Neutral Citation Number: [2021] EWCA Civ 1425

Case No: A3/2020/1726

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
MR JUSTICE TROWER AND UPPER TRIBUNAL JUDGE THOMAS SCOTT
[2020] UKUT 0175 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/10/2021

Before :

LADY JUSTICE KING
LORD JUSTICE HENDERSON
and
LORD JUSTICE ARNOLD

- -

Between :

SHEILING PROPERTIES LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents**

- -
- -

Mr Ben Elliott (instructed by **Levy and Levy Solicitors**) for the **Appellant**
Ms Aparna Nathan QC (instructed by **the General Counsel and Solicitor to HMRC**) for the **Respondents**

Hearing date : 15 June 2021

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Approved Judgment

Lord Justice Henderson :

Introduction

1. This appeal raises a short but important issue about the scope of the statutory regime relating to accelerated payment notices ("APNs") introduced by the Finance Act 2014 ("FA 2014" or "the 2014 Act"). The question, in brief, is whether the APN regime is prevented from applying to liabilities for pay as you earn ("PAYE") income tax which are the subject of a determination made by the respondents ("HMRC") under regulation 80 of the Income Tax (Pay As You Earn) Regulations 2003, SI 2003 No. 2682 ("the PAYE Regulations").

2. The contention advanced by the appellant company, Sheiling Properties Limited ("the Company"), is that in such a case there can be no "disputed tax" within the meaning of section 221(3) of the 2014 Act, which in turn depends on whether a determination made under regulation 80 is an "assessment" to tax for the purposes of section 221(3)(a). That contention was rejected by the First-tier Tribunal (Judge Jonathan Richards) in its decision ("the FTT Decision") released on 1 May 2018: see [2018] UKFTT 0247 (TC). It was again rejected on appeal by the Upper Tribunal (Trower J and Judge Thomas Scott) in its decision ("the UT Decision") released on 8 June 2020: see [2020] UKUT 0175 (TCC), [2020] STC 1380. The Company now brings a second appeal to this court, with permission granted by Floyd LJ.

3. The question arises in the context of appeals by the Company against penalties imposed on it by HMRC for non-payment of an APN requiring advance payment of PAYE income tax in the sum of £118,000, sent to the Company on 19 July 2016. A second APN sent to the Company by HMRC on the same date required advance payment of primary and secondary national insurance contributions ("NICs") in the sum of £67,452.

4. Both APNs related to a marketed scheme for the avoidance of income tax and NICs which the Company had entered into with two of its directors, Mr Ian Bullions and Mr Steven Houchen, in the 2011-12 tax year. The scheme involved arrangements under which the Company made substantial payments to the directors in return for which they incurred obligations to subscribe for partly paid shares in the Company. The scheme was promoted by Blackstar (Europe) Ltd, and had been duly notified to HMRC under the "DOTAS" (Disclosure of Tax Avoidance Schemes) legislation contained in the Finance Act 2004. The assigned DOTAS reference number of the scheme was 56363346.

5. The PAYE system does not itself impose any charge to tax. It is a secondary collection mechanism which requires employers to deduct and account for income tax in respect of employment income paid to employees. The underlying liability to tax is that of the employee alone, not the employer, although the liability is discharged *pro tanto* by the tax deducted at source by the employer in accordance with the PAYE Regulations: see generally sections 6 and 684 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"), and McCarthy v McCarthy & Stone PLC [2007] EWCA Civ 664, [2008] 1 All ER 221, at [42] to [45] per Sir Andrew Morritt C.

6. Having considered the scheme, HMRC formed the view that the sums paid to the two directors by the Company constituted employment income in their hands from which tax should have been, but was not, deducted at source by the Company in accordance with regulation 67G of the PAYE Regulations. In those circumstances, regulation 80 came into play. As in force in the 2016/17 tax year, when the APNs were served on the Company, regulation 80 provided materially as follows:

> "**Determination of unpaid tax and appeal against determination**
>
> (1) This regulation applies if it appears to HMRC that there may be tax payable for a tax year under regulation 67G… which has neither been –
>
> (a) paid to HMRC, nor
>
> (b) certified by HMRC under regulation 75A, 76, 77, 78 or 79.
>
> (1A) In paragraph (1), the reference to tax payable for a tax year under regulation 67G includes a reference to any amount the employer was liable to deduct from employees during the tax year whether or not that amount was included in any return under regulation 67B (real time returns of information about relevant payments) or 67D (exceptions to regulation 67B).
>
> (2) HMRC may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.
>
> …
>
> (5) A determination under this regulation is subject to Parts 4, 5, 5A… and 6 of TMA (assessment, appeals, collection and recovery) as if –
>
> (a) the determination were an assessment, and
>
> (b) the amount of tax determined were income tax charged on the employer,
>
> and those Parts of that Act apply accordingly with any necessary modifications."

7. The reference to "TMA" in regulation 80(5) is to the Taxes Management Act 1970. It can be seen, therefore, that the evident purpose of regulation 80(5) is to treat a determination made against the employer under the regulation in the same way, for the purposes of assessment, appeals, collection and recovery, as an assessment to income tax made on the employer. For those purposes, the determination is to be treated *as if* the determination were an assessment, and *as if* the amount of tax determined were income tax charged on the employer, and the specified Parts of TMA 1970 are then directed to apply accordingly "with any necessary modifications".

8. The relevant provisions of TMA 1970 include the following:

(1) In Part IV, which is headed "Assessment and Claims", section 29 empowers HMRC to make a "discovery" assessment of income tax "in order to make good to the Crown the loss of tax" where they discover, among other things, that "any income which ought to have been assessed to income tax" has not been assessed. Section 31(1) then provides that:

> "An appeal may be brought against –
>
> …
>
> (d) any assessment to tax which is not a self-assessment."

(2) In Part V, which is headed "Appeals and other proceedings", section 59B(6) lays down the basic rule that tax payable by virtue of an assessment is payable within 30 days of the date of the assessment, unless otherwise provided. Where an assessment to tax other than a self-assessment is appealed under section 31, section 55(2) states the default position that:

> "Except as otherwise provided by the following provisions of this section, the tax charged –
>
> (a) by the … assessment,
>
> …
>
> shall be due and payable as if there had been no appeal."

Subsections (3) to (6) then provide machinery for the postponement of payment, either by agreement or in default of agreement on the determination of an application by the taxpayer to the FTT, of "the amount (if any) in which it appears… that there are reasonable grounds for believing that the appellant is overcharged to tax". This basic regime for the postponement of tax pending the determination of an appeal under section 31 is then itself displaced in cases where an APN has been served under the 2014 Act, as I shall explain in the next section of this judgment.

The APN legislation

9. The APN regime was introduced by Chapter 3 of Part IV of FA 2014. The background to its enactment has been described in a number of cases, including (a) the judgments of Simler J (as she then was) at first instance, and on appeal of this court, in R (Rowe) v Revenue and Customs Commissioners [2017] EWCA Civ 2105, [2018] 1 WLR 3039, upholding [2015] EWHC 2293 (Admin); and (b) the judgment of Green J (as he then was) in R (Walapu) v Revenue and Customs Commissioners [2016] EWHC 658 (Admin), [2016] STC 1682. As Green J explained in Walapu, at [49]:

> "The Finance Act 2014 is designed to bring forward the payment of tax in dispute by those engaged in avoidance schemes. The avowed objective is to alter, fundamentally, the economics of tax avoidance so that disputed tax sits with the Exchequer rather than the taxpayer pending formal assessment or settlement. Put

> bluntly, it seeks to strip from the putative taxpayer the liquidity benefit of entering into tax avoidance schemes."

If the arrangements which lead to the service of an APN are ultimately held to be effective to avoid tax, the sums in question will be repayable with interest to the taxpayer: see the judgment of Arden LJ (as she then was) in the Rowe case at [1].

10. An APN may only be given if the three conditions set out in section 219 of FA 2014 are satisfied. So far as material, section 219 provides that:

> "(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 –
>
> …
>
> (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… 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 –
>
> …
>
> (b) the chosen arrangements are DOTAS arrangements;
>
> …
>
> (5) "DOTAS arrangements" means –
>
> (a) notifiable arrangements to which HMRC has allocated a reference number under section 311 of FA 2004,
>
> …"

11. By virtue of section 200(a), "relevant tax" is widely defined and includes "income tax".

12. Where an APN is given on the basis that a tax appeal has been made, section 221 specifies the content of the notice and defines "the disputed tax" of which payment may be demanded:

> "**221 Content of notice given pending an appeal**

> (1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(b) (notice given pending an appeal).
>
> (2) The notice must –
>
> (a) specify the paragraph or paragraphs of sections 219(4) by virtue of which the notice is given,
>
> (b) specify the disputed tax (if any),
>
> …
>
> (3) "The disputed tax" means 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.
>
> (4) "The denied advantage" has the same meaning as in section 220(5).
>
> …
>
> (6) In this section a reference to an assessment to tax, in relation to inheritance tax, is to a determination."

13. The definition of "the denied advantage" in section 220(5), in the case of a notice given under section 219(4)(b), i.e. where the chosen arrangements are DOTAS arrangements, "means so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise". For present purposes, the details of the definition do not matter, because there is no issue about the quantum of the disputed tax if it falls within the scope of 221(3). The sole issue which divides the parties is whether there is an "assessment to tax appealed against", within the meaning of section 221(3)(a), in circumstances where a determination has been made under regulation 80 of the PAYE Regulations. It is common ground that there is no amendment to a self-assessment which has been appealed against, nor is there any appeal against a conclusion stated by a closure notice. Accordingly, the Company can only be liable for the disputed tax specified in the APN given to it on 19 July 2016 if the regulation 80 determination on which the APN was founded was an "assessment to tax" for the purposes of section 221(3)(a).

14. The only other provision of the APN regime to which it is necessary to refer is section 224, which enacted the amendments of section 55 of TMA 1970 to which I have already referred. In the case of a notice given pending an appeal by virtue of section 219(2)(b),

the effect of the amendments is that none of the disputed tax specified in the notice given under section 221(2)(b) may be postponed by operation of the normal machinery in section 55 of TMA 1970. This is achieved by the introduction of new subsections 55(8B) to (8D), which in material part read as follows:

> "(8B) Subsections (8C) and (8D) apply where a person has been given an accelerated 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) – …
>
> (b) the disputed tax specified in the notice under section 221(2)(b) of that Act, or
>
> …
>
> (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 [*from a date which is then specified, depending on whether or not representations about the APN are made to HMRC under section 222*]."

Procedural history

15. In the light of the statutory background described above, I can now complete the procedural history, none of which is now in dispute.

16. On 17 February 2016, HMRC made the relevant regulation 80 determination against the Company and also issued corresponding decisions under section 8 of the Social Security Contributions (Transfer of Functions) Act 1999 requiring payment of employer's NICs in respect of the payments made to the two directors.

17. On 25 February 2016, the Company appealed against the determination and decisions, requesting postponement of the amount due. The grounds of appeal were that the payments to the directors were "not earnings" and were therefore not subject to PAYE and NICs. On 16 March 2016, HMRC agreed to postpone the amounts due.

18. On 19 July 2016, HMRC sent the two APNs to the Company. The Company then made written representations objecting to the APNs pursuant to section 222 of the 2014 Act, and also gave notice of its intention (if need be) to issue judicial review proceedings against HMRC (there being no statutory right of appeal against an APN). HMRC considered the representations, but decided to uphold the APNs and the sums demanded became due and payable on 9 November 2016. The Company did not pay the sums demanded and challenged the validity of the notices by issuing a claim for judicial review. That claim, we were told, is currently stayed pending the outcome of the present appeal.

19. On 22 December 2016, HMRC issued the Company with two penalty notices in respect of the non-payment of the APNs. It will be recalled that, although HMRC had agreed to the postponement of the amounts due before the APNs were given, the effect of the APNs was to reverse the postponement. The relevant penalty regime, which I need not describe in any detail, is contained in schedule 56 to the Finance Act 2009. It provides for an initial penalty of 5% of the unpaid tax, followed by further similar penalties, if the tax remains unpaid, on the expiry of five and eleven months respectively from the initial penalty date.

20. Following the exhaustion of various internal review procedures, the Company appealed to the FTT against the two initial penalty notices.

21. On 30 May 2017, HMRC issued further penalty notices, and these were in turn appealed by the Company to the FTT following the exhaustion of internal review procedures.

22. The Company's appeal against the penalties came on for hearing before the FTT on 19 March 2018. The Company was represented, as it has been at all stages, by Mr Ben Elliott of counsel. Three broad grounds of appeal were pursued by the Company. As summarised in the FTT Decision at [50], the grounds were:

    (1) the Company was entitled to the defence of "reasonable excuse" under paragraph 16 of schedule 56, the excuse being its belief that the APNs were invalid;

    (2) because of the drafting of the definition of "disputed tax" in section 221(3) of FA 2014, an amount demanded under a regulation 80 determination fell outside the scope of the definition with the consequence that the tax previously postponed was not subject to section 55(8D) of TMA 1970 and could not be "un-postponed", so no penalty could be charged in relation to the PAYE APN; and

    (3) for essentially the same reason, there was no "penalty date" for the purposes of PAYE demanded under the PAYE APN, again with the result that no penalty could be charged for any failure to pay it.

    It should be noted that the second and third of the grounds related only to the APN in respect of unpaid PAYE. Since the question of "reasonable excuse" is no longer in issue, having been decided adversely to the Company by both Tribunals, this court is not concerned (except as part of the background) with the APN relating to NICs.

23. The FTT dismissed the Company's appeal against the penalties on all three grounds. On the second ground, which corresponds with the Company's only ground of appeal before us, the FTT's reasoning is contained in the FTT Decision at [60] to [63]. The nub of the reasoning is to be found in the following passage:

> "61. I do not accept the Company's argument. Regulation 80(5) of the PAYE Regulations provides that:
>
> "A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if-
>
> (a) the determination were an assessment..."

> I agree with Mr Elliott that this is not a general "deeming provision". It does not provide that Regulation 80 determinations are treated for all purposes as "assessments". However, it does provide that Part 5 of TMA 1970 (which includes s55(8D)) must be applied as if the Regulation 80 determination were an assessment.
>
> 62. Section 55(8D) provides for "disputed tax" to be "un-postponed". Because, s55(8D) must be applied as if the Regulation 80 determination were an "assessment", when the statutory definition of "disputed tax" in s221(2)(b) of FA 2014 is applied for the purposes of s55(8D), that definition must also be read as if a Regulation 80 determination were an assessment. Mr Elliott's answer to this line of reasoning was that Regulation 80(5) is not expressed to apply for the purposes of s221(2)(b), but that approach involves reading the statutory provisions as if they were a computer program or a line of algebra. As I have noted, statutory provisions need to be construed in a purposive manner and, in Regulation 80(5), Parliament has shown a clear purpose that, when s55(8D) is being applied, it should be applied as if a Regulation 80 determination were an "assessment". Therefore, any question of whether tax is "un-postponed" has to be determined on the footing that a Regulation 80 determination is an assessment. Understood in those terms, Parliament's intention is clear."

24. The Upper Tribunal heard the Company's first appeal on 6 February 2020. HMRC were represented as they have been before us, by Ms Aparna Nathan QC. There were two grounds of appeal. The first was that the FTT erred in law in interpreting the term "disputed tax" in section 55(8C) of TMA 1970 as including tax arising from a regulation 80 determination; and the second was that the FTT erred in law in its interpretation and application of the "reasonable excuse" defence in the penalty legislation. As I have said, we are no longer concerned with the second ground. With regard to the first ground, the Upper Tribunal correctly noted, at [17] of the UT Decision, that it is "a pure question of statutory construction".

25. The Upper Tribunal's discussion of the first issue is at [41] to [56] of the UT Decision. The Upper Tribunal had "no hesitation in preferring HMRC's construction of the provisions": see [41]. Rather than summarising the Upper Tribunal's reasoning at this stage, I will refer to it as appropriate in my own discussion of the issue, to which I now turn.

Discussion

26. The only issue on this appeal, as reflected in the Company's concise grounds of appeal, is whether the term "disputed tax" in section 221(3) of the 2014 Act and section 55(8C) of TMA 1970 can include an amount stated in a regulation 80 determination, on the basis that pursuant to regulation 80(5) such a determination is subject to specified parts of TMA 1970, which include section 55(8C), as if it were an assessment. If the answer to that question is affirmative, it is now common ground that the penalties under appeal were correctly levied, and the defence of reasonable excuse fails, with the consequence

that the Company's appeal must be dismissed. Conversely, if on the true construction of the 2014 Act there was no "disputed tax" within the meaning of section 221(3), it is also now common ground that the PAYE tax charged under the relevant regulation 80 determination was postponed by agreement with HMRC, and that it could not now be "de-postponed" by virtue of section 55(8C) of TMA 1970, with the consequence that no late payment penalties can have fallen due.

27. The FTT decided in paragraph [62] of the FTT Decision (quoted above) that on a purposive interpretation of regulation 80(5) and section 55(8D) of TMA 1970 the deeming mandated by regulation 80(5) carries over into the statutory definition of "disputed tax" in section 221(2)(b) of the 2014 Act, and thence to section 55(8C)(b) and (8D) of TMA 1970. On behalf of the Company, Mr Elliott criticises that reasoning because, he says, it is inconsistent with the previous paragraph in the FTT Decision where the FTT expressly accepted his submission that regulation 80(5) is not a general deeming provision, and does not provide that regulation 80 determinations are treated "for all purposes" as assessments. The result, he submits, is that the term "disputed tax" would have different meanings in section 55 of TMA 1970 and section 221 of FA 2014, although those provisions are clearly intended to operate together (as the express reference to "the disputed tax specified in the notice under section 221(2)(b) of that Act" in section 55(8C)(b) shows).

28. The Upper Tribunal was unimpressed by Mr Elliott's objection, describing the argument in paragraph [54] of the UT Decision as "entirely circular because it assumes that the deeming effect of Regulation 80(5) does not extend to FA 2014, which we have found to be incorrect." The Upper Tribunal added (ibid):

> "Indeed, Mr Elliott's construction would itself lead to the peculiar result that a Regulation 80 determination could be the subject of an appeal (because he accepts that Regulation 80(5) applies to that extent), but that appeal would not relate to any disputed tax for the purposes of FA 2014 or Section 55(8C) to (8D)."

29. The core of the Upper Tribunal's reasoning on the effect of regulation 80(5) is to be found in the UT Decision at [50] to [51], which it is convenient to set out at this point:

> "50. In our view, the clear effect of Regulation 80(5) is to treat the determination as an assessment for the purposes of section 221(3), so that the tax charged under it is treated as arising "in consequence of ...[an] assessment to tax appealed against". The Parts of the TMA 1970 to which Regulation 80(5) applies include within them section 31 TMA, with the result that the determination is treated as an assessment which can be appealed under section 31(1)(d). They also include section 55(8B) to (8D),which disapplies the normal postponement rules in relation to the disputed tax specified in an APN.
>
> 51. Regulation 80(5) and section 221 do not refer to each other because they do not need to. The machinery for the assessment, appeal, collection and recovery of tax is contained within those parts of the TMA to which Regulation 80(5) is expressed to

> apply. It is not contained within some purpose-built code set out in FA 2014. So, when Regulation 80(5) makes a Regulation 80 determination subject to that machinery as if it were an assessment, and as if the tax determined in it were income tax charged on the employer, that is sufficient in drafting terms to bring the tax charged under the determination within section 221(3). That means in turn that when the draftsman of section 55(8C) disapplies postponement in respect of "the disputed tax specified in the notice under section 221(2)(b)", the operation of that provision extends to the tax in a PAYE determination which has been appealed against, which is to be treated for the purposes of the assessment, appeal and collection provisions (being contained in the TMA 1970) as an assessment to tax appealed against."

30. The Company's central submission to us is that the Upper Tribunal erred in holding that the term "disputed tax" includes an amount stated in a regulation 80 determination. Mr Elliott takes as his starting point the proposition that the term must have the same meaning in section 55 of TMA 1970 and section 221 of FA 2014 for the legislation to operate coherently. He goes on to submit that the source of the term "disputed tax" is to be found in section 221 of the 2014 Act, as an integral part of the APN regime which was then introduced as a separate code. The amendments made in the 2014 Act to section 55 of TMA 1970 are of a consequential nature, and merely import the concept of "disputed tax", as defined in section 221(3), for the purposes of subsections 55(8B) to (8D) of TMA 1970. Accordingly, since the deeming in regulation 80(5) is not expressed to apply for the purpose of section 221 of the 2014 Act, there is no basis upon which to apply an expanded definition of "assessment" in section 221(3). The ordinary technical meaning of "assessment" denotes an assessment to tax, which a regulation 80 determination is not. Indeed, if it were, the deeming in regulation 80(5) would not be necessary. The problem for HMRC, says Mr Elliott, is that the deeming in regulation 80(5) does not go as far as they wish, but in the absence of an express provision which extends the deeming to encompass the APN regime in FA 2014 there is no legitimate process of interpretation by which the gap can be filled.

31. These submissions were attractively presented by Mr Elliott, but for the reasons which follow I find them unconvincing.

32. Taking the matter in stages, my starting point is that income tax is a "relevant tax" for the purposes of Part 4 of FA 2014: see section 200(a). Next, section 203(a) defines "tax appeal" in Part 4 as meaning "an appeal under section 31 of TMA 1970… including an appeal under that section by virtue of regulations under Part 11 of ITEPA 2003 (PAYE)". The PAYE Regulations are made under Part 11 of ITEPA 2003, and the effect of regulation 80(5), on any view, is to treat a regulation 80 PAYE determination as if it were an assessment for the purposes of, inter alia, an appeal under section 31 of TMA 1970. It follows that the Company's appeal against the section 80 determination made against it on 17 February 2016 was a "tax appeal" for the purposes of the APN regime in Chapter 3 of Part 4 of FA 2014. So much is rightly conceded by Mr Elliott.

33. Turning now to the three conditions which must be satisfied before HMRC can give an APN, there is no dispute that Conditions B and C were satisfied when the PAYE APN was given to the Company on 19 July 2016. The chosen arrangements were DOTAS

arrangements, and they gave rise to an asserted tax advantage. Condition A was also satisfied, because the Company had made a "tax appeal… in relation to a relevant tax" which had not yet been determined by the FTT. The tax appeal was, of course, the Company's appeal against the regulation 80 determination, which is admittedly brought within the scope of the APN regime by the deeming effect of regulation 80(5) read in conjunction with the definition of "tax appeal" in section 203(a) of the 2014 Act. Accordingly, HMRC were in principle entitled to give an APN to the Company in relation to the pending tax appeal.

34. By virtue of section 221 of FA 2014, the APN given by HMRC to the Company had to specify "the disputed tax": see subsections (1) and (2)(b). So far as relevant, the definition of "the disputed tax" in subsection (3) is "so much of the amount of the charge to tax arising in consequence of… the… assessment to tax appealed against… 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."

35. As I have already indicated, there is no disagreement about the quantum of the determination of the disputed tax by HMRC, if it is once accepted that the tax charged by a regulation 80 determination can fall within the definition of that term. It seems clear to me, as it did to both Tribunals below, that when one reaches this critical stage in the analysis there can be no real doubt about the answer. In the context of an admitted tax appeal, where all three Conditions for the giving of an APN are satisfied, it would stultify the statutory scheme enacted by Parliament if the tax charged by the regulation 80 determination were not "disputed tax" within the meaning of section 221(3). Since the definition of "tax appeal" makes it clear that Parliament intended appeals against regulation 80 determinations to fall within the scope of the APN regime, I can see no rational basis on which Parliament could have intended to negate that result on the ground that there could never be any "disputed tax" in such a case. If at all possible, therefore, the legislation must be construed in a way which accords with Parliament's evident intention that an APN founded on a regulation 80 determination should be effective to ensure the counteraction of the denied advantage as determined by an officer of HMRC. As the FTT rightly perceived, this is the minimum that a purposive construction of the APN regime requires.

36. In my view, there is no difficulty in construing section 221(3) so as to conform with Parliament's evident intention. Since tax appeals against regulation 80 PAYE determinations are clearly brought within the scope of Condition A in section 219, in the way in which I have described, and since Conditions B and C were also satisfied, the entitlement of HMRC to give an APN to the Company was established. The provisions of section 221 as to the content of the notice are therefore of an ancillary nature, and they must be interpreted so as to give effect to, rather than contradict, that entitlement. Accordingly, the reference to the "assessment to tax appealed against" in the definition of "the disputed tax" in section 221(3) must be read as including a regulation 80 determination. There was no need for section 221 to spell this out explicitly, because regulation 80(5) already provides for such a determination to be treated as an assessment for the purposes of the appeal provisions in TMA 1970. On the required assumption that the Company's appeal against the regulation 80 determination is to be treated in the same way as an appeal against an assessment to tax, the language of section 221(3) can only reasonably be read as including such

appeals. Another way of making the same point would be to say that, read in context, the words "assessment to tax" in section 221(3)(a) must include a section 80 determination which by virtue of regulation 80(5) is subject to Parts 4 and 5 of TMA 1970 as if it were an assessment.

37. Furthermore, this interpretation does not in my opinion involve any inconsistency between the deeming required by regulation 80(5) and the meaning of "the disputed tax" in section 221 of the 2014 Act. The deeming in regulation 80(5) is indeed confined to the specified Parts of TMA 1970, but that deeming, read in conjunction with section 203(a) of the 2014 Act, is sufficient to ensure that an appeal against a regulation 80 determination is a "tax appeal" for the purposes of the APN regime. That in turn means that Condition A for the giving of an APN will be satisfied in cases of the present type, which in turn means that the definition of "the disputed tax" in section 221 must be construed accordingly in order to avoid an absurd result. Nor, on this approach, is there any tension or inconsistency between the definition of "the disputed tax" in section 221(3), properly understood, and the further reference to "the disputed tax" in section 55(8C)(b) of TMA 1970, as introduced by section 224 of the 2014 Act. As one would expect, the two provisions were clearly designed to work in harmony, as is made clear by the internal cross-reference to "the disputed tax specified in the notice under section 221(2)(b)".

38. In conclusion, I should briefly refer to some further points from which Mr Elliott sought to derive some support for his argument.

39. First, he repeated a submission made to the Upper Tribunal that it would not be surprising if Parliament had deliberately chosen to exclude tax charged under regulation 80 from the scope of the APN provisions. The reason for this is that PAYE is a collection mechanism which requires the employer to discharge the tax liability of another person, namely the employee, and in such circumstances it might be unduly harsh to require advance payment of the tax by the employer. I have no hesitation in rejecting this submission. As the facts of the present case well illustrate, there is nothing unusual about tax avoidance schemes in which companies and their directors or employees seek to arrange for the payment of remuneration in a way that avoids liability to income tax and/or NICs. It is not plausible to suppose that Parliament would have deliberately chosen to exclude schemes of that nature from the ambit of the APN regime. Nor is it right to say that there is no benefit to the employer in participation in such schemes. Quite apart from the fact that the financial interests of the employer and the director or employee will often be closely aligned, particularly if the latter is a shareholder, there is also likely to be a cash-flow advantage to the employer in being able to pay what is effectively remuneration without deduction of tax or NICs.

40. Secondly, Mr Elliott placed some reliance on section 221(6) of the 2014 Act, which says that in the section "a reference to an assessment to tax, in relation to inheritance tax, is to a determination". It was suggested that this shows that, when the draftsman wished to extend the normal meaning of an assessment to tax for the purposes of section 221, he did so explicitly. Again, however, I am satisfied that there is nothing in this point. Inheritance tax has a separate structure and procedural machinery of its own, nor is it a tax to which TMA 1970 applies (those taxes being income tax, corporation tax and capital gains tax). Accordingly, it was necessary to make express provision if determinations of liability to inheritance tax made under section 221 of the Inheritance Tax Act 1984 were to be brought within the scope of the APN legislation. By contrast,

the PAYE system forms an integral part of the law of income tax, and regulation 80(5) of the PAYE Regulations already deems a regulation 80 determination to be an assessment for the relevant purposes of TMA 1970. There was therefore no need for the draftsman to make further explicit provision to that effect.

41. Thirdly, Mr Elliott suggested that if Parliament had wished to bring PAYE within the scope of the APN legislation, it would have said so expressly and not left its inclusion to be inferred or implied. Again, I disagree. The definition of "tax appeal" in section 203(a) of FA 2014 shows that the draftsman had the appeal machinery of the PAYE Regulations well in mind, including regulation 80(5). This alone was enough to ensure that PAYE appeals potentially fell within the scope of the APN provisions, and no further express provision to that effect was needed.

Conclusion

42. I would accordingly dismiss the Company's appeal.

Lord Justice Arnold:

43. I agree.

Lady Justice King:

44. I also agree.