Neutral Citation Number: [2018] EWHC 1967 (Admin)

Case No: CO/5432/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2018

Before :

THE HONOURABLE MR JUSTICE LEWIS

- -

Between :

THE QUEEN ON THE APPLICATION OF ALASDAIR JAMES DOUGALL LOCKE	**Claimant**
- and -	
COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Defendant**

- -
- -

David Ewart QC (instructed by **Ernst & Young LLP**) for the **Claimant**
Richard Vallat QC and David Yates (instructed by **HMRC**) for the **Defendant**

Hearing date 2 July 2018:

Approved Judgment

THE HONOURABLE MR JUSTICE LEWIS:

1. This is a claim challenging 10 notices, known as follower notices, and accelerated payment notices ("APN") issued by the defendants, Her Majesty's Commissioners for Revenue and Customs, pursuant to Part 4 of the Finance Act 2014 ("the 2014 Act"). A follower notice requires a taxpayer to take corrective action to relinquish a particular tax advantage arising out of that taxpayer's tax arrangements. A taxpayer who fails to take corrective action to relinquish the particular tax advantage is liable to a penalty. An APN provides, in effect, that any disputed tax must be paid immediately and payment cannot be postponed.

2. In summary, the claimant, Mr Locke, claimed relief on interest paid on loans used to provide money to a partnership, Eclipse 10, involved in the acquisition and exploitation of film rights. Mr Locke contended that he used the loan to purchase an interest in the partnership. He contended that he was entitled to set off the interest payable on the loans against income by reason of sections 353 and 362(1) of the Income and Corporation Tax 1988 ("ICTA") (those sections now being replaced by sections 383 and 398(2)(a) of the Income Tax Act 2007).

3. The defendants contended that, in their view, the arrangements entered into by the claimant were similar to those described by the Court of Appeal in *Eclipse Film Partners No. 35 LLP v Revenue and Customs Commissioners* [2015] EWCA Civ 95, [2015] STC 1420 which proceeded on the basis that the arrangements involved the contribution of capital to (rather than the purchase of a share in) the partnership. The defendants therefore gave the claimant follower notices saying that there was a relevant judicial ruling, the ruling in *Eclipse 35*, which would, if applied to the claimant's arrangements, deny him the benefit of the tax advantage he asserted. They also gave APNs.

4. The claimant in effect contended that the conditions for serving a follower notice were not met as the judicial ruling in *Eclipse 35* did not deal with the question of whether or not the monies borrowed had been used to purchase a share in a partnership. Rather, the court in that case assumed that the monies were paid by way of capital contribution and considered, on the basis of that assumption, whether the conditions that needed to be satisfied to claim relief on that basis were met. The application of the reasoning in the ruling would not of itself deny the claimant the asserted tax advantage; it would only do so if there were first a decision as to whether the monies borrowed were used to contribute capital to the partnership not purchase an interest in it.

THE FACTS

5. The claimant has over time been engaged in a variety of business activities and investments. In about 2006, he decided to extend his involvement with partnerships connected with the acquisition, distribution and marketing of film rights. One such partnership was Eclipse 10.

6. The Eclipse Film Partnership LLPs had produced a subscription pack describing certain proposals for what was described in their literature as the opportunity to participate in that partnership. The material in the subscription pack explained that each partnership was a separate vehicle. The subscription pack contemplated that, to

put it neutrally, payments would be made by a person wishing to participate in a partnership. Persons wishing to become a partner (who were described as "subscribers") would be required to make a partnership application, sign a deed of adherence (indicating which particular film partnership they wished to be allocated to and what amount of money they wished to invest), and provide the amount of money which they wished to pay into the partnership. On acceptance by the partnership of the application made by an individual, that individual would become a member of the partnership. The individual would be obliged to provide the full amount of the payment included in their application. The payment to be made by the individual was referred to in the proposal as "a capital contribution". Other documentation referred to applicants as "subscribers" or "investors".

7. The deed of adherence provided that the applicant applied to become a member of a particular Eclipse Film Partnership (in the claimant's case Eclipse 10). It provided that acceptance of the deed of adherence by existing partners would constitute the applicant a member of the partnership. It confirmed that the applicant agreed to pay all of his "contribution". It recorded that, by completing and delivering the deed of adherence, the applicant agreed to join the relevant Eclipse Partnership and "to hold the interest in the partnership" subject to and in accordance with the deed. The schedule to the deed referred to the applicant's "investment" in the partnership and recorded that the applicant was "subscribing capital" to the partnership. Arrangements were in place to enable applicants to finance their payment by means of a loan.

8. The partnership deed for Eclipse 10 is dated 9 January 2006. The introduction to the document noted that "Capital contributions are being sought from investors who will, upon execution of or adherence to this Agreement, become Members". Clause 2 of the partnership agreement provides, under the heading members, that:

> "2 **Contributions**
>
> 2.1 ***Members***
>
> 2.1.1 Additional persons may be admitted as Subscribers at any time and from time to time provided that each such person executes and delivers to the Operator (having consulted with the Designated Members), a Deed of Adherence upon acceptance of which by the Operator, they shall be admitted to the Partnership.
>
> 2.1.2 Each Additional Member herby appoints each of the Designated Members (either acting alone or together with each other) as its true and lawful attorney with full power and authority on their behalf to sign a form LLP288a pursuant to which they consent to be a Member of the Partnership and any such other terms and documents that such additional Member is required to complete pursuant to the Act.
>
> 2.2 ***Capital Contribution and Interest***
>
> 2.2.1 Each Subscriber hereby agrees that it shall contribute the initial amount of their respective Contribution referred to as

such in their Deed of Adherence on its admission as a Member. The balance of the Contribution shall be advanced in such tranches and on such dates (in cleared funds) as shall be determined by the Designated Members and as specified in a Drawdown Notice given by the Designated Members to the Subscriber not less than five (5) Business Days prior to the date specified.

2.2.2 No interest shall shall be paid or payable by the partnership upon any Outstanding Contribution or upon any amount whether that amount be of a Net Income or Capital Gain nature, where that allocated to any Member but not yet distributed to that Member.

2.3 ***Failure to Contribute***
Notwithstanding any provision of this Agreement to the contrary, if any Member fails to provide to the Partnership the full amount of its Contribution on or before the date of its admission to the Partnership, then;

2.3.1 the Operator may, at any time thereafter, give notice to such Member requiring such Member to remedy such default and to pay interest to the Partnership on the amount outstanding for the period from the date of admission up to the date of payment thereof at the rate of 5% over LIBOR from time to time, on or before the expiry of twenty (20) Business Days from the date of receipt of such notice by the Member, from the Partnership. If the Member has not remedied that default and paid all interest at the expiry of the said 20 days from the date of such notice, the Operator shall cause such Member to cease to be a Member and to forfeit its paid up Contribution (if any). The Partnership shall pay, or apply on behalf of the forfeited Contribution monies to other Subscribers, pro rata to their respective Contributors;
and

2.3.2 the Partnership may at the election of a Designated Member take such legal advice and pursue any necessary legal action to recover any sums due by Members pursuant to clauses 2.3.1 and may meet the cost of such legal advice or action, including expenses relating thereto, from the capital of the Partnership. ”

9. Subscribers were defined as persons who executed a deed of adherence and any substitute member. “Capital contribution” was defined in clause 1 of the partnership agreement as:

“Capital Contribution

> In relation to a Member, the amount committed by such Member to the capital of the Partnership being, in the case of Members other than the Designated Members, the amount specified in their Deed of Adherence."

10. On 24 March 2006, the claimant completed and delivered the documentation necessary to enable him to become a member of Eclipse 10. Also on 24 March 2006, he borrowed money from HSBC to finance the payment he made to Eclipse 10 in connection with his application to become a member of the partnership. The purpose of the loan was said to be "to assist with an equity contribution into the Future Film arranged Eclipse structure".

11. A document dated 13 April 2006 entitled "certificate of partnership interest" certified that the claimant had "invested £29,700,000" in Eclipse 10 of which £28,920,692 had been financed by a loan.

12. The claimant completed a tax return for the 2005/2006 year of assessment. In that tax return, he claimed relief for interest in the sum of £1,374,087. In a schedule, the claimant claimed interest on qualifying loans. There were three loans shown involving, in total, the sum of £1,374,087. Two were loans from HSBC and were connected with the arrangements relating to Eclipse 10. Under a heading "Purpose of loan" the schedule stated "Purchase an interest in a film partnership" and then the amounts are given. The interest on the two loans relating to Eclipse 10 for which the claimant sought relief was given as, in total, £479,213,40.

13. Tax returns were made for subsequent years of assessment up to and including 2014/2015. In each case, the claimant claimed relief on the interest paid on the loans obtained to finance his arrangement with the Eclipse 10 partnership. In each case, the tax return recorded the purpose of the loan as being to "Purchase an interest in a partnership".

14. The defendants opened enquiries into the claimant's tax returns for the years of assessment 2005/2006 to 2014/2015 inclusive. The inquiry has not yet been completed and the defendants have not yet served a closure notice setting out their conclusions, pursuant to section 28A of the Taxes Management Act 1970 ("TMA").

The Litigation in relation to Eclipse 35

15. In the meantime, litigation had been taking place involving another Eclipse Film Partnership, Eclipse 35, culminating in the Court of Appeal decision in *Eclipse Film Partners No 35 LLP v Revenue and Customs Commissioners*. That litigation involved the partnership itself, not the individual partners. It is necessary to set out the relevant statutory provisions in force at the material time in that case. Section 353(1) ICTA provides, so far as material, that:

> "(1) Where a person pays interest in any year of assessment, that person, if he makes a claim to the relief, shall for that year of assessment be entitled to section 359 to 368 of this Act …. to relief in accordance with this section in respect of so much (if any) of the amount of that interest as is eligible for relief under this section by virtue of section by virtue of sections 359 to 365".

16. The relevant section is section 362 ICTA which, so far as material, was in the following terms:

> "362 Loan to buy into partnership
>
> (1) Subject to section 363 to 35, interest is eligible for relief under section 353 if it is interest on a loan to an individual to defray money applied –
>
> (a) in purchasing a share in a partnership; or
>
> (b) in contributing money to partnership by way of capital or premium or in advancing money to a partnership, where the money contributed or advanced is used wholly for the purposes of the trade, profession or vocation carried on by the partnership; or
>
> ….."

17. The scope of the Eclipse 35 appeal was described in the first instance decision of the First-tier Tribunal in [2012] UKFTT 270 (TC), [2012] STFD 823. The arrangements in place in that case were similar to those in place in the present case. As the tribunal explained, Eclipse 35 was a limited liability partnership involved in acquiring and exploiting film rights. All or most of its members were individuals who were liable to UK income tax. Eclipse 35 was financed by its members who, it was said, contributed capital to the partnership in part from their own resources but in substantial part by borrowing money for that purpose. The tribunal proceeded on the basis that if the conditions in section 362(1)(b) ICTA were met, the individuals would be entitled to claim relief upon the interest. They therefore considered that the key question was whether Eclipse 35 was carrying on a trade. Having considered the nature of the transactions and the economic realities of the arrangement, the First-tier Tribunal found that Eclipse 35 was engaged in a business involving the exploitation of film rights and not a trade: see paragraph 414. That decision was upheld by Sales J., as he then was, in the Upper Tribunal on appeal (see [2014] STC 114). The Court of Appeal identified the issue at paragraphs 4 and 5 of their judgment in the following terms:

> "4 Members of Eclipse 35 borrowed money to contribute to its capital. They paid interest on the money borrowed. They may be able to claim tax relief in respect of that interest but only if Eclipse 35 was carrying on a trade and only if the borrowed money was used wholly for the purpose of that trade. That is the combined effect of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") s. 863 and the Income and Corporation Taxes Act 1988 ("TA 1988") ss. 353 and 362."
>
> "5 Although the closure notice (and so this appeal) relates to Eclipse 35 itself rather than the personal tax position of any of its members, what is important in practical terms is whether the members are entitled to tax relief in respect of interest on their borrowings. Accordingly, it is convenient to treat TA 1988 s. 362(1) as the critical provision by way of background."

18. The Court of Appeal then set out the terms of section 362(1)(b) ICTA only. That is the provision dealing with capital contributions in which case the money provided has to be "used wholly for the purposes of the trade, profession, or vacation carried on by the partnership". The Court of Appeal concluded that the conclusion of the First-tier Tribunal that the partnership was not in reality carrying on a trade was justified. The business of Eclipse 35, looked at as a whole, did not have a trading character: see

paragraph 139 of the judgment. The requirements of section 362(1)(b) ICTA were, therefore, not met.

19. It is an important part of the claimant's arguments in the present case that it was assumed that the monies paid by the members of the partnership were paid by way of capital contribution and, therefore, the requirements of section 362(1)(b) ITCA had to be satisfied. The claimant contends that the litigation, and the decision of the Court of Appeal, was not concerned with the a priori question of whether the transactions between the individual members and the partnership by which monies were provided to the partnership were properly to be characterised as the purchase of a share (within the meaning of section 362(1)(a) ICTA) or a contribution by way of capital (within the meaning of section 362(1)(b) ICTA).

The Follower Notices in the Present Case

20. The defendants served 10 follower notices each dated 8 March 2017 on the claimant, one for each of the tax years from 2005/2006 to 2014/2015 inclusive. By way of example, the follower notice for the 2005/2006 tax year, identified the relevant judicial ruling in these terms:

> "**The final judicial ruling relevant to the chosen arrangements**
>
> On 17 February 2015 the Court of Appeal gave a ruling in the case of Eclipse Film Partners No 35 LLP v HMRC [2015] EWCA Civ 95 ("Eclipse 35 v HMRC"). You made a tax return on the basis that a particular tax advantage arose from particular tax arrangements. We consider that the Eclipse 35 v HMRC ruling is relevant to those tax arrangements.
>
> In Eclipse 35 v HMRC the First-tier Tribunal ("FTT") considered arrangements that involved:
>
> - individuals borrowing money to contribute as capital to Eclipse Film Partners No 35 LLP ("Eclipse 35) and paying interest on the money borrowed:
> - Eclipse 35 entering into a series of transactions in relation to the acquisition, distribution and marketing of film rights;
> - the individuals asserting a tax advantage by claiming relief in respect of the interest paid on the money borrowed on the basis that Eclipse 35 carried on a trade and that the borrowed money was used for the purpose of the trade
>
> and concluded that Eclipse 35 was not trading. The Court of Appeal upheld the conclusions of the FTT on this issue, saying at paragraph 139 of its decision:
>
> "… the FTT's conclusion that Eclipse 35 was not in reality carrying on a trade was justified an indeed correct. Eclipse 35 did not discharge the evidential burden of showing that it was engaged in trade in any realistic or meaningful way."

Arrangements are tax arrangements if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements. In Eclipse 35 v HMRC the FTT found (and Eclipse 35 agreed) that it was an objective of the members to obtain tax relief for the interest paid on their borrowings. The arrangements comprising the Eclipse 35 scheme were therefore tax arrangements because the obtaining of a tax advantage was one of the main purposes of the arrangements.

The Court of Appeal concluded that the transactions in which Eclipse 35 engaged had two aspects: the making of a payment which would be repaid with the interest over time and would produce a profit unrelated to the success or otherwise of the rights sublicensed; and the possibility of obtaining a share of contingent receipts. The first had the character of an investment and the second was insufficient in the context of Eclipse 35's business as a whole to give the business a trading character.

In so finding, the Court of Appeal upheld the findings of the FTT and the Upper Tribunal that Eclipse 35 was not trading. Consequently, as Eclipse 35 was not trading, tax relief was not available to the Eclipse 35 members in respect of interest paid on money borrowed to contribute to the LLP.

Looking at your arrangements, you:

- became a member in an LLP which entered into a series of transactions in relation to the acquisition, distribution and marketing of film rights;

- used borrowed money to contribute capital to the LLP and paid interest on the money borrowed;

- claimed relief in the year ended 5 April 2006 in respect of the interest paid on the money you borrowed on the basis that the LLP carried on a trade and that the borrowed money was used for the purpose of trade. The claim included a claim for relief against income arising from the LLP, and further a claim for relief against the remainder of your total income. The claim for relief against the remainder of your total income is the "asserted advantage" of the arrangements.

We consider that the Eclipse 35 v HMRC ruling is relevant to the arrangements that you undertook because:

- it relates to tax arrangements;

- the principles laid down and reasoning given in the ruling would, if applied to your tax arrangements, deny the tax advantage claimed to arise from those arrangements; and

- it is a final ruling.

> Applying the reasoning in Eclipse 35 v HMRC to your arrangements would produce the result that Eclipse Film Partners No 10 LLP was not trading. The arrangements involving Eclipse Film Partners No 10 LLP were of the same character, and had the same results, as those involving Eclipse 35. Eclipse Film Partners No 10 LLP was therefore not carrying on a trade for the same reasons Eclipse 35 was found not to be carrying on a trade.
>
> Consequently, tax relief claimed by you in the year ended 5 April 2006 in respect of interest paid by you on the money borrowed to contribute to Eclipse Film Partners No 10 LLP is denied to the extent that it was deducted from any component of your total income other than the income allocated to you in the partnership statement included in Eclipse Film Partners No 10 LLP's partnership return for the year ended 5 April 2006 and which you included in your tax return for the year ended 5 April 2006 ("the denied advantage").
>
> The ruling in Eclipse 35 v HMRC became final on 13 April 2016 when the application for leave to appeal was refused by the Supreme Court"

21. The corrective action that the claimant was required to take to avoid liability to a penalty was to amend the self-assessment included within the tax return for the relevant year in order to counteract the denied advantage, that is, in effect, to exclude the claim for relief on the interest paid on the loans obtained to provide money to the Eclipse 10 partnership. The follower notice explained that the claimant could make representations if he objected to the notice.

22. The defendants also gave the claimant APNs for each of the relevant tax years. The effect of these notices was to remove the ability to postpone payment of the disputed tax and, in effect, to require the disputed tax to be paid immediately.

THE STATUTORY FRAMEWORK

Background

23. The provisions governing follower notices and accelerated payments are contained in Part 4 of the 2014 Act. The background to the legislation dealing with follower notices is described in the judgment of Sir Ross Cranston in *R (Haworth) v Commissioners for HM Customs and Revenue* [2018] EWHC 1271 (Admin) at paragraphs 54 to 61. An analysis of the operation of the provisions is contained in *R (Broomfield) v Commissioners of Customs and Excise* [2018] EWHC 1966 (Admin).

The Statutory Provisions Governing Follower Notices

24. Chapter 2 of Part 4 of the 2014 Act sets out (1) the circumstances in which follower notices may be given (2) the content of the notices (3) the provisions for making representations about such notices and (4) penalties if the taxpayer does not take corrective action to relinquish a particular tax advantage.

Definitions

25. Section 210 of the 2014 defines "tax advantage" and "tax arrangements" of the purposes of Part 4 in the following ways.

> "(2) *"*Tax advantage*"* includes—
>
> (a) relief or increased relief from tax,
>
> (b) repayment or increased repayment of tax,
>
> (c) avoidance or reduction of a charge to tax or an assessment to tax,
>
> (d) avoidance of a possible assessment to tax,
>
> (e) deferral of a payment of tax or advancement of a repayment of tax, and
>
> (f) avoidance of an obligation to deduct or account for tax.
>
> "(3) Arrangements are "tax arrangements" if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.
>
> "(4) *"*Arrangements*"* includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)."

Circumstances in which a follower notice may be given

26. A follower notice may be given if four conditions, Conditions A, B, C and D, are satisfied. The relevant provision is section 204 of the 2014 Act which provides that:

> "(1) HMRC may give a notice (a "follower notice") to a person ("P") if Conditions A to D 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 tax arrangements ("the chosen arrangements").
>
> "(4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements.
>
> "(5) Condition D is that no previous follower notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements, judicial ruling and tax period.

> "(6) A follower notice may not be given after the end of the period of 12 months beginning with the later of—
>
> (a) the day on which the judicial ruling mentioned in Condition C is made, and
>
> (b) the day the return or claim to which subsection (2)(a) refers was received by HMRC or (as the case may be) the day the tax appeal to which subsection (2)(b) refers was made."

27. Section 205 of the 2014 Act then deals with what constitutes a final judicial ruling for the purposes of Condition C. The material provisions provide that:

> "(2) *"*Judicial ruling*"* means a ruling of a court or tribunal on one or more issues.
>
> "(3) A judicial ruling is "relevant" to the chosen arrangements if—
>
> (a) it relates to tax arrangements,
> (b) the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage, and
> (c) it is a final ruling.
>
> "(4) A judicial ruling is a "final ruling" if it is—
>
> (a) a ruling of the Supreme Court, or
> (b) a ruling of any other court or tribunal in circumstances where—
>
> (i) no appeal may be made against the ruling,
> (ii) if an appeal may be made against the ruling with permission, the time limit for applications has expired and either no application has been made or permission has been refused,
> (iii) if such permission to appeal against the ruling has been granted or is not required, no appeal has been made within the time limit for appeals, or
> (iv) if an appeal was made, it was abandoned or otherwise disposed of before it was determined by the court or tribunal to which it was addressed."

28. There are provisions governing the content of follower notices. In addition, there are provisions providing for a taxpayer to have 90 days beginning with the day on which a follower notice is given to make written representations objecting to a follower notice.

Penalties

29. The 2014 Act makes provision for penalties if the taxpayer does not undertake what is referred to as corrective action following the given of a follower notice. Section 208 of the 2014 Act provides so far as material that:

> "(2) P is liable to pay a penalty if the necessary corrective action is not taken in respect of the denied advantage (if any) before the specified time.
>
> "(3) In this Chapter *"the denied advantage"* means so much of the asserted advantage (see section 204(3)) as is denied by the application of the principles laid down, or reasoning given, in the judicial ruling identified in the follower notice under section 206(a).

"(4) The necessary corrective action is taken in respect of the denied advantage if (and only if) P takes the steps set out in subsections (5) and (6).

"(5) The first step is that—

(a) in the case of a follower notice given by virtue of section 204(2)(a), P amends a return or claim to counteract the denied advantage;

(b) in the case of a follower notice given by virtue of section 204(2)(b), P takes all necessary action to enter into an agreement with HMRC (in writing) for the purpose of relinquishing the denied advantage.

"(6) The second step is that P notifies HMRC—

(a) that P has taken the first step, and

(b) of the denied advantage and (where different) the additional amount which has or will become due and payable in respect of tax by reason of the first step being taken.

"(7) In determining the additional amount which has or will become due and payable in respect of tax for the purposes of subsection (6)(b), it is to be assumed that, where P takes the necessary action as mentioned in subsection (5)(b), the agreement is then entered into.

"(8) In this Chapter—

"the specified time" means—

(a) if no representations objecting to the follower notice were made by P in accordance with subsection (1) of subsection 207, the end of the 90 day post-notice period;

(b) if such representations were made and the notice is confirmed under that section (with or without amendment), the later of—

(i) the end of the 90 day post-notice period, and

(ii) the end of the 30 day post-representations period;

"the 90 day post-notice period" means the period of 90 days beginning with the day on which the follower notice is given;

"the 30 day post-representations period" means the period of 30 days beginning with the day on which P is notified of HMRC's determination under section 207".

30. The amount of the penalty is 50% of the value of the denied advantage: see section 209 of the 2014 Act. Provision for the assessment and payment of a penalty is made by section 211 of the 2014 Act which provides so far as material that:

"(1) Where a person is liable for a penalty under section 208, HMRC may assess the penalty.

"(2) Where HMRC assess the penalty, HMRC must—

(a) notify the person who is liable for the penalty, and
(b) state in the notice a tax period in respect of which the penalty is assessed.

"(3) A penalty under section 208 must be paid before the end of the period of 30 days beginning with the day on which the person is notified of the penalty under subsection (2).

"(4) An assessment—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Chapter),
(b) may be enforced as if it were an assessment to tax, and
(c) may be combined with an assessment to tax.
…..

"(5) No penalty under section 2018 may be notified under subsection (2) later than—
(a) in the case of a follower notice given by virtue of section 204(2)(a) (tax enquiry in progress), the end of the period of 90 days beginning with the day the tax enquiry is completed, and
(b) in the case of a follower notice given by virtue of section 204(2)(b) (tax appeal pending), the end of the period of 90 days beginning with the earliest of—
(i) the day on which P takes the necessary corrective action (within the meaning of section 208(4)),
(ii) the day on which a ruling is made on the tax appeal by P, or any further appeal in that case, which is a final ruling (see section 205(4)), and
(iii) the day on which that appeal, or any further appeal, is abandoned or otherwise disposed of before it is determined by the court or tribunal to which it is addressed."

Accelerated payment notices or APNs

31. Chapter 3 of Part 4 deals with accelerated payment notices. The defendants may give an APN to a person if Conditions A, B and C are met. Section 219 of the 2014 Act provides so far as material to this case:

"(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, gives) P a follower notice under Chapter 2—
>
> (i) in relation to the same return or claim or, as the case may be, appeal, and
>
> (ii) by reason of the same tax advantage and the chosen arrangements;
>
> ….."

32. There are other circumstances in which an APN may be given. These include cases where the particular scheme was notified to the defendant under the provisions governing the disclosure of tax avoidance schemes (the provisions are known as "DOTAS"). The Court of Appeal has considered the purpose of the APNs in that specific context in *R (Rowe) v Revenue and Customs Commissioners* [2017] EWCA Civ 2015, [2018] 1 W.L.R. 3030.

33. So far as Condition A is concerned, the present claim involve APNs given under section 219(2)(a) of the 2014 Act as they involve a case where a tax enquiry is in progress in relation to a return or claim made by the claimant in each of the relevant years of assessment. So far as Condition C is concerned, the claim does not fall within the scope of the DOTAS provisions (although, erroneously, it was thought at one time that they did). Consequently, this is a case where the defendants have given follower notices and the case falls within section 219(4)(a) of the 2014 Act.

34. There are provisions governing the content of APNs and for the making of representations objecting to the notice. The notice must specify amongst other things, the payment to made. That is dealt with in sections 220(3) and (4) of the 2014 Act in the following terms, so far as material:

> "(3) The payment required to be made under section 223 is 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 [(and disregarding any dispute which has been referred to a tribunal under section 12ABZB(3) of TMA 1970 but not yet determined).
>
> "(4) *"*The understated tax*"* means the additional amount that would be due and payable in respect of tax if—
>
> (a) in the case of a notice given by virtue of section 219)4)(a) (cases where a follower notice is given)—
>
> (i) it was assumed that the explanation given in the follower notice in question under section 206(b) is correct, and
>
> (ii) the necessary corrective action was taken under section 208 in respect of what the designated HMRC officer determines, to the best of that officer's information and belief, as the denied advantage;
>
> ….."

35. The effect of giving an APN is that the taxpayer must pay the understated tax within 90 days beginning with the day on which the APN is given, if no objection to the

APN is made, or within 30 days beginning with the day on which the taxpayer is notified of the defendants' decision on the representations (or the original 90 day period if later). That is provided for by section 223 of the 2014 Act which provides so far as material that:

> "(1) This section applies where—
>
> (a) an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while a tax enquiry is in progress) (and not withdrawn), and
> (b) an amount is stated in the notice in accordance with section 220(2)(b).
>
> "(2) P must make a payment ("the accelerated payment") to HMRC of that amount.
>
> "(3) The accelerated payment is to be treated as a payment on account of the understated tax (see section 220).
>
> "4) The accelerated payment must be made before the end of the payment period.
>
> (5) "The payment period*"* means —
>
> (a) if P made no representations under section 222, the period of 90 days beginning with the day on which the accelerated payment notice is given, and
> (b) if P made such representations, whichever of the following periods ends later—
> (i) the 90 day period mentioned in paragraph (a);
> (ii) the period of 30 days beginning with the day on which P is notified under section 222 of HMRC's determination
> …."

THE ISSUES

36. Against that background, the issue in the case is whether a follower notice can be given in the circumstances of this case. That in turn depends on the proper interpretation of the relevant statutory provisions and in particular whether:

    (1) Condition B in section 204(3) of the 2014 Act is satisfied as the tax returns in the present case are made on the basis that a particular tax advantage results from the claimant's tax arrangements; and

    (2) Condition C in section 204(4) is satisfied as the defendants are entitled to form the opinion that there is a relevant ruling in the present case, i.e. that the ruling in ruling in the *Eclipse 35* case would, if applied to the claimant's tax arrangements, deny the asserted tax advantage.

THE SUBMISSIONS

37. Mr Ewart Q.C. for the claimant contends that the claimant is seeking relief for interest on borrowings used to purchase a share in a partnership within the meaning of section 362(1)(a) ICTA. That, he submits is the particular tax advantage which is the asserted advantage within the meaning of section 204(3) of the 2014 Act. Furthermore, the ruling in Eclipse 35 would not, if applied to the claimant's chosen tax arrangements, deny the advantage that he claims as that ruling dealt only with the circumstances in

which section 362(1)(b) ICTA would not be satisfied. It was not dealing with the logically prior question of whether or not the tax arrangements involved the purchase of a share in the partnership or whether it was the payment of money by way of capital contribution. Mr Ewart submitted that the defendants were not entitled to determine that question by means of the procedure for giving follower notices.

38. Mr Vallat Q.C. for the defendants contends first that the particular tax advantage, the asserted advantage, was the claim for interest under section 353 ICTA. Secondly, Condition C is satisfied if the defendants are of the opinion that there is a relevant judicial ruling, that is a ruling which, if applied to the claimant's tax arrangements, would result in the asserted advantage being denied. Mr Vallat submitted that the defendants were entitled to take a view as to whether the arrangements in question were the same as those in *Eclipse 35*, so long as that view was not irrational. They were not obliged to accept the claimant's assertion that the transaction was in fact to be characterised differently from the transaction in *Eclipse 35*. Where, as here, the arrangements were materially similar to those in Eclipse 35, and where the relevant documentation did not refer to a purchase of a share, but used the phrase "capital contribution", the defendants were entitled to form the opinion that the ruling in *Eclipse 35* would, if applied to the claimant's arrangement, deny the asserted advantage. Hence, the defendants, he submits, were entitled to give follower notices to the claimant.

ANALYSIS

39. The issue, whilst easy to state, is not easy to resolve. In part, the difficulty results from seeking to match the concepts used in the 2014 Act with the provisions of other relevant statutes.

The Wording of Section 204 of the 2014 Act.

40. The starting point is the wording of the relevant provisions of the 2014 Act read in context. Section 204(3) of the 2104 Act refers to two particular concepts, namely "the particular tax advantage" and the "particular tax arrangements". Those, in turn, are defined in section 210 of the 2014 Act.

41. The tax advantage in the present case is the claim for relief on the payment of interest. On the wording of section 353 ICTA, it is that section which gives rise to the right to claim relief as appears from its wording – if a person pays interest, and he makes a claim for relief, he is entitled to "relief in accordance with this section". That is the particular tax advantage which the claimant seeks in respect of the amount of interest as is eligible. The provisions in section 362 ICTA are ways of determining the amount of the interest which is eligible for relief under section 353 ICTA. In those circumstances, it would not be right to characterise section 362(1)(a) as giving rise to one type of tax advantage – relief on interest on borrowing used to purchase a share in a partnership – and section 362(1)(b) as giving rise to a different type of tax advantage – interest on capital contributions paid to a partnership. Each of those subsections set out conditions governing eligibility for a claim for interest rather than setting out the entitlement to claim relief on interest.

42. Secondly, arrangements are tax arrangements if they are arrangements whose main purpose, or one of the main purposes is, to obtain a tax advantage. In the present case,

the arrangements in question are the deed of adherence, the partnership deed under which the claimant became a member of the partnership and which governed his rights and liabilities as a member, together, possibly, with the loan arrangements under which the money which he provided, to use a neutral term, to the partnership was obtained. It was open to the defendants to conclude, and was not contested by the claimant, that the main purpose, or one of the main purposes, of the arrangements was to enable the claimant to assert a tax advantage, that is to assert a claim that he was entitled to relief on the interest paid under the loan.

43. Turning then to Condition B, in section 204(3) of the 2014 Act, the tax return must be made on the basis that a particular tax advantage (which is referred to as the "asserted advantage") results from particular tax arrangements (referred to as "the chosen arrangements"). In the present case, the claim for interest relief (the asserted advantage) does result from the arrangements put in place by the taxpayer (the deed of adherence, the deed of partnership and the provision of money pursuant to a loan). The requirement of Condition B is satisfied.

44. Condition C in section 204(4) of the 2014 Act is satisfied if the defendants are "of the opinion that there is a judicial ruling which is relevant to the chosen arrangements". A relevant judicial ruling is defined in section 205 of the 2014 Act. The ruling must be one which the defendants could rationally consider satisfied the definition in section 205 of the 2014 Act.

45. First, the ruling must relate to tax arrangements. It would be open to the defendants to conclude that the *Eclipse 35* ruling does relate to tax arrangements. It relates to arrangements the purpose of which was to obtain a tax advantage, namely arrangements under which money was borrowed and provided to a partnership in order to obtain a tax advantage, namely claiming relief on the interest payable on the loan.

46. Secondly, and in many ways, the critical question, is whether the defendants could form the opinion that the principles laid down or the reasoning in the ruling in *Eclipse 35* would, if applied to the chosen arrangements (that is, the claimant's tax arrangements in the present case) deny the asserted advantage. The defendants were entitled to form that opinion. They are entitled to consider the nature of the arrangements in the *Eclipse 35* ruling and the chosen arrangements in the present case to determine if there is a sufficient similarity such that the reasoning in the ruling would apply.

47. Here, the arrangements described in the *Eclipse 35* ruling appear materially similar to those in the present case. Both involved arrangements whereby the taxpayer borrowed money, provided that to the partnership and became a member of the partnership. Further, there is nothing in the deed of partnership or the accompanying loan agreement, to suggest that there is any material difference between the arrangements in the *Eclipse 35* case and the present case. Clause 2.1 of the partnership deed provides that additional persons may be admitted as members on acceptance of a deed of adherence. Clause 2.2 provides that members shall contribute their respective contribution on admission as a member. There is nothing in the deed of partnership to indicate that the arrangement is any different in nature from the arrangements in the *Eclipse 35* case. In particular, there is nothing in the deed of partnership to suggest

that the provision of money by a person seeking to become a member was by way of a purchase of a share in the partnership rather than by way of capital contribution.

48. The deed of adherence refers to the person agreeing to pay all "of my contribution" and refers to "subscription" and "investment" in the partnership, not the purchase of a share in it. Clause 9 of the deed of adherence simply refers to the claimant agreeing "to hold the interest in the Partnership" (with no indication in that clause as to whether that interest has been purchased, or whether it is acquired by means of the capital contribution made). There is, therefore, nothing in the deed of adherence to suggest that the chosen arrangements in the present case are different from the arrangements in the *Eclipse 35* case. Similarly, the loan facility refers to the purpose of the facility being to "assist with an equity contribution". There is nothing in that to indicate that the chosen arrangements were different from the arrangements in the *Eclipse 35* case. The only documents which suggest that a legally different transaction was intended to be carried out is the claimant's tax returns which refer to the purchase of an interest in a film partnership.

49. In my judgment, however, the defendants are entitled to compare the chosen arrangements with the arrangements in the *Eclipse 35* ruling. They are entitled to form the opinion, given the nature of the arrangements in that case and the claimant's chosen arrangements in the present case, that the ruling in the *Eclipse 35* case would, if applied to the claimant's chosen arrangements, deny him the asserted advantage because the nature of the arrangements are the same and the relevant conditions for eligibility to claim relief (those in section 362(b) ICTA) are not satisfied.

50. There is nothing in the structure or the wording of Chapter 4 of the 2014 Act, read as a whole, which is inconsistent with that interpretation of section 204 of the 2014 Act or which might lead to the conclusion that a different interpretation should be placed on the section. Once it is accepted that the tax advantage is the claim for relief on interest resulting from the claimant's chosen arrangements, and that the defendants are entitled to form the opinion that the claimant's chosen arrangements are essentially similar to those in the *Eclipse 35* case, Chapter 4 of the 2014 Act operates as it would logically be expected to operate. If the claimant wishes to continue to claim that relief, he will be liable to a penalty and will have to pay the understated tax immediately. If he maintains, and succeeds in his claim, the penalty and the tax will be repaid with interest. That is the consequence of the situation being one in which a follower notice and an APN can be given.

51. I have considered whether the interpretation set out above is consistent with the purpose underlying Chapter 2 of the 2014 Act. The purposes appear from the terms of the legislation. The aim is to discourage taxpayers from making claims, or maintaining appeals, which seek tax advantages arising out of schemes which have already been the subject of final rulings by a court or tribunal. The aim is, broadly, to deter further litigation on points already decided by the relevant judicial court or tribunal and to deter taxpayers from spinning out disputes with the Revenue when the issues have already been resolved. Deterring taxpayers from relitigating points is intended to reduce the administrative and judicial resources needed to deal with such claims and appeals and to ensure that the taxpayer does not continue to have the benefit of retaining the amount of the disputed tax until the dispute is resolved. Those aims are to be achieved by making taxpayers liable to a penalty if they continue to

make such claims or maintain such appeals and by requiring them to pay the disputed tax immediately.

52. An interpretation of sections 204 and 205 of the 2014 Act which enables follower notices to be served in the present case is consistent with that purpose. The arrangements relating to the financing of investment in partnerships involved in the acquisition and exploitation of film rights, and the circumstances in which relief may be claimed on loans used to provide such financing, have been considered in *Eclipse 35*. The defendants are entitled to form the view that the claimant's chosen arrangements are essentially similar to those already litigated in *Eclipse 35* so that the reasoning of that ruling would, if applied to the claimant's chosen arrangements deny him the advantage of being able to claim relief on interest. If the claimant wishes to continue to claim that his arrangements are, in fact, not governed by the ruling in *Eclipse 35*, then Parliament has provided that he may be required to do so only on pain of being liable to pay a penalty and if he pays the disputed tax immediately. If he succeeds in his claim, the tax paid, and the penalty, will be repaid with interest.

53. I understand the point made by Mr Ewart that no tribunal or court has yet ruled on the question of whether becoming a member of a partnership on agreeing to provide finance to that partnership can be characterised as the purchase of a share in the partnership rather than a capital contribution to the partnership. However, the question is the proper interpretation of the provisions of Part 4 of the 2014 Act. Given the nature of the arrangements in the *Eclipse 35* case, and the similarity between those arrangements and the claimant's chosen arrangements, the defendants are entitled to form the view that the *Eclipse 35* ruling would, if applied to the claimant's chosen arrangments, deny the claimant the tax advantage he seeks. If he wishes to maintain that he is entitled to that relief because the chosen arrangements are to be given a different legal characterisation from that in the *Eclipse* 35 case, then he must do so on the basis that he is liable to a penalty and cannot enjoy the benefit of the understated tax pending the outcome of that claim.

CONCLUSION

54. The particular tax advantage asserted by the claimant in the present case was the claim for relief on the interest on the money that the claimant borrowed to finance his participation in the Eclipse 10 partnership. That tax advantage resulted from the tax arrangements put in place by the claimant. The defendants were entitled to form the view that the claimant's chosen arrangements were materially similar to the arrangements in the *Eclipse 35* and that ruling, if applied to the claimant's chosen arrangements, would deny him the asserted advantage. The conditions for issuing a follower notice in section 204 of the 2014 Act were therefore satisfied and the defendants were entitled to issue the follower notices and the APN to the claimant in respect of the relevant tax years. The claim for judicial review is, therefore, dismissed.