rather than sideways, loss relief tax avoidance schemes are in issue. Further, as already indicated, the claimants do not and cannot assert that the making of repayments prevented HMRC from subsequently opening enquiries into the efficacy of their tax avoidance schemes. Moreover, at the time the repayment claims were met, there was no power to issue PPNs even if there were other statutory provisions available affording HMRC power to postpone repayment. As for appeals in these cases being well advanced, this was in fact recognised and addressed by HMRC before issuing the PPNs. As Ms Elsey explains, HMRC concluded that this was not a sufficient reason to refrain from giving PPNs, and this view cannot be described as irrational.

108. Finally, as for hardship or "human suffering", seen in the context of participation in tax planning that always carried risk, to require the claimants to make payments now on account of disputed tax, pending determination of the underlying appeals, in circumstances where they have had up to 10 years' worth of the benefit of the 'avoided tax', it is difficult properly to characterise this requirement as "significant human suffering". In any event, HMRC have accepted that hardship can be considered, albeit not in order to avoid the requirement to make an accelerated payment but rather in an appropriate case to agree upon "time to pay" arrangements with a taxpayer who cannot pay in full immediately: see Julie Elsey at paragraph 26. In fact HMRC have adopted a policy of issuing pre-cursor or advance warning letters before issuing a PPN inviting the recipient to identify whether they would have problems paying or if they had any health or personal circumstances which would make it difficult for them to deal with the matter. This was done in the case of each of the lead claimants, but neither responded.

109. For all these reasons I do not accept that the decision to give PPNs in this case was irrational or unreasonable on any of the bases contended for by the claimants.

GROUND 5 – BREACH OF CONVENTION RIGHTS

110. The claimants contend that the decisions to give notices in their cases infringed their rights under Article 6 (the right to a fair trial) of and A1P1 to the Convention. I deal with each of these arguments in turn.

Interferences with rights guaranteed by A1P1

111. Ms Simor QC, on behalf of the claimants, accepts that PPNs can be given lawfully and compatibly with Convention rights because although amounting to an interference with possessions, there are cases where such interference will be in accordance with law and both justified and proportionate. She submits however (by reference to a great many Strasbourg and domestic authorities), that the issue of the PPNs to these particular claimants gives rise to four separate interferences with their enjoyment of property rights as guaranteed by A1P1: (i) it interferes with their statutory rights pursuant to s.55 TMA to retain control over the money and to hold it until the underlying tax dispute is determined by the FTT; (ii) based on the argument that the only way in which the carry back claims could be enquired into was under Schedule 1A TMA and no such enquiry was opened, where repayments have been made under Schedule 1A para 4(1) that created a crystallised right to that property, subject only to a discovery assessment, and the PPNs have interfered with those rights; (iii) the claimants have arguable claims based on well-established legal principles, that they are entitled to the loss relief, the only dispute being on the facts and the result being in no way predictable, so that the money itself is a possession that has been interfered with; and (iv) the PPNs amount to an imposition of tax which is in any event an interference with their property. Accordingly the claimants have both legal rights to and legitimate expectations of accrued substantive and procedural rights to hold the money until resolution of the tax dispute. The money so held is either a possession in law or in accordance with legitimate expectations (as understood by Strasbourg authority); or the claimants have arguable claims in Strasbourg terms to hold the money because there is no dispute as to the interpretation or application of the law in relation to the underlying dispute and no final decision has yet been made.

112. Furthermore, Ms Simor contends that each of these interferences is unlawful in this case because they were not 'prescribed by law': these PPNs apply legal consequences to past actions and alter legal rights that arose in the past. They could not have been foreseen by the claimants, who could not have regulated their conduct to avoid them. This obviously relevant factor was not considered by HMRC. Further they were neither necessary in the sense of being rationally connected to the policy objective of the legislation nor proportionate in the sense that they imposed an excessive burden on the claimants, which could not be justified by reference to any general public interest. That is particularly so having regard to the absence of sufficient procedural safeguards, HMRC's failure to take account of their individual circumstances in issuing the PPNs, and the retrospective effect of the PPNs. Given the imminent resolution of the underlying dispute, there is no need for payment now and to require payment now will cause significant hardship.

113. Against that, HMRC contend that there has been no interference with A1P1 rights because A1P1 is not engaged: the claimants have no established right to, or interest in, the sums payable under the PPNs, since it has not been established that they were ever entitled to the tax deductions in the first place. Nor has there been any retrospective removal of a right to postpone payment of the disputed tax. Rather the claimants are no longer being allowed the benefit of that

postponement. Alternatively and in any event, HMRC contend that any interference is prescribed by law, justified and proportionate.

114. Article 1 Protocol No.1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
> 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."

115. The first question to be determined is whether A1P1 is engaged because there has been an interference with the claimants' "possessions" as that term is properly understood.

116. It is common ground that the general principles to be applied in determining whether A1P1 is engaged are set out in Kopecký v Slovakia (2005) 41 EHRR 43 (see [42] to [52]). The Strasbourg Court held that a possession can be an existing asset or a claim in respect of which an applicant can argue that he has a legitimate expectation that the claim will be realised. However the Court concluded that its case-law did not contemplate the existence of a "genuine dispute" or an "arguable claim" as a criterion for determining whether there is a "legitimate expectation" protected by A1P1 but rather, "where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it": [52].

117. In this case, the claimants completed self-assessment returns pursuant to s.8A TMA setting out their personal income and gains for each relevant tax year. So far as the Ingenious LLP loss claims are concerned, although they made carry back loss relief claims seeking to set off their share of the partnership losses against personal income in the earlier year to that to which the partnership losses related (Year 1), they were nevertheless obliged by s.8 (1B) TMA to include a statement of the partnership losses allocated to them in their self-assessment returns for the period to which the losses related (Year 2). This was information included in the Year 2 return "for the purpose of establishing the amounts to which a person is chargeable to income tax and capital gains tax" for that year of assessment and for establishing "the amount payable by him by way of income tax for that year": s.8(1) TMA. It is only if those partnership losses can be brought into account for Year 2 that a right to carry back those losses can arise in relation to Year 1. HMRC challenged the claims to bring into account the partnership losses in Year 2 as a foundation for carrying back the benefit of those losses to Year 1 by enquiry into the partnership return and partnership statement and hence by way of deemed enquiry under s.12AC(6) TMA into each

partner's Year 2 return (the s.9A enquiries). This was a lawful means of challenge to both Year 2 and Year 1 loss relief and was exercised by HMRC in all these cases.

118. Accordingly, in each case income tax was payable by each claimant. The investment in the Ingenious LLPs and the losses consequently allocated to them, afforded the claimants a basis for claiming that their income tax liability should be reduced to reflect those losses. Although repayments reflecting the reduced tax liability were made, this was not in any sense a final determination, and the claims were (and were known to be) subject to possible challenge. The claimants' entitlement to reduce their liability by setting off their share of the partnership losses (for either or both years) was fundamentally challenged by HMRC. The outcome will depend, among other things, on whether the LLPs were carrying on a trade; whether they were doing so with a view to profit; whether they incurred expenditure equal to 100% of the budget of the film; whether the expenditure was incurred wholly and exclusively for the purposes of their trade; and whether losses were computed correctly as a matter of GAAP.

119. Accordingly, I do not accept Ms Simor's argument (seeking to avoid that analysis) that because a taxpayer is chargeable to income tax on net amounts which take account of relief or allowances and because ss.380-381 afford a statutory entitlement to deduct trading losses from other profits in the same or earlier years, the sums in question are entitlement and possessions. She relies on a passage in Unilever at p.690 (Sir Thomas Bingham MR): "The taxpayer's entitlement to deduct trading losses from other profits in the same year, although provided by statute, gives effect to a very basic principle. A tax regime which did not provide such an entitlement could scarcely be regarded as equitable.…". But this passage does not support her argument: there was no suggestion that the trading losses in question in Unilever were anything other than allowable, the only question being whether Unilever had forfeited an undoubted right to claim same year loss relief because of a failure to achieve strict compliance with time limits regarded as nothing more than a technicality.

120. The question in these circumstances is whether the money representing the reduced tax liability (or loss relief claim) held by the claimants pending the determination of the dispute is an existing asset or possession for A1P1 purposes. So far as the money itself is concerned, that is affected by the argument as to whether it is payable to HMRC. As Vos LJ held in APVCO 19 Ltd and others v HM Treasury & Anor [2015] EWCA Civ 648 at [46]:

> "Of course, the money is a possession in one sense, but it is a possession impressed with an arguable claim by HMRC, which prevents it being properly regarded as a possession for A1P1 purposes."

Both sides claim to be entitled to the money but nobody yet knows to whom it properly belongs, and the mere fact that it is held for the time being by the taxpayer does not make a difference.

121. Nor in my judgment can the claimants be said to have possessions in the form of claims in respect of which they have a legitimate expectation that they will be realised. Following Kopecký a "legitimate expectation" protected by A1P1 of such a claim cannot simply be based on the existence of a "genuine dispute" or an "arguable claim". There must be as a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it.

122. This question has been addressed in similar contexts in a number of domestic cases. In ToTel v FTT [2011] STC 1485 a challenge under A1P1 to the obligation to pay VAT as a pre-condition of bringing an appeal was rejected by Simon J. Although this decision was subsequently reversed by the Court of Appeal ([2012] EWCA Civ 1401) that conclusion was reached on the basis that the delegated legislation in question was ultra vires the enabling legislation and A1P1 rights were not addressed. At first instance at [122] Simon J held:

> "Whether or not the claimant has complied with all the conditions for claiming input tax is the substantive issue between the claimant and the Commissioners. Until that issue is resolved it is difficult to see how the claimant can have a legitimate interest which could amount to a property right."

123. In Huitson v HMRC [2012] QB 489, [2011] EWCA Civ 893, Mummery LJ rejected at [67] the argument that the judge below erred in failing to find that the claimant had a proprietary interest in a sufficiently established claim to tax relief to give rise to a legitimate expectation that would attract A1P1 protection. He explained at [68] that the emphasis on appeal in relation to this issue had changed and the case advanced now addressed the deprivation by retrospective legislation of the claimant's possession in the form of the alleged proprietary interest in the nature of his claim to tax relief. He held at [69]:

> "The 'claim' to tax relief under the DTA is one which has neither been accepted by HMRC nor has it been made out in any tribunal or court. All that has been established is the existence of a genuine dispute about whether the scheme based on the claim for tax relief under the DTA worked."

124. In this case, similarly, the claimants' claims to loss relief have not been established and depend on the application and interpretation of the relevant legislation to the Ingenious LLP scheme. There is a genuine dispute about their entitlement to the relief. Accordingly they have no legitimate interest amounting to a property right that has been interfered with by the PPNs, since it has not been established that they were ever entitled to the tax deductions in the first place: this is the very issue being litigated in the FTT.

125. Furthermore, the decision in APVCO 19 Ltd and others v HM Treasury & Anor is binding, clear authority that legislation can remove without any interference with possessions, a taxpayer's argument that had existed previously (that HMRC was not entitled to the money) with the result that tax is payable and the money

in the taxpayer's hands must fund it. In those circumstances it is difficult to see why a different result should follow from the lesser step of legislation requiring the disputed sum to be paid on account of the tax (but without finally determining liability) pending resolution of the dispute.

126. In the light of that reasoning, the fact that there was a statutory right to hold the disputed sums pursuant to s.55 TMA, pending resolution of the dispute, does not alter the position. That entitlement was removed by the amendments made by FA 2014. The amendments were not retrospective: the claimants have had the benefit of the money for a prolonged period and are not being required to account for that benefit in any way. The amendments apply prospectively. In any event, to the extent that the sums in question are impressed with an arguable claim by HMRC, they cannot properly be regarded as a possession for A1P1 purposes. Merely because those sums must be paid on account pending resolution of the dispute does not convert them into possessions.

Prescribed by law

127. Despite my conclusion that A1P1 is not engaged by the issue of PPNs to these claimants, I will in any event address the question whether there was an unlawful interference with A1P1 rights on the footing that A1P1 is engaged.

128. The applicable principles are not in dispute. They are set out in the judgment of Lord Reed in AXA General Insurance Limited v HM Advocate [2012] 1 AC 868 at 116-124. The existence of a legal basis in domestic law is a necessary but not sufficient condition. The measure must be clear and precise in its terms; sufficiently foreseeable; and must not operate in an arbitrary manner (this latter requirement is not incompatible with the existence of discretion). The effect of these requirements in any particular case will inevitably depend upon the context and circumstances involved.

129. Particular emphasis in this context was placed by Ms Simor on the requirement of foreseeability. In Vistinš and Perepjolkins v Latvia (App no.71243/01) the Strasbourg Court held that the scope of the notion of 'foreseeability' depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed: [96]; and further that a rule is "foreseeable" when it affords a measure of protection against arbitrary interferences by public authorities and provides minimum procedural safeguards commensurate with the importance of the principle at stake: [97]. (See Hentrich v France (App. No 13616/88) for an example of a case where minimum safeguards were not provided).

130. Ms Simor also contends that the concept of 'foreseeability' requires that the law is sufficiently clear and certain to enable an individual to regulate his conduct: Sunday Times v United Kingdom (1979-80) 2 EHRR 245 at [49], so that "he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail".

131. Retrospective tax legislation is not prohibited. Its effect is generally considered by the Strasbourg court in its assessment of proportionality rather than when considering the lawfulness of the interference. In NKM v Hungary [2013] STC 1104 at [51] the Court expressly recognised that retroactive taxation can be applied to remedy technical deficiencies of the law, in particular where the measure is ultimately justified by public-interest considerations.

132. I agree with Mr Eadie that the question whether the interference is prescribed by law is to be answered by reference to the legislation permitting the PPNs that are said to interfere. To the extent that Ms Simor's submissions suggested otherwise, I disagree with her.

133. The measure in question involves a requirement to make an accelerated payment pending resolution of a tax dispute in cases where tax avoidance schemes have been used. Underlying appeal rights in relation to the disputed tax are preserved and the avenue of judicial review is available to challenge the lawfulness of a decision to give a PPN. I have already dealt above with the other procedural protections available (including the opportunity to make representations before any payment obligation arises) and concluded that they are more than adequate.

134. These circumstances cannot be compared to the circumstances in cases like Vistinš and Hentrich v France where permanent appropriation by the state was in question, and where the ECHR described the power as being exercised "arbitrarily". Simply because HMRC have a discretion does not render the issuing of PPNs unpredictable in any relevant sense.

135. Although FA 2014 confers a discretion on HMRC to give PPNs, that discretion is neither open ended nor uncertain. The statutory requirements that must be met as conditions for giving notices are clearly identified and capable of being objectively ascertained. This is particularly so in light of the approach adopted by HMRC of giving notices where the statutory conditions are met, save in exceptional circumstances.

136. So far as foreseeability is concerned, at paragraph 126 of their skeleton argument the claimants assert that "if they had known that participating in a business notified under DOTAS meant that monies contributed would be claimed by executive act some 10 years later at short notice and prior even to any enquiry or assessment to tax, it is highly unlikely that they would have made the investment". This is untenable. The primary risk to the claimants was not precisely when they might have to pay the relevant tax, but whether they would have to pay it. That was a risk that must have been well understood and for which financial provision can be expected to have been made. At the time they participated in the schemes, the claimants could not have known when HMRC's enquiries and any FTT appeal process would end. It was possible that the appeal process could have concluded much earlier, with a consequential requirement to pay the disputed sums.

137. For these reasons and in respect of retrospectivity, the further reasons set out below, the PPNs were prescribed by law.

Proportionality

138. So far as proportionality is concerned the interference must be in the general interest and "there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. This involves an assessment of whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights: the individual should not be required to bear an individual and excessive burden…": AXA at [126].

139. In the area of taxation measures in particular, in determining whether a state has met the requirement of fair balance/proportionality, the relevant test was explained by the ECHR in Bulves v Bulgaria [2009] STC 1193 at [63]:

> "However, in determining whether this requirement has been met, it is recognised that a contracting state, not least when framing and implementing policies in the area of taxation, enjoys a wide margin of appreciation, and the court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation"

140. The concept of the margin of appreciation recognises that there may be circumstances where a public authority is better placed than the courts to determine how the individual and community interests should be balanced so that weight should be given to the decisions of public authorities within the discretionary area of judgement accorded to them when addressing whether the individual concerned has had to bear "an individual and excessive burden": James v United Kingdom (1986) 8 EHRR 123 at [50]; Hentrich v France.

141. Thus as noted by Barling J in Allan v HMRC [2015] UKUT 16 (TCC) at [40]:

> "In the light of these principles the hurdle for those alleging infringement of A1P1, particularly in the context of taxation provisions, has understandably been described as 'very high' (see, for example, paragraph 60 of the recent judgment of Mrs Justice Andrews in *R(on the application of St. Matthews (West) Ltd and others) v HM Treasury and HMRC* [2014] EWHC 1848 (Admin). Tax measures are seen as entitled to particular deference in the light of the second paragraph of A1P1 itself".

142. Barling J identified only two cases in which the Strasbourg Court had held that the wide margin of appreciation had been exceeded so as to result in an infringement of A1P1 rights in the tax context. These were Hentrich and R.Sz v Hungary [2013] ECHR 41838/11 (see paragraphs 41 and 42 of Allan) but in his view, with which I respectfully agree, these two cases "involved extreme circumstances: in Hungary there was an un-signalled, retrospective and discriminatory tax charge amounting to almost total deprivation of benefits designed to serve a social purpose, namely to protect an employee on termination of his or her employment. In Hentrich the state had arbitrarily

exercised a rarely – used right of pre-emption to deprive the applicant of land she had purchased, in circumstances where she had no effective recourse to legal challenge. It is interesting to note that notwithstanding the "individual and excessive burden" which the applicant was held to have borne as a "selected victim of the exercise of the right of pre-emption", the measure would still have been within the margin of discretion available to the state if the applicant had had an effective means of challenging it."

143. In addressing proportionality here, the relevant context is that Parliament has, following consultation, decided to change the presumption of where the tax sits during a dispute concerning a tax avoidance scheme and remove the cash flow advantage of participating in such schemes. Such a measure clearly falls within the wide margin of appreciation afforded to the democratically elected legislature. Given that the DOTAS registration scheme was set up as a means of identifying those using tax avoidance schemes, to include DOTAS schemes within the accelerated payment legislation is an obviously rational response. Structures that are notified under DOTAS have characteristics or 'hallmarks' of avoidance and it provides a clear and objective criterion that can be readily operated by taxpayers and their advisers. For DOTAS disclosures made on a purely precautionary basis, there is likely to be little or no additional tax liability so an APN is unlikely to arise. There is nothing in the legislation or its application which can properly be said to be arbitrary. It is accompanied by appropriate procedural safeguards, including effective means of challenge.

144. So far as retrospectivity is concerned, Ms Simor relies on the stance taken by the Government during the consultation process and the Parliamentary debates, that the legislation was not retrospective. In her submission, there is nothing in the legislation that requires it to operate retrospectively and it would therefore accord with the legislative purpose for HMRC's discretion to give notices to be exercised only in respect of investments in DOTAS schemes that took place after it came into force on 17 July 2014.

145. In my judgment, the legislation is not retrospective in the true sense of the word: the requirement to make accelerated payments on account of tax applies only with effect from 17 July 2014. For anyone who has had a repayment of disputed tax in the past, that benefit has been enjoyed and the legislation makes no attempt to claw it back (by requiring such a person to account for interest etc). Nevertheless I accept that it does have an element of retrospectivity in the sense that it applies to schemes invested in in the past and to appeals already made. Those elements are apparent on the face of the legislation, in the definitions adopted as to the reach and scope of FA 2014 as already described. They were understood and recognised by Parliament, and it was competent for Parliament acting within the margin of appreciation, to draw the line in this way. Although not a basis for reaching that conclusion, the ability to make 'time to pay' arrangements supports it.

146. There is a reasonable relationship of proportionality between the means employed and the aim sought to be realised in this case. The disincentive to use new tax avoidance schemes was not the only purpose of FA 2014. Parliament's intention was generally to remove the cash flow advantage of participating in

such schemes, regardless of whether the participation was before or after FA 2014 and by necessary implication, to give that cash flow advantage to the Exchequer. The claimants have had a significant cash flow advantage (whether they sought it or not) and this advantage would have continued but for the PPNs, albeit that the appeals in their cases may come to an end sooner than in other cases involving PPNs.

147. To reverse that cash flow advantage by giving PPNs now (irrespective of the stage reached in existing appeals) is consistent with the legislative purpose. The claimants have chosen to enter tax avoidance schemes that were liable to challenge and the efficacy of which necessarily takes time to resolve. Even if required to borrow money or sell assets as a consequence of the PPNs, in my judgment it cannot be said that these measures which shift where the money sits in the interim, impose so burdensome, arbitrary, unfair or excessive an interference on the claimants, compared to the general body of taxpayers, who have not chosen to enter such schemes.

148. This ground accordingly fails for all the reasons set out above.

Article 6 of the Convention

149. Finally, the claimants contend that the PPNs are not tax but are peremptory demands by HMRC for payment of monies that may or may not in the future give rise to liabilities that are subject to a penalty regime for non-payment, and therefore they determine civil rights under Article 6, and do not concern liability to tax as was the case in Ferrazzini v Italy [2001] STC 1314. The claimants have therefore been deprived of a fair and public hearing before the FTT. Alternatively, they involve a criminal charge because they are a surcharge with a deterrent and punitive purpose, applicable to a definable group, and involving punitive consequences, within the meaning of Jussila v Finland [2009] STC 29 at [31] to [39].

150. I do not accept either argument. Article 6 does not apply when the state determines a person's liability to pay tax: Ferrazzini v Italy and Jussila v Finland. In Ferrazzini the ECHR stated at [29]:

> "In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the convention was adopted, those developments have not entailed a further intervention by the state into the 'civil' sphere of the individual's life. The court considers that tax matters still form part of the hard core of public authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant. Bearing in mind that the convention and its protocols must be interpreted as a whole, the court also observes that art 1 of Protocol 1, which concerns the protection of property, reserves the right of states to enact such

> laws as they deem necessary for the purpose of securing the payment of taxes (see, mutatis mutandis, *Gasus Dosier-und Főrdertechnik GmbH v Netherlands* (1995) 20 EHRR 403 at 434, paragraph 60). Although the court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer."

151. The suggestion that the approach in Ferrazzini is inapplicable because the money due under a PPN is not "tax" is unsustainable. The question is not a question of classification, but one of substance. The rationale for the approach in Ferrazini is that "tax matters still form part of the hard core of public authority prerogatives, with the public nature of the relationship between the taxpayer and the tax authority remaining predominant". That is why tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects they produce for taxpayers.

152. That rationale applies equally to a PPN. FA 2014 Schedule 32 para 6(3) provides that the accelerated partner payment is to be treated as a payment on account of the understated partner tax; and to the extent that the understated partner tax is paid before the accelerated partner payment, the latter is treated as having been paid to the same extent at the same time. The amounts due are as a matter of substance, payments on account of tax.

153. Save so far as penalties are concerned it is not even arguable that criminal charges are involved. So far as penalties are concerned however, there is a statutory right of appeal to the FTT against any penalty under FA 2014 and Schedule 32 para 7 read with s.226 Finance Act 2012 and paras 9-18 of Schedule 56 FA 2009. This satisfies any Article 6 obligations in that regard.

154. In any event, even if Article 6 did apply to the issuing of a PPN, the claimants have had access to an independent and impartial tribunal on judicial review. This avenue offers "full jurisdiction" to deal with their complaints, that being the relevant test: see Runa Begum v Tower Hamlets LBC [2003] 2 AC 430.

155. Finally for completeness, I note that a number of points were referred to by counsel in their skeleton arguments and oral submissions and I was taken to many authorities and passages in the evidence. I have sought in this judgment to deal with what I consider to be the principal points raised. Both sides can be assured however, that I have carefully considered all the other points and all the authorities relied upon.

CONCLUSION

156. For all these reasons, despite the able and cogent submissions of Mr Southern and Ms Simor, these claims for judicial review fail and are dismissed:

(i) the PPNs were lawfully issued and the principles of natural justice have been adhered to by the statutory scheme and by HMRC in exercise of the discretion conferred by FA 2014.

(ii) Condition B is satisfied.

(iii) There has been no breach of the claimants' procedural or substantive legitimate expectations.

(iv) The decision to give PPNs was neither unreasonable nor irrational. It represented a lawful exercise of the statutory discretion conferred by FA 2014.

(v) There has been no unlawful interference with the claimants' possessions by the giving of PPNs in this case. Article 6 of the Convention does not apply but in any event, the claimants have had access to an independent and impartial tribunal on judicial review.