

## Legality and operation of Accelerated Payment Notice legislation (R (on the application of Rowe and others) v Revenue and Customs Commissioners)

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**Tax analysis:** Keith Gordon, barrister at Temple Tax Chambers, considers the case of R (on the application of Rowe and others) v Revenue and Customs Commissioners, which dealt with questions about the legality and the operation of the Accelerated Payment Notice (APN) legislation in the Finance Act 2014.

### Original news

*R (on the application of Rowe and others) v Revenue and Customs Commissioners; R (on the application of Vital Nut Co Ltd and others) v Revenue and Customs Commissioners* [\[2017\] EWCA Civ 2105](#)

### What was this case about?

This was the long-awaited Court of Appeal decision concerning the legality and the operation of the APN (and Partner Payment Notice (PPN)) legislation in the [Finance Act 2014](#).

Mr Rowe was a member of a film partnership which had entered into tax avoidance arrangements which were being challenged by HMRC. The present case concerned PPNs issued to Mr Rowe and his partners seeking payment of the tax ahead of the final resolution of the dispute between HMRC and the partnership.

Vital Nut was also in dispute with HMRC. Its dispute centred on the corporation tax deductions available on its contributions to an Employer-Funded (or Financed) Retirement Benefits Scheme. Its APN had been issued to secure payment to HMRC of the corporation tax in dispute.

One key distinction between the two cases was that the partnership in Rowe had received a closure notice (and, therefore, there had been a prior determination by HMRC that the film scheme was not effective for tax purposes), whereas Vital Nut's enquiry is still ongoing.

The Court of Appeal had to consider a number of distinct challenges to the APN/PPN legislation and HMRC's decisions to issue the notices in the particular cases.

### What did the court decide?

The court dismissed each line of argument raised by the taxpayers. In particular, it concluded that the issue of the notices was not unreasonable, disproportionate, ultra vires or otherwise unfair. Nor did it breach the principles of natural justice or Article 1 of the First Protocol to the European Convention of Human Rights.

The taxpayers in *Rowe* also raised a specific argument that related to the line of cases including *Cotter v Revenue and Customs Commissioners* [\[2013\] UKSC 69](#), [\[2013\] STC 2480](#), and *R (on the application of De Silva and another) v Revenue and Customs Commissioners* [\[2017\] UKSC 74](#), [\[2017\] STC 2483](#). This too failed (in the light of the Court of Appeal's decision in *De Silva* as subsequently upheld by the Supreme Court).

Vital Nut also argued that there had been an improper consideration of the case by the officer who issued the APN. But this too was rejected by the court on the basis that the officer was most likely to have reached the same conclusion had the correct approach been taken.

### Does this leave any questions open for further judicial reviews in relation to APNs/PPNs?

Absolutely. In the judgment of Lady Justice Arden there are a number of instances where HMRC's arguments concerning the application of the legislation were rejected by the court but where HMRC had done enough in the particular cases before the court to defeat the challenges being made.

In particular, at para [50], her Ladyship recognised the APN/PPN powers to be particularly extensive and that this implicitly required them to be exercised (by HMRC) and supervised (by the courts) with caution. In other words, it is not sufficient for HMRC to point to the statutory conditions for a notice to be satisfied, there has to be an additional safeguard to ensure that they are being used appropriately in any particular case.

One concern expressed by many taxpayers is that the APN/PPN powers are being used as a cost-effective alternative to a proper investigation by HMRC, given the latter's lack of resources. Lady Justice Arden made it clear at para [55] that such an approach would amount to an abuse of power, but noted that there was insufficient evidence that such a

concern was merited in the particular cases before her. I suspect that whatever the truth of the matter it will always be extremely difficult in all cases to make good such an argument due to the lack of evidence.

Where taxpayers might have more joy is in relation to the role taken by the designated officer when issuing an APN/PPN. Contrary to the High Court (in *Vital Nut*), Lady Justice Arden made it clear at para [62] that the officer must 'be positively satisfied' that the amount of tax being sought is in fact due. Indeed, at para [67], it is made quite clear that APNs/PPNs may not usually be made at early stages of an enquiry because the officer cannot issue a notice without 'having diligently weighed up...all the information available and not before, and the designated officer has no reason to doubt that information'. At para [69], Lady Justice Arden made it clear that the burden of proof falls on HMRC.

One complaint about the APN/PPN legislation is that HMRC are using it without any regard to the ability of taxpayers to fund the tax being demanded. HMRC point to the fact that they will defer payment obligations in cases of hardship (without necessarily conceding their entitlement to penalties for late payment). However, at para [91], Lady Justice Arden said that that was not enough and that 'taxpayers should not be required to comply with APNs/PPNs where the result would be arbitrary or oppressive'.

At para [112], her Ladyship makes it clear that HMRC should have explained the basis of their calculation as to any taxpayer's additional liability. That was satisfied in the present cases but might not be so more generally.

Furthermore, it is widely known that the standard APN and PPN template used by HMRC is not entirely in accordance with the legislation, and might well render the notices as defective. That argument was not raised in *Rowe* or *Vital Nut* and therefore did not feature in the court's analysis.

However, the point was aired in another recent judicial review hearing (*R (on the application of Broomfield) v HMRC* [2017] EWHC 2926 (Admin)), albeit at the permission stage only—the decision focused on Follower Notices (FNs) rather than APNs and PPNs, but the same principles apply. This could present taxpayers with another limb with which to challenge any notices, although in many cases HMRC can remedy the situation simply by reissuing the notices in a form which complies with the legislation.

Also relevant is a point made (strictly obiter) by Lady Justice Arden concerning the correct approach to be followed in FN cases. As her ladyship makes clear at para [41], follower notices may be issued only where an earlier case has 'effectively determined' the case to which the FN is intended to cover. As demonstrated in *Broomfield*, HMRC are currently issuing FNs more widely including cases where taxpayers have a wholly independent line of challenge. Given that many APNs/PPNs are issued on the back of FNs, this provides another angle with which to challenge an APN/PPN.

## What are the practical implications of this case?

The reason why the decision was long-awaited was because there are so many other cases involving APNs/PPNs (and also FNs) which the courts have stockpiled pending the determination of the *Rowe* and *Vital Nut* case. Of course, there is a real possibility of *Rowe* and *Vital Nut* being taken to the Supreme Court, meaning that those other cases will be held back for some considerable further time.

Furthermore, one issue arising from the Court of Appeal's judgment which will merit further judicial scrutiny is the apparent belief by the court that the statutory representations which may be made by a taxpayer (within the 90-day period from the date of receipt of a notice) will be considered by the same designated officer who issued the notice in the first place. This appears to be a misreading of the statutory code and could lead to further arguments on behalf of taxpayers about the unfairness of the code.

*Interviewed by Alex Heshmaty.*

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