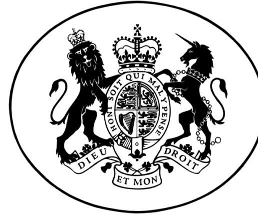
{2017} UKFTT 0829 (TC)



TC06224

Appeal number: TC/2016/01937

INCOME TAX – Understated Partner Tax - Accelerated Partner Payment - Partner Payment Notice (PPN) –- appeal against Penalty under paragraph 7 of Schedule 32 and Section 226 of Finance Act 2014 for late payment of sum under the PPN – Jurisdiction to consider validity of PPN and amount on appeal against penalty – Procedural Validity of PPN & Penalty notice - Reasonable Excuse and Special Circumstances under Schedule 56 of Finance Act 2009 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DAVID BEADLE **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE RUPERT JONES

Sitting in public at Taylor House, London on 2 October 2017

With further documents and submissions submitted by both parties on 3, 13 and 16 October 2017

Keith Gordon and Ximena Montes Manzano Counsel for the Appellant instructed by Jefferies Law LLP

Aparna Nathan, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. The appellant, David Beadle, appeals against a penalty issued against him by HMRC on 16 July 2015. The penalty was for late payment of a sum due under a partner payment notice (“PPN”) issued to him on 17 October 2014 and confirmed on 14 May 2015. Payment of the sum was due 30 days after notification of the confirmation of the PPN (ie. by mid-June 2015) but not made by the appellant until shortly after the penalty was issued on 16 July 2015.

2. The penalty was in the amount of £5,002.74, calculated at 5% of the tax due of £100,054.80 for the year ending 5 April 2005.

Preliminary Issue Decision

3. This decision cannot be read in isolation but is to be read together with the Preliminary Issue Decision of Judge Jonathan Richards dated 5 July 2017 – *David Beadle v HMRC* [2017] UKFTT 544 (TC). For the reasons set out within that decision, the Judge concluded at a preliminary hearing that the Tribunal has no jurisdiction in this penalty appeal to determine whether the figure of understated partner tax stated on the PPN is the lawful figure, and if not, what is the lawful figure.

Evidence

4. The Tribunal received three Lever Arch files of documents for the hearing: two from HMRC and one from the appellant.

5. The appellant produced a witness statement in support of the appeal, signed and dated 18 September 2017, served on 20 September 2017.

The appellant’s witness statement

6. Material parts of the appellant’s statement provide as follows:

> 2. I received a partner payment notice dated 17 October 2014 ("PPN") that showed an amount payable of £100,054.80. I made representations to HMRC dated 5 January 2015. HMRC responded to those representations in a letter dated 14 May 2015. HMRC's letter informed me that if I did not make the payment within a period of 30 days of the date of the letter (14 May 2015) then penalties would be charged. I have been told (by New Dawn Tax Partnership) that the law says penalties will be charged if a payment is not made within a 30 day period beginning with the day on which I was notified under paragraph 5 to Schedule 32 of HMRC's determination. I am told (by New Dawn Tax Partnership) that the day I was notified may not be the same date as the date of the letter so I am not sure what the actual correct due date was to avoid a penalty although the penalty assessment (dated 16 July 2015) itself states the payment was due on 12 June 2015.

3. My representations of 5 January 2015 (that New Dawn Tax Partnership drafted for me) included in Ground 3 confirmation that by that time I was a claimant in a civil action against HMRC. I gave the case reference as *Barry Knibbs & Others -v- Commissioners For Her Majesty's Revenue And Customs* LHC-2014-0016561. I referred to particulars of the claim that I understood HMRC had in their possession. I had seen those particulars before I instructed Jefferies Essex LLP to instigate my claim against HMRC. I noted that David Ewart QC was instructed in my civil claim and I was aware of that before I instructed Jefferies Essex LLP to instigate my claim against HMRC. As I noted in my letter, I believed the lawful amount shown in the PPN should be zero.

4. I sent HMRC a letter before claim dated 28 May 2015. HMRC responded in a letter dated 15 June 2015.

5. I did not in fact make the payment of £100,054.80 until a short time after I had received the penalty notice dated 16 July 2015.

6. My letters to HMRC dated 23 August 2015 and 12 November 2015 (both of which were drafted for me by New Dawn Tax Partnership) set out why I did not make payment before the due date.

7. Service of this statement, 12 days before the hearing, was said by HMRC to be in breach of the Tribunal's directions dated 18 August 2017 which were in the following terms:

> 4.Mr Beadle may, no more than 28 days prior to the substantive hearing, send HMRC (with a copy to the Tribunal) a statement of what he considers to be relevant facts relating to his underlying tax position and that of Ingenious Film Partners LLP that, in his view, demonstrate that HMRC calculated the amount of accelerated partner payment due from him incorrectly.
>
> 5. Given the Tribunal's conclusion as to its jurisdiction set out in its decision of 6 July 2017, the Tribunal will not discharge Mr Beadle's penalty on the grounds that HMRC calculated the accelerated partner payment incorrectly. However, the Tribunal will, at the hearing, hear submissions as to what, if any, findings of fact it should make on matters referred to in Direction 4 in case its conclusion on the scope of its jurisdiction is reversed on appeal. HMRC should, therefore, at the hearing, be in a position to explain to the Tribunal which matters on Mr Beadle's statement are agreed and which are not.

8. The Judge's reasons for these directions were as follows:

> 3………However, for reasons set out at [3] of the Interlocutory Decision, I consider that the Upper Tribunal should have the benefit of full findings of fact in Mr Beadle's appeal before it deals with an appeal against my decision on the preliminary issue. That is why, in paragraph [3] and paragraph [56(2)] of the Interlocutory Decision, I extended the deadline for Mr Beadle to apply for permission to appeal in relation to the preliminary issue until after the entirety of his appeal had been determined. Were there to be an appeal to the Upper Tribunal before necessary findings of fact are made, there is a danger that there will be delay in the determination of all matters relevant to Mr Beadle's appeal: the familiar potential drawback of any decision to deal with a point as a preliminary issue.

4. I also consider that it would be possible to make full findings of fact in Mr Beadle's appeal in relatively short order. The Tribunal's letter of 6 July 2017 envisaged that a hearing would take place two to three months after it was sent and I regard that as practicable for a "basic" appeal such as this. By contrast, the alternative course that Mr Beadle is advocating would involve much more delay. Even if this Tribunal granted permission to appeal (and no application has been received to date), a hearing in the Upper Tribunal is likely to be several months away at least. Moreover, whatever the Upper Tribunal's conclusion, there would still need to be an additional hearing before this Tribunal to determine the facts relevant to Mr Beadle's appeal.

Admissibility of the statement

9. HMRC objected to the admission of the appellant's witness statement for the reasons: a) that it was served in breach of the Tribunal's directions; b) it took the evidence no further than the contents of the existing documents; but that c) they had indicated in correspondence that they wished to cross examine the appellant upon it but that it was said that he would be absent abroad on the day of the hearing. In particular, Ms Nathan submitted she would have wished to cross examine the appellant on paragraph 2 of the statement and what the appellant knew or might reasonably have believed to have been the date by which the PPN payment was due.

10. The appellant did not attend the hearing so was not available for cross examination upon his statement.

11. Following oral argument at the outset of the hearing, the Tribunal decided that it would admit this evidence with its reasons to follow.

12. The reasons for admitting the statement under Rule 15 of the Tribunal Rules are that: a) the service of the statement 14 days before the hearing was not in breach of the direction of 18 August 2017 which states 'no more than 28 days'. Even if the direction was intended to read 'no less than 28 days' 14 days was sufficient time for HMRC to consider the statement which they clearly had done so; b) it was a short statement containing very little material that was not evidenced elsewhere in the papers and was largely not in dispute; c) the issue as to the appellant's belief or otherwise as to the date by which payment was due was not central to the appeal and the issue of the date by which the PPN was to be paid could be determined by inspection of the documents themselves and submissions on fact and law. In his statement the appellant does not state or suggest that he believed he had or had indeed made payment of the PPN within the deadline. The evidence simply goes to whether the 30-day deadline for payment, occurring some-time in June 2015, was correctly stated within the PPN as being 12 June 2015.

13. The Tribunal is satisfied that the contents of the witness statement are accurate to the best of the appellant's knowledge and belief and finds them as facts with this exception. Given that the appellant did not attend the hearing for cross examination, the Tribunal will give no weight as to his evidence regarding 'not being sure' as to the due date by which the amount due under the PPN was to be paid. The Tribunal is not satisfied, in the absence of hearing from the appellant, that he was confused as to the due date.

14. In the circumstances, the Tribunal simply finds that the appellant was informed by his advisers, after the event, that the due date for the accelerated partner payment set out in the penalty notice as 12 June 2015 may have been incorrect.

15. The appellant also served a 'Statement of Relevant Facts' on 20 September 2017 upon which HMRC commented on 25 September 2017. A copy of the statement of Relevant Facts with HMRC's comments is appended to this decision at Appendix A.

16. The Tribunal is not able to place any weight upon any evidence or fact within this statement which is disputed by HMRC when some of the statement contains submissions of law and the appellant was not available for cross examination on factual matters.

17. Therefore, for the avoidance of doubt, the Tribunal finds as facts those matters within Appendix A which are agreed between the parties but not those matters which are in dispute upon which the Tribunal makes no finding.

18. The tribunal finds the following further facts.

The Facts

19. The background facts are set out at paragraphs 4 – 10 of the Preliminary Issue Decision of Judge Jonathan Richards issued on 5 July 2017. They are summarised below.

20. The appellant was a participant in a marketed tax avoidance scheme involving a partnership (Ingenious Film Partners LLP) in the year ending 5 April 2005.

21. The partnership entered into arrangements (which were "DOTAS arrangements" for the purposes of s219(5) of Finance Act 2014) by which it was claimed that a trading loss was realised for that year. The appellant claimed to carry back his share of that loss to reduce his taxable income for the tax year 2001-02 and obtained relief by way of repayment of approximately £100,000 calculated by reference to tax originally paid for the 2001-02 tax year.

22. HMRC opened an enquiry into the partnership's tax return for, among others, the tax year 2004-05. On 30 November 2012, HMRC issued the LLP with a closure notice reducing the LLP's trading loss to nil.

23. The appellant received a letter dated 3 October 2014 informing him that he would soon be receiving a PPN in relation to his involvement in the partnership scheme in the 2004-05 tax year. The letter enclosed information sheets (entitled "CC/FS24- Tax avoidance schemes-accelerated payments") which set out the consequences of non-payment of the PPNs.

24. On 17 October 2014, HMRC issued the appellant with the PPN. That document required the appellant to pay an accelerated partner payment of £100,054.80.

25. The document stated that it was a Partnership Payment Notice issued under Part 4 Chapter 3 and Schedule 32 of the Finance Act 2014 (Sch 32 FA 2014) for the year ended 5 April 2005. The document specified the subparagraph of paragraph 3 Sch 32 FA 2014 by virtue of which the notice was given: stating it to be paragraph 3(5)(b)– the arrangements are DOTAS arrangements. The document specified that payment was required to be made of £100,054.80; by 20 January 2015 or on a later date if representations were made under paragraph 5 of Sch 32.

26. The document explained the effect of paragraphs 5 and 6, and of the amendments made by sections 224 and 225: it stated, inter alia, that the taxpayer cannot appeal against the notice but that representations may be made as to whether the conditions have been met for issuing the notice and the deadline for doing so.

27. The notice explained the payment due date as being 20 January 2015 or, if having made representations these did not result in the notice being completely withdrawn then, the later of 20 January 2015 or 30 days after notification of the confirmation of the decision. Therefore, the payment requirements within the PPN are described in accordance with the statutory scheme set out in paragraphs 5 and 6 of Sch 32 of FA 2014. The notice therefore explained the effect of non-payment of the amount due under the PPN.

28. The document stated: 'You have no right to apply to us or to a tribunal to postpone the payment of any understated partner tax to which this notice relates. If a court or tribunal later decides that our view of the effect of the DOTAS arrangements is incorrect then we would normally be required to repay the amount (or part of the amount) that you paid under this notice'. It went on to deal with the protection of the revenue pending further appeals. These provisions are described in accordance with sections 224 and 225 of FA 2014.

29. The notice explained the financial consequences for not paying on time. The additional sums which become due for late payment are referred to as surcharges rather than penalties. The first surcharge of 5% of the tax still owed is said to become payable if the tax was not paid within 28 days of the due date (rather than the taxpayer becoming liable to a penalty of 5% of the tax unpaid at the end of the payment period – ie. the due date).

30. To the extent these are errors in describing the effect of paragraph 7 of Sch 32 as applied to section 226 FA 2014, they are repeated in the reminder letter of 5 December 2014 but largely corrected in the PPN confirmation decision of 14 May 2015. The Tribunal considers the legal consequences of this below.

31. A letter reminding the appellant of the deadline for payment of the sums due pursuant to the PPN was sent on 5 December 2014 by HMRC. This also:

(a) set out the due date for payment of the amount due under the PPN; and

(b) stated that late payment would result in additional amounts (described as surcharges rather than penalties) being due (described as becoming payable if

payment is not made within 28 days of the date it is due rather than becoming payable if not made by the due date).

32. At some time in 2014 (and before 5 January 2015) the appellant filed a Claim in the Chancery Division against HMRC claiming to have suffered a loss for the purposes of income tax for the tax year 2004-2005. The appellant's claim was joined with others to that of Mr Barry Knibbs and remains before the High Court awaiting determination.

33. The appellant made in-time representations by letter dated 5 January 2015 against the validity of the PPN on that basis that:

(a) The amount of "understated tax" specified in the notice (which determined the amount of accelerated partner payment due under the PPN) was not due as matter of law;

(b) Condition B in paragraph 3(3) of Schedule 32 of FA 2014 ("Schedule 32") was not met.

34. The appellant was informed by letter dated 14 May 2015 from HMRC that the representations were rejected and the PPN was confirmed on the basis that each of Conditions A, B & C was met. Payment was required within 30 days beginning with the date of the letter or the period of 90 days beginning on the day on which the PPN was given, whichever was the later. The letter stated that penalties would be charged in respect of payments not made before that date and reference was made to the original PPN for further details of penalty charges. Given the fact that 90 days had already expired since the PPN was given on 17 October 2014, a reasonable taxpayer would read the letter as stating that the payment was required within 30 days of 14 May 2015.

35. The deadline for payment of 30 days following the date of the confirmation letter may be in error - rather the effect of paragraph 6(5)(b)(ii) of Sch 32 FA 2014 is that it was 30 days after the relevant partner was notified of the decision. The legal consequences of this are considered below.

36. On 28 May 2015 the appellant wrote to HMRC with a letter before claim in a proposed claim for judicial review with the details of the decision challenged as follows:

> (1) the decision made on 14 May 2015 by HMRC not to reduce the understated Tax as specified in the disputed PPN; and
>
> (2) the decision made on 14 May 2015 by HMRC that the disputed PPN was not unlawful.

37. No judicial review challenge to the PPN or its confirmation has ever been pursued by the appellant.

38. The appellant failed to pay the sum due of £100,054.80 within 30 days of the confirmation of the PPN on 14 May 2015. He made the payment shortly after the Penalty notice was issued on 16 July 2015 and at least two months after being notified of the confirmation of the PPN on 14 May 2015.

39. That the appellant made the PPN payment late and outside the payment period of 30 days following notification of the confirmation on 14 May 2015 is not in dispute. The appellant has not stated when the confirmation letter dated 14 May 2015 was received and it is therefore presumed to have been received on 15 May 2015 in the post. Therefore the 30-day deadline for payment is likely to have fallen on 14 June 2015 (rather than 12 June 2015 or some later date, if the confirmation letter was not received until a later date).

40. A penalty notice was issued to the appellant in respect of the non-payment of the PPN on 16 July 2015 in the amount of £5,002.74 for the year ending 5 April 2005 this being 5% of the tax due under the PPN which had not been paid by the due date. It is that penalty notice which is the subject of this appeal. The penalty notice stated that an accelerated partner payment of £100,054.80 was due on 12 June 2015. The legal consequences of the potential error as to the due date are considered below.

41. The appellant made payment of the PPN shortly after the notice of 16 July 2015 as he stated in his witness statement. The fact of late payment outside the 30-day deadline is not in dispute.

42. By letter dated 23 August 2015, the appellant appealed the penalty for late payment of the amount due under the PPN. His letter included the following

"The reasonable excuse is that I believe, based upon leading QC advice, that HMRC have breached their statutory duty, owed to me under paragraph 4(1) of schedule 1A of TMA, in regards to claims I made to carry back losses for tax purposes to earlier years. I have issued one or more high court claims where HMRC is the defendant. If such claims succeed then HMRC shall be ordered to give effect to my carry back claims in full. The grounds of the High court claims are substantive, not fanciful and HMRC have not applied to have the claims struck out. If the carry back claims have to be given effect in full, as I believe they do, then the amount payable under each notice could only lawfully be zero and no late payment would have occurred."

43. By letter dated 4 September 2015, HMRC responded to the appellant's letter of appeal giving their view of the matter and offered him a review of the decision.

44. The offer of a review was accepted by HMRC in a letter dated 15 September 2015.

45. The appellant wrote to HMRC on 12 November 2015 to make further representations. His letter included the following statements:

"I wish to make it very clear at the outset that my late payment under the PPN (for an amount of potential tax) was not due to insufficiency of funds or missing a payment date due to an unforeseen event. The issues involved in the late payment arise from a complex underlying

interpretations of tax law which I believe means that the amount, HMRC alleged as payable, was unlawful and therefore not properly due under statute.

It goes without saying that if the amount payable is shown, by my ongoing High Court action against HMRC, to be unlawful then a penalty cannot be lawful either. I therefore reserve all rights in that respect.

….

I have explained to HMRC that my reason why I should be excused from penalty for late payment (ie. In Judge Medd's word 'my excuse') is that I have a genuinely held and honest belief based on ratio of the Supreme Court and based on the opinion of an eminent QC often used by HMRC, that the amount HMRC have told me is payable under the issued PPN is unlawful. Further I have an outstanding claim against HMRC at the High Court which will prove, if the High Court claim is successful, the amount HMRC have told me is payable under the PPN was unlawful.

Further HMRC had received my claim for losses, gave effect to my claim and failed – in my opinion based on advice – to issue a relevant enquiry notice under paragraph 5 of Schedule 1A of TMA into my claim- again all prior to the issue of the PPN and therefore before any due date for payment of the PPN. Finally, the decision of Justice Sales (as was) in *De Silva* did not provide any judicial authority on HMRC statutory duty under paragraph 4(1) of Schedule 1A TMA and so the ratio of the Supreme Court in *Cotter* had not been overridden by *De Silva* and I was able to rely on a binding unanimous judgment of the Supreme Court. In any event I was aware that the Court of Appeal had granted permission for an appeal for the decision of Justice Sales and such permission requires there to be an arguable case by the taxpayer.

The only question to be answered in law is therefore whether the reason for late payment I have put forward is itself reasonable."

46. HMRC's review concluded that the appellant had no reasonable excuse for late-payment of the PPN and upheld the penalty. The outcome of the review was communicated by letter dated 18 March 2016 in which HMRC considered and rejected the appellant's submissions on reasonable excuse and special circumstances / special reduction.

47. On 4 April 2016 the appellant appealed against the penalty on the grounds: 1) the PPN was a nullity in law as the partnership return had not been made and / or the appellant is not a partner of the partnership; 2) Further and alternatively, the amount payable under the PPN should have been zero so that the penalty should also have been zero; 3) he had a reasonable excuse for not making a payment so that it should be cancelled by virtue of paragraph 16 of Schedule 56 of the Finance Act 2009; 4) HMRC erred in law in failing to consider that there were special circumstances under paragraph 9 of Schedule 56 of the Finance Act 2009 which should have reduced the penalty.

48. A preliminary hearing took place on 12 and 13 June 2017. As set out above, in his Preliminary Issue Decision, dated 5 July 2017 Judge Jonathan Richards decided that the Tribunal had no jurisdiction to consider grounds of appeal 1) and 2) in this appeal.

The Law

Accelerated Payment Notices and Partner Payment Notices: Generally

49. The purpose of the accelerated payment and partner payment regime is to remove the cash flow advantage of participating in tax avoidance schemes and, by necessary implication, provide that cash flow advantage to the Exchequer pending the determination of a substantive tax dispute. This was explained by Simler J in *Rowe v HMRC* [2015] EWHC 2293 *(Admin)*:

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

50. The circumstances in which a PPN may be issued are set out at paragraph 3 of Schedule 32 to the Finance Act 2014 ("FA 2014"). Paragraph 3 provides that a PPN may be issued if conditions A to C are met.

51. Condition A is that a tax enquiry is in progress in relation to the partnership return or that an appeal has been made in relation to an amendment to the partnership return or a conclusion stated in a closure notice closing an enquiry into the partnership return.

52. Condition B is that the return or, as relevant, the appeal is made on the basis that a particular tax advantage ("asserted advantage") results from particular arrangements ("the chosen arrangements").

53. Condition C is that one or more of the stipulated requirements are met. The relevant stipulated condition for the purposes of the appeal is that the chosen arrangements are DOTAS arrangements (paragraph 3(5)(b) of Schedule 32).

54. Paragraph 4(1) of Schedule 32 imposes requirements as to the contents of a PPN. The notice must:

(a) specify the paragraph or paragraphs of paragraph 3(5) by virtue of which the notice is given,

(b) specify the payment [(if any)] required to be made under paragraph 6, . . .

(c) explain the effect of paragraphs 5 and 6, and of the amendments made by sections 224 and 225 (so far as relating to the relevant tax in relation to which the partner payment notice is given) [, and

(d) if the denied advantage consists of or includes an asserted surrenderable amount, specify that amount and any action which is required to be taken in respect of it under paragraph 6A].

55. The relevant partner may make "representations" regarding the PPN to HMRC but these are limited by paragraph 5 of Schedule 32 FA 2014 to the following:

> "(2) The relevant partner has 90 days beginning with the day that notice is given to send written representations to HMRC—
>
> (a) objecting to the notice on the grounds that Condition A, B or C in that paragraph was not met,
>
> (b) objecting to the amount specified in the notice under paragraph 4(1)(b), or
>
> (c) objecting to the amount specified in the notice under paragraph 4(1)(d)."

56. HMRC must consider the representations and either confirm or withdraw the PPN (if the representations were made under paragraph 5(2)(a) Schedule 32 of the FA 2014) or confirm the amount specified, amend the amount specified or remove the amount specified in the PPN (if the representations are made under paragraph 5(2)(b) or (c) FA 2014).

57. The scope of the right to make representations was considered by Green J in *Walapu v HMRC* [2016] EWHC 658:

> "[72] Fifth, Mr Southern QC submitted that the scope of the right of representation was in fact overly narrow. This was a highly abstract argument and not one backed up with evidence. When asked for illustrations of this fairness deficit he gave by way of example the following matters that a person might wish to make representation about: personal circumstances; time to pay; abuse arguments for instance complaining that HMRC was seeking to avoid issuing an assessment etc. There is in my view nothing in this point. The evidence is that HMRC are ready to listen to 'personal circumstances' concerns and will, in a proper case, consider alternative payment arrangements. This already happens quite independently of the statutory representation process. Mr Akash Nawbatt, for the Revenue, drew my attention to the explanation given by the Revenue in Rowe and recorded in the judgment by Simler J (at [65]) which he submitted applied equally to APNs issued during the course of an enquiry:
>
> > '[65] Moreover the scope of representations (extending to the statutory basis for the PPN and the amount, as identified in Sch 32 para 5) is adequate to ensure that fairness is preserved. This allows representations to be made challenging the rationality of the designated officer's determination, based on his information and belief, both as to the efficacy of the tax avoidance arrangements and as to the amount. For example, as Mr Eadie QC submitted, if there was clear judicial authority (at whatever level) that a particular tax scheme was legally effective to produce the tax advantage asserted, that would be a basis for challenging the rationality of the officer's determination in relation to a PPN involving the identical tax scheme. However, it does not allow representations on the wider basis contended for by the claimants, in effect challenging the merits of the decision by reference to the efficacy of the tax avoidance scheme itself. The

merits of the underlying tax dispute is a matter to be dealt with in the statutory appeal. I agree with Mr Eadie that affording such a right would be in- consistent both with the purpose of the preserved statutory appeal rights, and the limited nature of the representations allowed under FA 2014. It is no part of the statutory scheme that before giving a PPN, there must be some final determination of the merits of the underlying tax avoidance scheme itself.'

[73] In this paragraph Simler J is recording her acceptance of the argument that the right to make representation would include any arguments that touch upon the statutory ground but which may also be couched in recognisable public law grounds such as irrationality. The example she gives is irrational behaviour going to 'efficacy' (ie of the tax scheme) and to computation. She does however carefully differentiate such arguments from those going to the ultimate merits. An APN is, by its nature, a provisional decision which may be rescinded (and the moneys obtained repaid with interest) if the final decision favours the taxpayer. As the judge inferred, to permit the representation process to become in effect the test bed for the final result would run counter to the objective of the Finance Act 2014 and to the retained appeal structure which follows on from the assessment."

58. Where a partner has been issued with a PPN they must make a payment ('the accelerated partner payment') to HMRC of that amount by the end of the payment period (paragraph 6(2) & (4) of Schedule 32). Paragraph 4(2) requires the payment made under paragraph 6 to be an amount equal to the amount which a designated HRMC officer determines, to the best of their information and belief, as the understated partner tax.

59. The payment period for the amount due under the PPN to be paid is within 90 days after the date of issue of the PPN unless the recipient of the PPN makes "representations" to HMRC (paragraph 6(5)(a) of Schedule 32 FA 2014).

60. The alternative payment period, relevant for the purposes of this appeal, is the period of 30 days beginning with the day on which the relevant partner was notified under paragraph 5 of HMRC's determination following the representations made (paragraph 6(5)(b)(ii) of Schedule 32).

61. The effective payment period is whichever is the later of these two.

62. In this appeal HMRC notified the appellant by letter dated 14 May 2015 that the PPN and the amount due under had been confirmed following his representations. Therefore the 30-day period began to run from notification by service of HMRC's letter to the appellant, given this was later than 90 days following the PPN of 17 October 2014.

63. There is no statutory right of appeal to this Tribunal against HMRC's decision to issue a PPN – see the Preliminary Issue Decision of Judge Jonathan Richards dated 5 July 2017 at paragraph 18. Since the Tribunal is a creature of statute, it follows that the Tribunal has no jurisdiction to set aside a PPN on the grounds that it was not validly issued (applying the principles set out in *HMRC v Hok Ltd* [2012] UKUT 363 and other cases).

64. However, at footnote 2 to paragraph 37 of his decision in *Kieran O'Donnell v HMRC* [2016] UKFTT 743 (TC), Judge Jonathan Richards considered the Tribunal may have a limited form of jurisdiction to decide whether the content of the notice satisfies the statutory criteria for valid notices set out in paragraph 4 of Schedule 32, what this Tribunal shall describe as the 'procedural validity' of PPNs:

> In recording that the parties were agreed on this issue, I am not suggesting that the Tribunal necessarily has jurisdiction as to the "validity" of PPNs generally. However, it does seem to me that, in order for a penalty to be payable, the Tribunal must be satisfied that the taxpayer has received a PPN (as opposed to some other document). Therefore, if a taxpayer were arguing that a document is not a PPN (for example because it does not contain some or all of the information specified in paragraph 4 of Schedule 32) I believe that the Tribunal may well have jurisdiction to consider that argument.

Penalties

65. Non-payment of the amount due under the PPN by the deadline, ie. within the payment period, gives rise to a liability to penalties by virtue of paragraph 7 of Schedule 32 of the Finance Act 2014. Paragraph 7 applies section 226 of the Act (on the liability to penalties for failure to pay accelerated payments) with some modifications.

66. Paragraph 7 provides:

7 Penalty for failure to comply with partner payment notice
Section 226 (penalty for failure to make accelerated payment on time) applies to accelerated partner payments as if—
(a) references in that section to the accelerated payment were to the accelerated partner payment,
(b) references to P were to the relevant partner, and
(c) "the payment period" had the meaning given by paragraph 6(5).

67. Section 226 of the Finance Act 2014 provides as follows:

226 Penalty for failure to pay accelerated payment
(1) This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while tax enquiry is in progress) (and not withdrawn).

(2) If any amount of the accelerated payment is unpaid at the end of the payment period, P is liable to a penalty of 5% of that amount.
…
(7) Paragraphs 9 to 18 (other than paragraph 11(5)) of Schedule 56 to FA 2009 (provisions which apply to penalties for failures to make payments of tax on time) apply, with any necessary modifications, to a penalty under this section in relation to a failure by P to pay an amount of the accelerated payment as they apply to a penalty under that Schedule in relation to a failure by a person to pay an amount of tax.

68. At paragraph [30] of the decision in *Kieran O'Donnell v HMRC* [2016] UKFTT 743 (TC) Judge Jonathan Richards held that subsections (2)-(7) of section 226 apply, with modifications, to penalties for failures to make payment in relation to PPNs but that subsection (1) does not apply:

> "There is a slight question as to how, if at all, ss226(1) of Finance Act 2014 should be adapted so as to apply to PPNs as distinct from APNs. If s226(1) had some application in relation to PPNs, there would be a logical difficulty, since a PPN is not a species of APN and is not issued "by virtue of section 219(2)(a)" as that section applies only to APNs and not to PPNs. Section 226(1) sets out preconditions that must be satisfied before a penalty can be charged for late payment of an accelerated payment. It sets those preconditions by explaining when s226 "applies" and those preconditions relate to the circumstances in which the APN is issued. By contrast, in paragraph 7 of Schedule 32, Parliament explains that s226 "applies" to accelerated partner payments in a manner similar to the way it applies to accelerated payments. Paragraph 7 does not refer to the PPN at all (and in particular, does not deem the PPN to be an APN which it would need to do if s226(1) was intended to apply to PPNs in a similar way to APNs). Paragraph 7 of Schedule 32, therefore, answers the question of when s226 "applies" in the context of PPNs and there is no need to read s226(1) to decide when it applies. Therefore, I do not consider that s226(1) has any application to PPNs (as distinct from APNs) and, instead the operative provisions set out in s226(2) to s226(7) are to be applied, with the modifications set out in paragraph 7 of Schedule 32 to accelerated partner payments." (emphasis added)

69. In *Rai v HMRC* [2017] UKFTT 0467 (TC), released in June 2017, Judge Richard Thomas decided at paragraphs 31 to 56 of the Tribunal's decision that section 226(1) did apply to PPNs and that as a result of his interpretation of section 226, substantial and additional modifications were required to paragraph 7 of Schedule 32 and to paragraphs of Schedule 56 of the Finance Act 2009. The Judge in *Rai* did not appear to have had the benefit of considering the decision *O'Donnell*.

70. In *O'Donnell* and *Rai* there are therefore two conflicting decisions of the First Tier Tribunal on the application of paragraph 7 of Schedule 32 to section 226 of the FA 2014. This Tribunal prefers the interpretation of Judge Jonathan Richards in *O'Donnell* and considers it to be the correct statement of the law. It provides the simplest solution, is based on sound reasons and properly reflects the drafting of the paragraph 7 of Schedule 32. The Tribunal considers it to represent the intention of Parliament.

71. Applying *O'Donnell* and by reading section 226(2) of the Act as modified by paragraph 7 of Schedule 32, the result is that if any amount of the accelerated partner payment is unpaid at the end of the payment period the partner is liable to a penalty of 5% of the amount under the notice

72. Section 226(7) of the Finance Act 2014 applies paragraphs 9-18 of Schedule 56 of the Finance Act 2009 ('FA 2009'). These provide:

(a) That if a request to defer the penalty is made before the penalty liability arises, the penalty is suspended during the period for which an agreement for deferred payment has been reached (paragraph 10 Schedule 56 of the FA 2009);

(b) That the penalty must be assessed and notified to the person liable (paragraph 11 Schedule 56 FA 2009). HMRC must state in the notice the period in respect of which the penalty is assessed (paragraph 11(1)(c));

(c) There is a right of appeal to the Tribunal in respect of the penalty itself or the amount of the penalty (paragraph 13 Schedule 56 FA 2009);

(d) On an appeal the Tribunal may as appropriate affirm or cancel the penalty or substitute for the decision made by HMRC one that HMRC had the power to make (paragraph 15 Schedule 56 FA 2009);

(e) Where special circumstances exist, the penalty may be reduced (paragraph 9 Schedule 56 FA 2009); and

(f) There is no liability to pay a penalty if the person liable satisfies HMRC or the Tribunal that there is a reasonable excuse for the failure to make a payment (paragraph 16(1) Schedule 56 of the FA 2009).

73. Therefore, the right of appeal to the First Tier Tribunal against the penalty imposed in consequence of a relevant partner's failure (or alleged failure) to make an accelerated partner payment within the payment period is by virtue of section 226 (7) of FA 2014 and paragraph 13 of Sch 56 FA 2009. That is the jurisdiction this Tribunal is exercising.

Reasonable Excuse and Special Circumstances

74. The term "reasonable excuse" for the purpose of paragraph 16(1) is not defined in Schedule 56 FA 2009 or any other relevant statute.

75. However, paragraph 16(2) of Sch 56 sets out the exclusions for what are not considered to constitute a "reasonable excuse": for example, lack of funds is not a reasonable excuse unless attributable to events outside the person's control and reliance on another person to act is not a reasonable excuse unless the person assessed to the penalty took reasonable care to avoid the failure.

76. "Reasonable excuse" was considered in *The Clean Car Company Ltd v The Commissioners of Customs & Excise* [1991] VATTR 234 ('The Clean Car Company'), Judge Medd QC remarked:

> '… the question of whether a particular trader had a reasonable excuse should be judged by the standards of reasonableness which one would expect to be exhibited by a taxpayer who had a responsible attitude to his duties as a taxpayer, but in other respects shared such attributes of the particular appellant as the tribunal considered relevant to the situation being considered.'"

77. In *Raggatt v HMRC* [2016] UKFTT 391 Judge Kempster stated at paragraph [15]:

"…In the current appeal we have applied the test preferred by Lord Donaldson MR in Steptoe[3] ([Customs and Excise Commissioners v Steptoe [1992] STC 757] at 770):

5 "… [I]f the exercise of reasonable foresight and of due diligence and a proper regard for the fact that the tax would become due on a particular date would not have avoided the insufficiency of funds which led to the default, then the taxpayer may well have a reasonable excuse for non-payment, but that excuse will be exhausted by the date on which such foresight, diligence and 10 regard would have overcome the insufficiency of funds.""

78. The term "special circumstances" is not defined in Schedule 56 FA 2009. However, paragraph 9(2)(a) provides that special circumstances do not include ability to pay.

Errors in the PPN or Notices of Assessment to Penalty

15 79. Section 114 Taxes Management Act 1970 ("TMA") provides as follows:

"114 Want of form or errors not to invalidate assessments, etc

(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, 20 if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

(2) An assessment or determination shall not be impeached or affected—

(a) by reason of a mistake therein as to—

25 (i) the name or surname of a person liable, or

(ii) the description of any profits or property, or

(iii) the amount of the tax charged, or

(b) by reason of any variance between the notice and the assessment or determination."

80. The Court of Appeal in *Keith Donaldson v HMRC* [2016] EWCA Civ 761 30 ("*Donaldson*") considered the failure of HMRC to state the period in respect of which the penalty was assessed, a mandatory requirement of paragraph 18(1) of Schedule 55 to the Finance Act 2009. Lord Dyson (Master of the Rolls) observed at paragraphs [23] to [29] as follows:

"**[23]** Ms Murray submits that the notice of the penalty assessment given by HMRC to 35 Mr Donaldson did not state "the period in respect of which the penalty is assessed" as required by para 18(1)(c). It failed to *state* any period at all. The notice should have

stated both the *number of days* in respect of which the penalty was assessed and the *start and end dates* of the period. The notice enabled Mr Donaldson to work out the number of days (90), but it did not *state* that number, nor did it *state* the period.

[24] Mr Vallat's primary submission is ….

5 **[25]** I do not accept Mr Vallat's submission. It is true that in some contexts the phrase "period in respect of which the penalty is assessed" is the relevant tax year. But in the context of a daily penalty, I consider that the most natural interpretation of the phrase is that it refers to the period over which the penalty has been incurred. It would have been surprising if Parliament had not intended that HMRC should notify P how a daily 10 penalty has been calculated i.e. over what period he has incurred the penalty. He needs that information to enable him to decide whether to challenge the assessment of the penalty.

[26] The next question is whether the notice of assessment in this case did state the period in respect of which the daily penalty was assessed. It undoubtedly did not state 15 the start or the end dates of the period. It stated that Mr Donaldson was liable for the maximum penalty of £900 calculated at the rate of £10 per day for a maximum of 90 days. It also referred him to para 4 of the Schedule. In my view, this was not sufficient to satisfy the requirements of para 18(1)(c). The notice did not identify the three month period. Referring him to para 4 of the Schedule (as the notice did) did not enable him to 20 work out (still less by doing so did the notice state) to which three month period it was referring. As I have said at para 8 above, this seems to have been the view of the UT. The notice should have specified the three month period, at least by stating when it started. It should not be a cause for surprise that Parliament intended that the taxpayer should be told not only the amount of the daily penalty, but how it has been calculated 25 i.e. the start and end date of the three month period.

[27] It is, therefore, necessary to consider Mr Vallat's alternative argument that the failure to state the period over which the penalty was incurred does not of itself invalidate the assessment because, despite the defect, the notice was in substance and effect in conformity with para 18 or accorded to its intent and meaning within section 30 114(1) of the Taxes Management Act 1970 ("TMA") Section 114(1) of TMA provides:

"An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or 35 according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

[28] Ms Murray submits that the failure of the notice of assessment to state the period is not saved by section 114(1) because the notice did not state any period at all. In my 40 view, that is not a sufficient answer to the section 114(1) argument. Section 114(1) is expressed in wide terms. It captures a notice "affected by reason of a mistake, defect or *omission* therein" (emphasis added). Thus, the mere fact that the notice omitted to state the period cannot be determinative. An omission to state the period is saved by section 114(1) if the notice is "in substance and effect in conformity with or according to the 45 intent and meaning of the Taxes Acts". In *Pipe v Revenue and Customs Commissioners* [2008] STC 1911 at para 51, Henderson J said that a mistake may be too fundamental

or gross to fall within the scope of the subsection. I agree. The same applies to omissions.

[29] In my view, the failure to state the period in the notice of assessment in the present case falls within the scope of section 114(1). Although the period was not stated, it could be worked out without difficulty. The notice identified the tax year as 2010-11. Mr Donaldson had been told that, if he filed a paper return (as he did), the filing date was 31 October 2011. The SA Reminder document informed him that, since he had not filed his return by the filing date, he had incurred a penalty of £100. It also informed him that, if he did not file his return by 31 January 2012, he would be charged a £10 daily penalty for every day the return was outstanding. This information was reflected in the notice of assessment. Mr Donaldson could have been in no doubt as to the period over which he had incurred a liability for daily penalty."

(emphasis added)

81. It followed that even where any requirement to specify a period in respect of the penalties was mandatory under paragraph 18(1) of Schedule 55 to the Finance Act 2009, a failure to specify the period may be cured by virtue of section 114 TMA.

The appellant's submissions

82. Mr Gordon, leading Ms Montes Manzano, pursued the following arguments on behalf of the appellant in support of the appeal:

(a) the appellant has a reasonable excuse for late payment of the amount sought by the PPN (which would absolve any liability for a penalty, paragraph 16); and/or

(b) there are special circumstances which justify a reduction of the penalty (paragraph 9);

(c) there are procedural challenges against the penalty:

(i) Assuming that section 226 is in fact applicable in the present case – HMRC have the burden to demonstrate that the conditions for a penalty under that section are satisfied (*Michael Burgess & Brimheath Developments Limited v HMRC* [2015] UKUT 578 (TCC)). This includes demonstrating that there is an effective PPN (a matter left at large in *Benton (and others) v HMRC* [2017] UKFTT 396 (TC)), i.e. one that answers to the statutory description including all mandatory requirements of a PPN. In particular, and without prejudice to the burden of proof falling on HMRC, the Appellant cited the inaccurate explanations of the effect of the Finance Act 2014, Schedule 32 ("Schedule 32"), paragraphs 5 and 6 (contrary to paragraph 4(1)(c)).
(ii) The notice of penalty assessment cites the wrong payment date, rendering the notice void as per *Sokoya* [2009] UKFTT 163 (TC).
(iii) The notice of penalty assessment fails to identify the officer who issued it preventing strict compliance with TMA, section 31A(1), (4) (as potentially recognised by the Tribunal in *Rai v HMRC* [2017] UKFTT 0467 (TC)).
(iv) It might also be argued that the penalty assessment is invalid for the simple reason of having been issued automatically (i.e. by computer rather than by an officer or Commissioner) contrary to Schedule 56, paragraph 11(1) (opening

words, when read with paragraph 18(2) and the Commissioners of Revenue & Customs Act 2005, section 4(1)). However, it was recognised that it would probably have been too late for HMRC to obtain any evidence ahead of the hearing to deal with this argument. Therefore, the Appellant would not pursue the point at the hearing if (but only if) the ground would otherwise cause the hearing to be adjourned. Nevertheless, the facts relating the automatic issue of the penalty also underlie part of the Appellant's concerns in relation to special circumstances (see paragraph 25 below).

(d) As stated on the notice of appeal itself, the appellant also took issue with Schedule 32, paragraph 1(4) – given that HMRC have concluded that the appellant was not a partner of a partnership. However, as intimated at the preliminary hearing, this was no longer being pursued in the present case.

Reasonable Excuse

83. Mr Gordon submitted that none of the circumstances in paragraph 16(2) of Schedule 56 FA 2009 applies in the present case and, therefore the reasonable excuse test should be considered by reference to the ordinary meaning of those words rather than any narrower definition as might be applied by HMRC, as explained by Judge Berner in *Barrett v HMRC* [2015] UKFTT 329 (TC) and, in particular at [154], [161] thus:

> The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard. Whilst other cases in the First-tier Tribunal may give an indication of the approach that has been taken in the particular circumstances at issue, those cases cannot be regarded as providing any universal guidance.
>
> …
>
> The test is one of reasonableness. No higher (or lower) standard should be applied. The mere fact that something that could have been done has not been done does not of itself necessarily mean that an individual's conduct in failing to act in a particular way is to be regarded as unreasonable. It is a question of degree having regard to all the circumstances, including the particular circumstances of the individual taxpayer. There can be no universal rule; what might be considered an unreasonable failure on the part of one taxpayer in one set of circumstances might be regarded as not unreasonable in the case of another whose circumstances are different.

84. Mr Gordon relied upon the following combination of circumstances which he submitted provided the appellant with a reasonable excuse for late-payment:

(a) The appellant believed (and still believes) that the PPN sought payment of an excessive amount.
(b) That belief was both objectively and subjectively reasonable:
(i) objectively, because the amount could not, given the facts, be justified on the statute; and

(ii) subjectively, because it was consistent with actions being taken by the appellant elsewhere (in the form of a civil action in the High Court in proceedings in which leading Counsel was instructed by the Appellant and his co-claimants).

Excessive amount

85. Mr Gordon submitted that it was unclear to what extent HMRC acknowledged that the PPN cited an excessive figure and that the gist of their case was simply that the appellant should have pursued judicial review. Equally, it was acknowledged by the appellant that (given the preliminary decision) the Tribunal would not discharge the penalty on this point alone. Nevertheless, the Tribunal undoubtedly had jurisdiction to consider the reasonableness of the appellant's belief so as to determine whether the appellant had a reasonable excuse for non-payment.

86. Mr Gordon submitted that HMRC had ample opportunity to challenge the appellant's loss carry-back claim, but failed to do so. The PPN legislation is designed to accelerate the payment of tax, not to generate new tax liabilities (especially as there would be no statutory mechanism to allow such asserted liabilities to be challenged).

87. He submitted that this is a case where the PPN seeks the *accelerated* payment of an amount that could not otherwise be lawfully claimed by HMRC. The appellant could have challenged the PPN in enforcement proceedings using public law arguments. Even if he cannot use those arguments directly in the Tribunal to resist a penalty for non-payment, the fact that the underlying "debt" is not enforceable is a reasonable excuse for non-payment.

88. Mr Gordon submitted that the entire rationale of the advanced payments legislation is to ensure that (in prescribed cases) "tax in dispute" is held by HMRC rather than by the taxpayer, pending resolution of the dispute. Accelerated and partner payment notices require the *accelerated* payment of a potential liability. They do not create a liability that could not otherwise arise. Thus, the ultimate correctness of an accelerated payment will always be determined at the end of the statutory appeal process governing the dispute (by the decision of the First-tier Tribunal or otherwise). It was believed that this is common ground.

89. Similarly, he submitted, in the case of a PPN, a PPN can only require the additional tax that would become due and payable by the relevant partner.

90. Mr Gordon also argued it was common ground that there is the dichotomy between claims made in a return and those made outside a return. Although the distinction is clear from the statute, the precise dividing line was not known until the Supreme Court's decision in *HMRC v Cotter* [2013] STC 2480. That concluded that there was a distinction between a return and the return *form*. The former consists only of entries that feed into the Self Assessment liability calculation for the year (being the difference determined in section 9(1)(b) and which gives rise to the net liability identified in section 59B(1)).

91. Thus, he submitted, if a claim is made otherwise than in a return, the provisions in Schedule 1A apply in place of the parallel (i.e. not intersecting) provisions elsewhere in the TMA. For example, any enquiry into the claim must be made under Schedule 1A, paragraph 5 rather than under section 9A.

92. Mr Gordon submitted that in the present case (also believed to be common ground) there has been no such paragraph 5 enquiry into the loss carry-back claim made by the appellant. Thus, the consequential provisions of Schedule 1A, paragraphs 7 to 9 cannot be engaged in the present case.

93. Therefore, he submitted that the PPN at the heart of this case cannot seek an accelerated payment of any tax that might fall due under any provision in Schedule 1A.

94. He submitted that one aspect of the Self-Assessment regime is that partnerships do not pay tax. Instead, a partnership tax return must allocate to each partner a share of the partnership's income or losses on which the partner is taxed (or in respect of which the partner can claim relief) on an individual-by-individual basis (sections 12AA and 8(1B)).

95. He submitted that HMRC may open enquiries into individual partners' tax returns (under their ordinary enquiry powers in section 9A) or they may instead open an enquiry into a partnership tax return (section 12AC). Where a partnership enquiry has been opened, there is a deemed section 9A enquiry into the partner's return (section 12AC(6)).

96. Mr Gordon submitted that, akin to closure notices for individuals under section 28A, partnership enquiries are similarly subject to a closure notice procedure (section 28B). Thus, the closure notice will effect any required amendments to the partnership tax return (section 28B(2)). However, axiomatically, that process alone cannot trigger any additional tax liability (since partnership returns themselves do not crystallise any such liability). Consequently, the mandatory nature of section 28B(2) is matched by an obligation to amend each partner's return "so as to give effect to the amendments of the partnership return" (section 28B(4)). See also *Wong Yau Lam and Sau Yau Lam t/a Sunlight Takeaway Meals v HMRC* [2016] UKFTT 659 (TC) at [24]

97. It was submitted that it had sometimes been argued by HMRC that this mandatory duty can somehow be deferred until after the conclusion of any appeal process undertaken by the partnership against the partnership closure notice. However, such an approach would render nugatory the provisions in section 50(9), especially given that sections 28B(4) and 50(9) have their own independent payment obligations (section 59B(5)(b), Schedule 3ZA, paragraphs 8 and 11).

98. For present purposes, Mr Gordon submitted that the state of the law is that the loss carry-back claim was treated as made in the appellant's 2004/05 tax return (and, therefore, HMRC were not required to use the Schedule 1A powers to enquire into the claim). However, notwithstanding all of HMRC's guidance materials to the contrary (see paragraphs A19 to A21 below), this means that there was a requirement to

include the claim in the 2004/05 return and so the effect of the claim should have been taken through the Appellant's Self Assessment calculation for the 2004/05 tax year (i.e. the difference identified in paragraph A3 above).

99. The consequence of that was submitted to be that upon conclusion of the enquiry into the partnership (and the Tribunal's determination of any appeal), the consequential amendments under sections 28B(4) and 50(9) TMA may be made, including amendment to the Appellant's 2004/05 Self-Assessment. Thus, in due course, additional tax could become due by virtue of section 59B(5). He submitted, it is accepted, that any such additional tax could be the subject of an accelerated or partner payment notice (leaving aside the question as to the precise circumstances of when a notice under Schedule 32, paragraph 3(2)(b) is warranted).

100. However, Mr Gordon asked what is the extent of any such additional tax? That must, he said, depend on the circumstances of the case. Ordinarily, a taxpayer's Self Assessment calculation will take into account any claims made in the return. Therefore, should HMRC decide that the claim was not appropriate then the additional tax will be the difference between: a. the figure that HMRC consider that the Self Assessment should have been; and b. the actual Self Assessment.

101. However, Mr Gordon submitted that if (for whatever reason) the actual Self-Assessment did not reflect the claim made (and therefore – by reference to the amounts shown in the return – was excessive), the correction of the return (required by sections 28B(4) and 50(9)) cannot lead to an adjustment of the Self-Assessment figure – because that (as it transpired) already shows the amount that HMRC consider to be correct.

102. That is precisely the situation in which Mr Gordon submitted that the appellant finds himself. The appellant's Self Assessment liability was £1,308.26.

103. However, according to HMRC, the appellant should have effected his loss carry-back claim worth £100,054.80 through the Self Assessment calculation and so the figure, had he done so, would have shown a negative liability of £98,746.54. Having decided that the Appellant was not entitled to his loss relief claim, HMRC now consider that the *correct* Self Assessment liability should have been £1,308.26. This is the same figure that would have been returned had the Appellant not been a member of the partnership.

104. Mr Gordon submitted that is also precisely what was shown on the actual Self Assessment and therefore no correction is lawfully possible to this aspect of the return.

105. Conversely, had the Self Assessment shown a negative liability of £98,746.54 then, of course, he submitted that there would have been an additional liability of £100,054.80, potentially able to be collected via a PPN.

106. He submitted that, to the extent that HMRC now wished to say that the losses are not available to the Appellant, there is no adjustment necessary to the *return* so as

to give effect to HMRC's views. Furthermore, there is no adjustment to the 2004/05 Self Assessment capable of being made so as to give effect to HMRC's views.

107. Mr Gordon submitted, there is nothing on the Appellant's self-assessment that is capable of correction (and any other form of amendment would be *ultra vires*) irrespective of other amendments that are made to the return under section 28B(4). Thus, before and after any amendment, the Self-Assessment figure is and remains £1,308.26.

108. As submitted above, HMRC's arguments and reliance on *De Silva* are said to be inconsistent with HMRC's various calculation sheets. For example, the section 9(1)(b) figure of £1,308.26 is shown in Box 18.3 of the return and is calculated in steps 1 to 4 of the SA151W helpsheet [see Tab 51/477] and in particular Box w83 [see Tab 51/484].

109. From this Self Assessment figure, further adjustments are made to enable an individual to determine the amount actually payable on the following 31 January. Most commonly, such an amount will be reduced by reference to any payments made on account (whether required or otherwise) (section 59B(1)(b) and Box w90). However, also available to reduce the amount payable is the consequence of making a claim which is calculated by reference to an earlier year (Schedule 1B, paragraph 2(6) and Box w88). This w88 box is then copied into Box 18.5 on the return.

110. Mr Gordon submitted that analysis of the Appellant's tax return will demonstrate that Box 18.5 was not completed. However, that is simply because the relief had already been claimed in a separate letter (in accordance with Schedule 1B, paragraph 2(2)) and therefore it was unnecessary (and inappropriate) for a further credit to be claimed. Indeed, HMRC's guidance makes it clear that these boxes should "not include losses which … have [been] previously claimed".

111. Mr Gordon submitted that the above arguments (which do no more than reflect a straightforward interpretation of the statutory code) do nevertheless lead to the question as to how HMRC could lawfully challenge what they consider to be excessive loss carry-back claims.

112. He submitted that the answer is in fact quite clear: carry-back claims are subject to the parallel provisions in Schedule 1A for the simple reason that they do not impact upon the tax payable for the year of the loss (*Cotter*). Schedule 1A contains its own enquiry rules which are similar to those in section 9A (but contain extended time limits so as to dovetail the timing of the return in which any relief might initially be claimed (Schedule 1A, paragraph 5(2)(b))).

113. Mr Gordon submitted that as with the mainstream Self Assessment provisions, HMRC also have a residual right to challenge taxpayers outside the enquiry mechanism in cases where HMRC have made a discovery (section 29). Indeed, section 29(1)(c) expressly deals with the situation where "any relief which has been given is or has become excessive". Furthermore, section 30 contains parallel rules to allow HMRC to recover tax which has been repaid to an individual which HMRC

consider ought not to have been repaid to him. To date, HMRC have chosen not to engage these powers in relation to the Appellant although it should be noted that, *inter alia*, time limits would now preclude HMRC from doing so.

114. In short, Mr Gordon submitted that contrary to the whole purpose and effect of the FA 2014 provisions, the PPN is seeking payment of an amount that could *never* be collected (i.e. rather than representing an *accelerated* payment of a potential future liability, the PPN is creating a tax liability *ex nihilo*). Indeed, at every stage of the statutory process, the only permissible addition to the appellant's self-assessed liability for 2004/05 is nil. Furthermore, there is no other statutory mechanism available to the appellant to allow the Tribunal to determine the correct adjustment to be made to his Self-Assessment.

115. In these circumstances, he submitted, the appellant had every good reason to decline to comply with HMRC's excessive and unjustified demand. Furthermore, this is a case where the appellant did not simply ignore the PPN (although it is submitted that he was entitled to do so).

(a) First, he engaged in the only statutory route of challenge available to him and fully engaged in the process by explaining why the PPN sought an incorrect amount.

(b) Secondly, through the High Court proceedings of which he is a co-claimant, he was actively seeking judicial clarification of the position.

116. Mr Gordon submitted that this conduct is wholly consistent with the "responsible trader" approach as set out by Judge Medd QC in *The Clean Car Co Ltd v HMCE* [1991] VATTR 234 and adopted by this Tribunal (for example in *Perrin v HMRC* [2014] UKFTT 488 (TC) at [87]):

> In my judgment it is an objective test in this sense. One must ask oneself: was what the taxpayer did a reasonable thing for a responsible trader conscious of and intending to comply with his obligations regarding tax, but having the experience and other relevant attributes of the taxpayer and placed in the situation that the taxpayer found himself at the relevant time, a reasonable thing to do?

Other mitigating circumstances

117. Irrespective of the correctness of those arguments, Mr Gordon submitted it was reasonable for the appellant to believe them to be correct. Mr Beadle relied on legal advice given by his tax advisers and Counsel and is currently exercising his right to challenge the PPN in the High Court.

118. Furthermore, it is undoubtedly reasonable to withhold payment if one considers the demand to be excessive (just as the facts show Mr Cotter did when he disputed a tax liability based on the interpretation of similar statutory provisions).

119. He submitted that HMRC's supposedly preferred course of action would require a taxpayer to embark upon judicial review proceedings (which are expensive, lengthy and cumbersome – for both taxpayer and HMRC) and would have still resulted in the

issue of a penalty notice given (as held by the Tribunal in the preliminary decision) the penalty is automatically applied whatever action is or is not taken by the taxpayer. Whilst (by omission) Parliament has undoubtedly required taxpayers to take that route if they wish to challenge a PPN, Parliament *has not* curtailed the Tribunal's jurisdiction insofar as appeals against penalties are concerned.

Section 226 FA 2014

120. Mr Gordon argued that Schedule 32, paragraph 7 expressly applies section 226 FA 2014 which, in turn, applies the procedural provisions of Schedule 56 FA 2009. Other than the limited curtailment of the meaning of "reasonable excuse" in paragraph 16(2), the Tribunal's jurisdiction in relation to penalty appeals is unfettered.

121. Mr Gordon submitted that it should be noted that it was suggested at the preliminary hearing that section 226 applied, but only if one ignored subsection (1) (despite the clear instruction to the contrary in Schedule 32, paragraph 7). This was the view taken by the Tribunal in *O'Donnell v HMRC* [2016] UKFTT 743 (TC). However, Judge Thomas's subsequent decision in *Rai* provides an alternative solution to the drafting infelicities. These competing views as to what was the presumed intention of Parliament demonstrate the difficulty in applying a rectifying construction, even more so given that this is a case of a penal provision where clarity is vital. It is the appellant's view that section 226 cannot apply in the present case.

122. He submitted that it was clear from the Accelerated Payment Notice ("APN") legislation, there are broadly two circumstances in which APNs may be issued: in the course of an enquiry, or whilst an appeal is live. These are the two situations referred to in, respectively, section 219(2)(a) and (b). Section 226 is expressly limited to cases where an APN is given by virtue of section 219(2)(a). (The parenthetical words, as well as the entire phrase "by virtue of …", put it beyond doubt that section 226 is not intended to be engaged in section 219(2)(b) cases.)

123. Mr Gordon submitted that even applying Judge Thomas's rewriting of paragraph 7 in *Rai* (albeit with the correction of his erroneous reference to section 219(3)(a)) provides that section 226 can apply only in paragraph 3(2)(a) cases. There is no possible construction that will permit section 226 to apply in cases where there is no longer an open enquiry. Indeed, there would be no need for any such provision in other cases: that is because other cases can be broadly divided into two categories: live appeals and concluded appeals. For live appeals, the obligation to make any payment of tax will generally be effected by the postponement rules being overridden (see the Taxes Management Act 1970 ("TMA"), section 55(8B)—(8D) as inserted by FA 2014); for concluded appeals, the ordinary obligations to make payment are engaged without any special provision required.

124. He submitted that similarly, in partnership cases, there is a mandatory obligation on HMRC to issue partners with corrections at the same time as the partnership is issued with a closure notice (TMA, section 28B(4)). Such a notice would trigger its own obligation to make payment (TMA, section 59B(5)(b)) and its own potential exposure to a penalty/surcharge (see, for example, Schedule 56, paragraph 1, item

19). The PPN legislation is relevant only to the extent that HMRC consider it reasonable to assume that the appeal will yield a further additional tax liability (*cf* TMA, section 50(9)).

125. Mr Gordon submitted that the present case is a paragraph 3(2)(b) case rather than a paragraph 3(2)(a) case. Therefore, HMRC's right to make a penalty assessment cannot be by virtue of section 226.

Special reduction

126. Mr Gordon submitted that under FA 2009, Schedule 56, paragraph 9, HMRC have a wide discretion to reduce a penalty for special circumstances (except in two circumstances not relevant to the present appeal). No such reduction has been given in the present case.

127. It was the appellant's case that each of the circumstances cited above in relation to reasonable excuse is also applicable in relation to his claim for a special reduction. In addition, the appellant relies upon the procedural challenges identified above.

128. In particular, he submitted that if HMRC are imposing a penalty for non-payment of an amount that is in fact unenforceable (and assuming that that fact alone cannot amount to a reasonable excuse for non-payment) the circumstances must inevitably be so special so as to require any penalty to be mitigated in full.

129. Under paragraph 13(2), a taxpayer has the right of appeal against the amount of any penalty and the Tribunal may make a special reduction of its own. Under paragraph 15(3)(b), however, any independent application by the Tribunal of the special reduction rules is available only if the original decision by HMRC in this regard was flawed.

130. The appellant relied on the approach taken by the Tribunal in *Medway Bond & Storage Company Ltd v HMRC* [2016] UKFTT 169 (TC) at [32] as to the meaning of "flawed".

131. An automated penalty notification (unsurprisingly) involves no exercise of discretion and, therefore, is automatically flawed (see the illustrative case of *Scofield v HMRC* [2011] UKFTT 199 (TC)).

132. Should it prove relevant, Mr Gordon submitted that HMRC's subsequent letter of 4 September 2015, stating HMRC's view, expressly disavowed any entitlement to consider special reduction. That was self-evidently deployed a flawed approach.

133. If, however, (as was suggested in, for example, *Half Penny Accountants Ltd v HMRC* [2016] UKFTT 45 (TC) at [40] although not conceded here) the application of the "flawed" test focuses on the conduct of the internal review instead (at least where one has been carried out), then that too is flawed for the following reasons: (a) the reasons cited by the internal reviewer refer to a judicial review claim whereas in fact the High Court claim is of a different nature. Furthermore, the internal reviewer made no reference to the nature of the claim or the difficulties caused to the Appellant by HMRC in their failure to explain HMRC's position regarding how they calculated

(and justify) the amount payable under the PPN; (b) the internal reviewer has similarly failed to take into account the circumstances of the case involving HMRC pursuing an amount that they could not otherwise recover but for the (abuse of the) accelerated payments legislation; (c) the internal reviewer has also failed to take into account the incorrect date on which the penalty allegedly fell due; (d) in his reference to the *Rowe* decision, the internal reviewer has seemingly "copied and pasted" standard text concerning the then recent development in the case law without considering its relevance to the matter in issue. Indeed, if the decision in *Rowe* has been taken into account then it renders the internal reviewer's decision flawed for taking into account an irrelevant consideration (as the *Rowe* case did not concern itself with the (e) furthermore, the reference to *Rowe* was ostensibly a response to the Appellant's concern that the legislation was new and that a judicial review (*sic*) claim had been made. However, the fact that separate proceedings had *subsequently* been determined by the High Court is no answer to that point; (f) the reference to *Rowe* (whilst irrelevant) purports to be *one* of the reasons why the Appellant's concerns have been rejected. Yet, there are no other reasons given for the internal reviewer's decision, meaning that either: (i) no *relevant* factors were actually taken into consideration; or (ii) the decision is devoid of reasons and therefore unlawful. (g) in any event, as the internal reviewer acknowledges, the *Rowe* decision is subject to appeal and therefore its (disputed) relevance is somewhat limited; (h) finally, the internal reviewer has asserted that "the decision maker was correct in not applying a special reduction" – yet the decision maker was either the HMRC computer (which exercised no discretion) or the officer who subsequently set out HMRC's view (on 4 September 2015) which expressly asserted that special reduction was not even available.

134. For all these reasons, Mr Gordon invited the Tribunal to make the relevant findings of fact in respect of the argument that no additional tax could ever become due and payable and conclude: (a) that the Appellant had a reasonable excuse for non-payment of the amount demanded by the PPN; or (b) in the alternative, there are special circumstances requiring the penalty to be reduced to nil and that HMRC's prior decision on this point was flawed.

HMRC's submissions

135. Ms Nathan, on behalf of HMRC, submitted that the penalty was due and payable by the appellant in the circumstances of this case.

Validity of the PPN and Penalty Notice

136. Ms Nathan submitted that the Tribunal has decided as a preliminary issue that it has no jurisdiction to determine the validity of the PPN in the context of an appeal against a penalty for late payment of a PPN (see the Preliminary Issue Decision). Consequently, the appellant must, in claiming that no penalty is due, base his arguments on grounds other than the validity of the PPN.

137. She submitted that the burden of proof on HMRC is limited to showing the circumstances giving rise to the challenged penalty exist: in other words, that HMRC

need to show that, in the context of PPNs, a PPN was issued, the amount due under the PPN was not paid on time, and the amount of the penalty due for such late payment has been computed in compliance with the statutory provisions (*Nijjar v HMRC* [2016] UKFTT 175 at paragraph [25]).

5 138. HMRC contended that the burden of proof is discharged if the document:

(a) States that it is a PPN (and not some other document) (*O'Donnell* at [37] footnote 2);

(b) On its face specifies or explains (applying where necessary the provisions of section 114 TMA), the matters required by paragraph 4 Sch 32 FA 2014. That 10 no more is required is consistent with the proposition accepted by the FTT that in penalty appeals it lacks jurisdiction to determine whether the PPNs are validly issued i.e. whether the conditions for issuing valid PPNs have in fact been satisfied (see *Beadle; Nijjar* and *Goldenstate Ltd v HMRC* [2017] UKFTT 568 paragraphs [33][34]).

15 139. Ms Nathan submitted that HMRC can discharge the burden of proof in relation to the PPN in question:

(a) The document states that it is a PPN;

(b) The document specifies the paragraph or paragraphs of paragraph 3(5) by virtue of which the notice is given: in this case it is paragraph 3(5)(b) Sch 32 FA 20 2014;

(c) The document specifies the payment required to be made under paragraph 6: in this case, £100,054.80;

(d) The document explains the effect of paragraphs 5 and 6, and of the amendments made by sections 224 and 225: it states, inter alia, that 25 representations may be made and the effect of non-payment of the amount due under the PPN. To the extent that the appellant relies on the inclusion of an incorrect date for payment in claiming that the requirement to explain the effect of paragraphs 5 and 6 Schedule 32 FA 2014 is not met, HMRC contend that the appellant cannot succeed. Section 114 TMA applies to cure such an error. 30 *Donaldson v HMRC* [2016] EWCA Civ 761 at [29] indicates that a failure to comply with a mandatory requirement (e.g. by omitting to include a mandatory requirement in a notice) is capable of being corrected by s114 TMA in circumstances where the taxpayer could have been in no doubt as to the relevant facts determining his liability. HMRC, accordingly contend that as a result of 35 the correspondence between HMRC and the appellant, he can have been in no doubt of the date by which the amount due under the PPN was payable (*HMRC v Bristol & West* [2016] EWCA Civ 397 at paragraphs [24] to [27] and *Mabbutt v HMR*C [2017] UKUT 289).

140. Ms Nathan submitted that the appellant failed to pay the amount due under the 40 PPN by the due date. Accordingly, a penalty is payable (paragraph 7 Schedule 32 and

section 226 FA 2014). HMRC contend that the issue of how section 226 FA 2014 applies in the context of PPNs issued where there is an appeal (rather than an ongoing enquiry) has been decided (in HMRC's submission, correctly) by the FTT in *O'Donnell*.

141. To the extent that it is claimed that the requirements of paragraph 4 Schedule 32 have not been met because the PPN does not identify the officer issuing the PPN, Ms Nathan contended that the appellant is wrong (and is in any event precluded by the Preliminary Issue Decision from raising a point going to the validity of the PPN): there is no express requirement within paragraph 4 Schedule 32 FA 2014 for the issuing officer to be identified. Second, nor is there any express requirement in paragraphs 9-18 Schedule 56 FA 2009 for the penalty issuing officer to be identified. In any event, the appellant was able to correspond in respect of the PPN and penalty given that he was provided with the details of the issuing office and the address.

142. She submitted that at a late stage (by email dated 19 September 2017), the appellant indicated that he may wish to raise as a ground of appeal the manner in which the PPN penalty was issued:

> "The Appellant would also argue that the penalty assessment is invalid for the simple reason of having been issued automatically (i.e. by computer rather than by an officer or Commissioner) contrary to Schedule 56, paragraph 11(1) (opening words, when read with paragraph 18(2) and the Commissioners of Revenue & Customs Act 2005, section 4(1))".

143. Ms Nathan submitted that it was too late in the day for the appellant to be raising a new ground of appeal and the Tribunal was respectfully asked to exclude the ground: allowing the appellant to adduce such a ground of appeal at such a late stage not only prejudiced HMRC in terms of their ability to respond adequately to the late ground, but also risked vacating the listed hearing date given that HMRC would need further time to make factual enquiries into the precise manner in which the PPN penalties are issued.

144. For these reasons, she submitted that permitting the Appellant to raise this late ground would not be consistent with the overriding objective of the Tribunal Rules (rule 2 Tribunal Procedure (First tier Tribunal) Rules 2009). For the present, HMRC submitted that the ground of appeal is flawed in that it confuses the decision to issue a penalty with the implementation of the decision.

Reasonable Excuse

145. Ms Nathan submitted that the appellant's basis for justifying late payment of the amount due under the PPN does not constitute a "reasonable excuse". The appellant's reason for late payment is that he has ongoing litigation which he considers will render the PPN invalid (on a number of grounds). This reason cannot, on any view, be said to come within the ordinary meaning of "reasonable excuse" as described in *'The Clean Car Company'* given that:

(a) it is the appellant's deliberate course of action that results in his non-compliance with the obligation placed upon him by the PPN;

(b) it is difficult to justify the appellant's reason for late payment as consistent with "the standards of reasonableness which one would expect to be exhibited by a taxpayer who has a responsible attitude to his duties as a taxpayer" given that the Appellant's technical challenge in the other proceedings:

(i) ignores the Court of Appeal decision in *De Silva v HMRC* [2016] EWCA Civ 35 (relating to the procedural machinery of enquiring into the losses that underlie loss relief claims in the year in which the losses arise);

(ii) Misinterprets and misapplies the Supreme Court decision in *Cotter v HMRC* [2013] UKSC 69 (which concerned the treatment in the earlier year of a carry back loss relief claim);

(iii) Constitutes an abuse of process by bringing the proceedings otherwise than by way of judicial review;

(iv) Undermines the purpose of the PPN legislation which was, as described in *Rowe*, to ensure that the tax resided with the Exchequer pending the outcome of proceedings to determine whether the tax was indeed due. The appellant's reasoning if accepted would permit any taxpayer to circumvent the evident intention of Parliament as to who should hold the tax pending the final determination of the tax appeal by allowing taxpayer to institute multiple proceedings in different fora.

Excessive Amount

146. Ms Nathan contended that the appellant's submissions on s28B(4) TMA 1970 cannot found a reasonable excuse for not paying the amounts due under the PPN nor do they found special circumstances.

147. She submitted that section 28B(4) is used to amend partners' returns to give effect to the amendments in the s28B(1) and (2) closure notice. It is usual, but not universal, practice per EM7205 to wait until the partnership return is final and make the s28B(4) amendments after any partnership appeal. Where a partnership appeals against the conclusion(s) or amendment(s) in the s28B closure notice:

- if the Tribunal decides the partnership statement as amended by HMRC is already correct, amendments to the partners' returns should be made under s28B(4). If the s28B(4) amendments have already been made before the Tribunal decision, no further amendment is required.

- If the Tribunal decides that the partnership statement as amended by HMRC contains amounts that are excessive or insufficient, either s50(6)(b) or s50(7)(b) is engaged requiring HMRC to amend the partnership statement in line with the Tribunal's decision. Then

s50(9) is engaged requiring HMRC to amend partners' returns to give effect to the reductions under 50(6) or increases under 50(7).

- If HMRC have already made amendments under s28B that are unaffected by the Tribunal's decision, there will be no excessive or insufficient amounts and consequential amendments to partners' returns will fall to be made under s28B(4).

148. She submitted that the question of which section allows HMRC to amend partners' returns depends on the facts of each case and the decision of the tribunal. As is apparent, there is room for s28B(4) and 50(9) to operate in appropriate circumstances.

Whether Special Reduction is due: paragraph 9 Schedule 56 FA 2009

149. Further Ms Nathan submitted that there are no special circumstances warranting a "special reduction" for the purposes of Schedule 56 FA 2009 paragraph 9. The appellant had relied in this regard once again on the fact that he challenges the validity of the PPN on technical grounds in other proceedings. This basis does not easily or at all fall within the concept of "special" circumstances.

Discussion and Decision

150. Consideration of this appeal follows from the Preliminary Issue decision of Judge Jonathan Richards in which the Judge stated the following at paragraph [44]:

> Therefore, in order to determine the "matter in issue" for the purposes of s49D of TMA 1970 in Mr Beadle's appeal, the Tribunal need only decide (i) whether he paid the accelerated partner payment specified in the PPN on time (ii) if not, whether HMRC have correctly calculated the penalty as 5% of the accelerated partner payment specified in the PPN (iii) whether a statutory defence is available and (iv) whether the Tribunal is able to exercise its limited jurisdiction to alter HMRC's decision on "special circumstances". The apparently broadly drafted right of appeal does not require the Tribunal to consider whether HMRC should have calculated the accelerated partner payment differently.

151. In light of the submissions heard at the hearing, and despite the issue not being raised within the appellant's grounds of appeal, the Tribunal would add two further issues to be determined before the four identified above: whether there were a procedurally valid PPN issued by HMRC and whether there was a procedurally valid penalty notice issued by HMRC (ie. did the contents of each notice satisfy the statutory requirements?).

152. The burden of proof is upon HMRC to satisfy the Tribunal in relation to the issues identified above other than those of 'reasonable excuse' and 'special circumstances' where the burden falls upon the appellant.

(i) Was there a procedurally valid PPN – did the contents of the notice meet the statutory requirements?

153. HMRC have satisfied the Tribunal that there was a procedurally valid PPN issued whose contents satisfied the statutory requirements.

154. HMRC have discharged the burden of proof in relation to the PPN in question. The Tribunal has found:

5 (a) The document states that it is a PPN;

(b) The document specifies the paragraph or paragraphs of paragraph 3(5) by virtue of which the notice is given: in this case it is paragraph 3(5)(b) Sch 32 FA 2014 (satisfying the requirement of paragraph 4(1)(a) of Sch 32);

(c) The document specifies the payment required to be made under paragraph 6:
10 in this case, £100,054.80 (satisfying the requirement of paragraph 4(1)(b) of Sch 32);

(d) The document explains the effect of paragraphs 5 and 6 of Sch 32: it states, inter alia, that representations may be made; payments of the accelerated partner payment requiring to be made before the end of the payment period; and the
15 effect of non-payment of the amount due under the PPN. The document also explains the effect of the amendments made by sections 224 and 225 FA 2014 in relation to lack of right to the postponement of payment and protection of the revenue pending appeal (satisfying the requirement of paragraph 4(1)(c) of Sch 32).

20 155. The PPN includes a reasonably accurate statement as to when the accelerated partner payment is due – either by 20 January 2015 or 30 days after the after notification of HMRC's decision following the taxpayer's representations, whichever is the later. This was also explained in the information sheet issued to the appellant with the warning letter on 3 October 2014.

25 156. The appellant took issue with the date of 20 January 2015 being inaccurate as not being 90 days following the date of the original PPN of 17 October 2014 (it appeared to include a grace period of 6 days allowing for 90 days from service by 23 October 2014). Given the appellant served no evidence as to when in fact the PPN was received ie. on a date other than 23 October 2014, the Tribunal cannot be
30 satisfied that 20 January 2015 was an inaccurate date.

157. Furthermore, even if HMRC have given an inaccurate, and overly generous, statement of the deadline for representations then this deadline would be enforceable against them on public law principles. Any misstatement has not in fact prejudiced the appellant's rights, nor would it reasonably do so, so any defect would be capable
35 of being cured under section 114 TMA 1970.

158. The PPN and reminder letter of 5 December 2014 include an incorrect date on which the penalty (described as a surcharge) arises as being after 28 days within the date due for payment rather than the penalty arising if payment is not made by the payment due.

159. Nonetheless, it is not a statutory requirement to include an explanation as to how penalties apply under paragraph 7 of Sch 32 and section 226 FA 2014. There is only the requirement to explain the effect of paragraphs 5 and 6 Schedule 32 FA 2014. Furthermore, the misstatement is largely corrected by the confirmation letter of 14 May 2015 which sets out that penalties will be charged if payment is not made within 90 days of the PPN or 30 days beginning with the date of the letter, whichever is the later.

160. In any event and to the extent necessary, section 114 TMA applies to cure any of the potential errors identified in the PPN. *Donaldson v HMRC* [2016] EWCA Civ 761 at [29] indicates that a failure to comply with a mandatory requirement (e.g. even by omitting to include a mandatory requirement in a notice) is capable of being corrected by s114 TMA in circumstances where the taxpayer could have been in no doubt as to the relevant facts determining his liability.

161. The Tribunal finds that as a result of the correspondence between HMRC and the appellant when read as a whole, he cannot have been in reasonable doubt as to the date by which the amount due under the PPN was payable. To the extent the Tribunal gives any weight to the appellant's witness statement at paragraph 2 he has not suggested in his statement that he was in reasonable doubt at the time of the receipt of the warning letter with information notice (3 October 2014), nor PPN (17 October 2014), nor reminder (5 December 2014) nor confirmation letter (14 May 2015) as to when payment was due. His evidence appears to relate to advice received after the event as to potential errors in dates.

162. The facts of this case do not involve any omission of any requirements but potential and relatively minor errors in dates in notices which resulted in no prejudice to the appellant. These were potential errors of a lesser degree and not mistakes too fundamental or gross to fall within the scope of section 114 TMA.

(ii) Was there a procedurally valid penalty notice issued and did the contents meet the statutory requirements?

163. The first argument the appellant raised was that section 226 FA 2014 did not apply to the appellant's circumstances and no penalty could be raised as section 226(1) FA 2014 required an enquiry to be open (see 219(2)(a) FA 2014) in order that a penalty could apply. No enquiry was open and in progress in relation to the appellant.

164. For the reasons set out above, the Tribunal has found that the reasoning in *O'Donnell* is to be followed and that section 226(1) FA 2014 does not apply to penalties under paragraph 7 Sch 32 FA 2014. Therefore, the appellant's argument proceeds on a mistaken premise. The ability of HMRC to raise a penalty for non-payment of a PPN is not limited to situations where an enquiry is in progress under section 219(2)(a) as suggested by the appellant. Therefore, the penalty notice in question could be lawfully issued.

165. The Penalty Notice of 16 July 2015 stated that the accelerated partner payment was due on 12 June 2015. This appears to have been calculated on payment being due on a 28-day basis from notification of the confirmation of the PPN on 14 May 2015. As a matter of law paragraph 6(5)(b)(ii) and paragraph 5(4)(a) of Sch 32 FA 2014 would provide for payment to be made within 30 days of the relevant partner being *notified* of the confirmation determination (the letter being dated 14 May 2015).

166. The effect of section 7 of the Interpretation Act 1978 and section 115 of the Taxes Management Act 1970 is that the letter of 14 May 2015 is presumed to have been served and notice given on the following day after posting, namely 15 May 2015. There was no other evidence received to suggest that notification was given at a later time. In particular, no evidence was produced by the appellant as to when he received the letter of 14 May 2015 so as to displace any presumption in law. Payment was due 30 days after notification to the appellant of the confirmation decision of 14 May 2015, as was correctly stated within the PPN. This due date was likely to be 14 June 2015 assuming notification on 15 May 2015 by delivery of the letter in the first-class post.

167. Therefore, the Penalty Notice contained an error as to the payment due date, it being likely to be 14 June 2015 and not 12 June 2015. However, the fact that the notice of penalty assessment cites the wrong payment date, does not render the notice void. Mr Gordon did not identify any breach of statutory requirement that the penalty notice states the date on which the payment was due and penalty arose. It may by inference be said to be an incorrect statement of the end of the period in respect of which the penalty was assessed for the purposes of paragraph 11(1)(c) Sch 56 FA 2009.

168. As a result of the range of correspondence between HMRC and the appellant, including the warning letter and information sheet, PPN, reminder letter and confirmation letter of 14 May 2015, he could reasonably have inferred the date by which the amount due under the PPN was payable and a penalty arose.

169. The appellant has not suggested in evidence that he was confused or misled at the time of receiving the PPN as to the payment due date and date on which a penalty arose. The Tribunal is not even satisfied that the Penalty notice left him in doubt. The Tribunal is only satisfied that he was advised after the event that there was a legal argument as to the correct end date for the period of assessment for the penalty.

170. It is worth recalling the appellant had not made payment of the accelerated partner payment by the due date, whether that be 12 or 14 June 2015 and indeed, not at any time before the penalty notice was issued on 16 July 2015.

171. Once again, to the extent required, section 114 TMA would apply to cure such any such error. This is a relatively minor error in a date in a notice which resulted in no prejudice to the appellant. This was a potential error of a lesser degree and not a mistake too fundamental or gross to fall within the scope of section 114 TMA.

172. While neither the PPN nor the notice of penalty assessment identified the officer of HMRC who issued them there was no statutory requirement to do so under either paragraph 4 of Sch 32 of FA 2014 or paragraph 11 of Sch 56 FA 2009. In any event, the appellant was able to correspond in respect of the PPN and penalty given that he was provided with the details of the issuing office and the address.

173. At a late stage (by email dated 19 September 2017), the appellant indicated that he may wish to raise as a ground of appeal the manner in which the PPN penalty was issued:

> "The Appellant would also argue that the penalty assessment is invalid for the simple reason of having been issued automatically (i.e. by computer rather than by an officer or Commissioner) contrary to Schedule 56, paragraph 11(1) (opening words, when read with paragraph 18(2) and the Commissioners of Revenue & Customs Act 2005, section 4(1))".

174. HMRC submitted prior to the hearing that it was too late in the day for the appellant to be raising a new ground of appeal and the Tribunal was respectfully asked to exclude the ground.

175. The Tribunal is satisfied it would have prejudiced the HMRC in terms of their ability to respond adequately to the late ground. For these reasons, the Tribunal would have not permitted the ground to be raised as it was not in accordance with the overriding objective as set out in rule 2 Tribunal Procedure (First tier Tribunal) Rules 2009.

176. Furthermore, in oral argument during the hearing Ms Nathan submitted that the Penalty notice was not generated automatically based upon information she had seen. Letters sent from HMRC dated September 2015 following the appeal against the penalty identify an officer and support this proposition.

177. Nonetheless, there was no need for the Tribunal to determine this point conclusively because Mr Gordon had at the outset of the hearing accepted he would not pursue this ground for the purposes of the appeal.

(iii) Whether he paid the accelerated partner payment specified in the PPN on time

178. There is no dispute that the appellant did not pay the accelerated partner payment specified in the PPN on time ie. within 30 days of notification of confirmation of the decision to uphold the PPN on 14 May 2015. Payment was not made until after the penalty notice was issued on 16 July 2015.

(iv) Whether HMRC have correctly calculated the penalty as 5% of the accelerated partner payment specified in the PPN

179. There is no dispute that the penalty was accurately calculated at 5% of the tax due under the accelerated partner payment.

(v) Whether a statutory defence is available - Reasonable Excuse

180. The starting point in considering whether the appellant has a reasonable excuse is to understand the Parliamentary intent expressed in the PPN legislation. Tribunal Judge Jonathan Richards put it this way at paragraphs 30, 33 and 50 of his Preliminary Issue Decision:

5 30. The PPN regime set out in FA 2014 was part of a closely articulated statutory code whose evident purpose was to deal with what Parliament perceived to be unfair cash flow advantages obtained by users of tax avoidance schemes. In *Rowe and others v HMRC* [2015] EWHC 2293 (Admin), Simler J considered the background to the FA 2014 provisions including (at [20] of the judgment) extracts from the Government's response to a consultation preceding 10 the introduction of legislation that summarised the Government's view as follows:

> The Government's proposals therefore have the simple objective of changing the presumption of where the tax sits, so that anyone who enters into an avoidance scheme will have to pay over the tax in dispute. Simler J's analysis of the background to the statutory provisions led her to the conclusion (set out at [70] of *Rowe*) that:

15
> Parliament has enacted a statutory scheme intended to operate broadly across a wide range of tax avoidance schemes to remove the cash flow advantage pending enquiry and appeal.

…….

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33. In paragraph 5 of Schedule 32, Parliament has prescribed the procedure that a taxpayer dissatisfied with HMRC's determination of the accelerated partner payment must follow. In essence, the taxpayer is given the right only to make representations to HMRC (and those representations can be made only on certain specified grounds). HMRC are required by 25 paragraph 5(2) of Schedule 32 to consider those representations. There is, however, no right to appeal to the Tribunal against HMRC's decision to issue a PPN or against HMRC's determination of the accelerated partner payment specified in the PPN. Although the statutory provisions do not make this express, it is clear that taxpayers are also entitled to seek the remedy of judicial review.

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……………

50. My conclusions as to the effect of the statutory provisions are fortified by considering the purpose for which they were enacted. Parliament has decided that, in tax avoidance situations where particular conditions are met, HMRC should have the right to demand accelerated 35 payment of their determination of the tax in dispute before a court or tribunal has determined the amount of tax, if any, that the taxpayer owes. If Mr Ewart were correct in his submissions the result would be that a taxpayer could simply refuse to pay the accelerated partner payment demanded, wait until HMRC commenced enforcement proceedings and only then argue that HMRC applied a flawed approach to calculating the sum claimed. Moreover, the same 40 arguments could be deployed in penalty proceedings. While courts and tribunals consider these arguments, the taxpayer would retain the use of the tax in dispute. Furthermore, a logical corollary of Mr Beadle's approach would be that taxpayers could always argue in enforcement and penalty proceedings that the underlying tax avoidance scheme succeeded in its objective so that no additional tax could ever be due as a matter of law. In those cases, 45 penalty appeals or enforcement proceedings might turn into "mini trials" on the merits of the avoidance scheme, or at very least might be stayed until a court or tribunal had adjudicated on the efficacy of that scheme. I do not consider that Parliament could have intended any of these results in the context of legislation whose very purpose was to remove cash flow advantages from taxpayers who enter into tax avoidance arrangements.

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181. The Tribunal agrees with adopts this reasoning. Penalty appeals are not to turn into mini-trial of the merits of the avoidance scheme. In the Tribunal's view the same principle extends further: PPN penalty appeals are not to turn into a trial of the merits of the underlying tax liability sought under the PPN, whether this be a challenge to the merits of the avoidance scheme or any other substantive challenge to the tax liability. The substantive challenge can be pursued in extra statutory claims, such as judicial review, or, if available, in statutory appeals to the Tribunal such as against a closure notice and assessment.

182. Notwithstanding the Preliminary Issue Decision as to the limits of the Tribunal's jurisdiction in a PPN penalty appeal, Mr Gordon did continue to seek to challenge the lawfulness of HMRC's conclusion as to the appellant's underlying understated partner tax liability within this penalty appeal.

183. He did this, in effect and in summary, in two ways.

184. First, he argued that the PPN is seeking payment of an amount that could *never* be collected (i.e. rather than representing an *accelerated* payment of a potential future liability, the PPN is creating a tax liability *ex nihilo*) contrary to the whole purpose and effect of the FA 2014 rules. He submitted that at every stage of the statutory process, the only permissible addition to the appellant's self-assessed liability for 2004/05 is nil. Furthermore, he submitted that there is no other statutory mechanism available to the appellant to allow the Tribunal to determine the correct adjustment to be made to his Self-Assessment. As there could never be an amendment to the appellant's self-assessment based on the partnership return, there would could never be an appealable decision to the Tribunal in which the underlying accelerated partnership payment under the PPN could be challenged.

185. Second, he argued that the appellant had a reasonable belief, based upon expert advice, that HMRC's calculation of the underlying understated partner tax for the accelerated partner payment set out within the PPN was unlawful. He submitted that the appellant's reasonable belief formed a reasonable excuse for not paying the sum due under the PPN.

186. The Tribunal rejects both of these arguments for the following reasons.

187. The Tribunal has no jurisdiction in a penalty appeal to hear a challenge to the lawfulness and calculation of the underlying understated partner tax liability and accelerated partner payment set out the PPN for the reasons set out within the Preliminary Issue Decision.

188. There exist alternative ways in which the appellant may challenge the underlying tax liability alleged by HMRC. There exist at least two extra statutory methods which might be pursued. The first is judicial review, which the appellant proposed in his letter before action on 28 May 2015 but did not pursue. The second is his claim currently before the Chancery Division. If necessary, a taxpayer may seek to obtain interim relief from the Courts attempting to stay enforcement or payment of

any sum due pending the outcome of these types of challenge. There may also be arguments that can be raised in defence to any enforcement proceedings.

189. In addition, in circumstances where the enquiry is still open at the time of issue of the PPN a taxpayer may have to await a closure notice, amendment or underlying assessment and take their statutory challenge on appeal to Tribunal. Alternatively, if the enquiry is closed they may take the challenge to the underlying tax liability under the PPN in an appeal against the closure notice, amendment or assessment.

190. However, on the facts of the appellant's case Mr Gordon seeks to argue that there will be no available statutory challenge to the amount sought to be paid under the PPN. He submits there can be no amendment to his self-assessment and partnership return hence the amount claimed in the PPN could never be collected (and there would be no available statutory appeal against the underlying tax liability).

191. Miss Nathan on behalf of HMRC strongly contests the merits of this argument and has relied upon the submissions in relation to section 28B(4) of the TMA as set out above.

192. There is no need for the Tribunal to determine the merits of this argument for the same reasons as above.

193. Even were the Tribunal to accept the appellant's argument that no amendment to the appellant's self-assessment can be made, depriving HMRC of the ability to collect the payment or depriving the appellant of the ability to make any statutory appeal to Tribunal against the alleged understated partner tax liability and opportunity to obtain repayment through this channel, the Tribunal would come to the same conclusion. This type of challenge to the substantive liability must be taken by whatever route available, statutory or otherwise, but in the interim the appellant must pay the sum under the PPN as decreed by Parliament under the FA 2014. If the taxpayer's challenge succeeds then they may obtain a refund or repayment but this does not negate the requirement to pay the sum under the PPN in the interim. He cannot enjoy the benefit of the cash advantage while the substantive challenge is decided.

194. The appellant's first argument cannot provide a reasonable excuse where the availability of judicial review, or a claim in the Chancery Division provides an extra statutory route of challenge to the underlying tax liability sought in the PPN. Indeed, the appellant has pursued just such a Chancery Division claim that may render repayment from HMRC.

195. Therefore, Mr Gordon's first argument, ingenious as it may or may not be, cannot undermine the reasons explained by Judge Jonathan Richards for the Tribunal having no jurisdiction to consider arguments on the underlying partner tax liability in a penalty appeal.

196. Likewise, Mr Gordon's second argument, superficially attractive as it may be, must also fail. The Tribunal will not embark on an exercise of examining the reasonableness of the appellant's belief that the sum set out in the PPN was not

payable in law based on the first argument, the lawfulness of the tax avoidance scheme or any other legal argument.

197. Indeed, there is no evidence that the specific argument raised by Mr Gordon at the hearing is the very same as the legal advice upon which the appellant based his belief that the underlying partner tax was not payable and which is submitted to be a reasonable belief. Nevertheless, even if the appellant's advice and belief were in identical terms, it would make no difference to the Tribunal's decision.

198. In order to do examine the reasonableness of the appellant's belief as to any of the potential legal arguments regarding the underlying partner tax liability, the Tribunal would need to examine the merits of the substantive arguments which it has no jurisdiction to determine. To do so would again run contrary to the Parliamentary intention in the FA 2014. If, the appellant is successful in any challenge to the partner tax liability, by whatever route, he may obtain a repayment or refund of the sum payable under the PPN. In the mean-time, statute provides that he should not have benefit of the cash advantage while this dispute is resolved. The appellant's belief, even if reasonable, in the merits of the underlying challenge to the partner tax liability, in whatever form, cannot be relied upon to found a reasonable excuse for not paying the sum set out in the PPN.

199. Even if the Tribunal had jurisdiction to consider the reasonableness of the belief, there would be evidential difficulties.

200. The Tribunal would need to decide if it was satisfied that the appellant had proved on the balance of probabilities that he had a belief in the merits of the substantive arguments that was reasonable. His witness statement and letters of 23 August 2014 and 12 November 2015 do not go so far as stating that he had a reasonable belief in the merits of any of the legal arguments advanced that the underlying partner tax was not payable. The statement and letters explain that he received professional advice that the sum was not payable and / or he had no liability, he held a genuine and honest belief as to this and he had made a Chancery Division claim from which he expected repayment.

201. Determination of whether the appellant subjectively believed the arguments to be reasonable would also require the Tribunal to hear oral evidence from the appellant and upon which he could be cross examined, which the appellant has not enabled by his absence. It would likely involve the appellant waiving his Legal Professional Privilege as to the legal advice he received on the prospects of his case and the strength of the substantive arguments.

202. There is no need to conduct this exercise. Even if the appellant had a reasonable belief, subjectively, objectively or both, and based upon professional advice, that he was not liable to pay the underlying understated partner tax liability, this could not form a reasonable excuse for failure to pay the PPN within the payment period.

203. Applying the test in the *Clean Car Company*, a reasonable taxpayer in the appellant's position would make payment of the sum under the PPN within the payment period and make whatever challenges (whether statutory or extra statutory) to the underlying liability he or she chose to do in the mean-time. This would be the case, whatever his or her reasonable belief as to the merits of his substantive challenge. If such a challenge were successful then the appellant would receive a refund or repayment but this cannot reasonably excuse making a payment on the sum due under the PPN that Parliament has required should be made in the interim.

204. This is all the more so in circumstances where the appellant had already challenged the substantive liability in his Chancery Division Claim in 2014 and indicated he would pursue a judicial review on 28 May 2015 before payment was due under the PPN by 14 June 2015.

205. The fact is the appellant deliberately chose not to make payment of the PPN within the statutory deadline and only made payment after he received a penalty notice. The Tribunal makes no finding as to whether or not this was a deliberate strategy of the appellant – to incur a penalty so as to initiate a statutory appeal in which to raise the substantive argument – because the appellant gave no evidence and HMRC did not go so far as to suggest this.

206. However, the Tribunal does note that the appellant has not suggested there was any change of circumstances, other than the issue of a penalty notice, between the confirmation of the PPN on 14 May 2015 and his payment, shortly after 16 July 2015, of the sum due which inclined him to make payment when he did. He does not suggest his belief in the merits of the argument had changed so as to prompt him to make payment. Therefore, if he believed it proper to make payment after 16 July 2015, it is likely that the issue of the penalty notice did prompt the appellant to make payment. It is a reasonable inference that the issuing of the penalty notice must have had some effect upon the appellant's mindset to induce payment.

207. If the appellant is to rely on his genuine, and said to be reasonable, belief that he is not liable to the underlying tax as a reasonable excuse not to pay the amount sought under the PPN, it is notable that he decided to pay the sum after the penalty notice was issued given his belief has remained the same since. If this belief were a reasonable excuse, then that reasonable excuse would persist to the time of the hearing and until such a time as any substantive challenge to the liability has failed. There would be no need to make payment of the sum due under the PPN when the appellant did, although he may have had a desire not to see the penalty increase over time, as it would do under the operation of section 226 of the FA 2014. In contrast, to Mr Gordon, the Tribunal does not view the appellant's late compliance with the PPN, in not entirely ignoring payment, as being to his credit. There is no dispute that the payment was deliberately late.

208. The analysis set out above applies to any of the matters relied upon by the appellant as a reasonable excuse for late payment of the sum due under the PPN. The fact that the appellant has ongoing litigation which he considers will render the sum sought under the PPN unlawful (on any number of grounds) does not form a

reasonable excuse for late payment. The taxpayer's actions do not fall within the range of responses of the reasonable taxpayer in the appellant's circumstances. The reasons for late payment do not constitute a "reasonable excuse" as described in *'The Clean Car Company'* given that:

5 (a) it is the appellant's deliberate course of action that results in his non-compliance with the obligation placed upon him by the PPN;

(b) it is difficult to justify the appellant's reason for late payment as consistent with "the standards of reasonableness which one would expect to be exhibited by a taxpayer who has a responsible attitude to his duties as a taxpayer" given the
10 appellant's challenge, and proposed challenge, in other proceedings:

(c) it undermines the purpose of the PPN legislation which was, as described in *Rowe*, to ensure that the tax resided with the Exchequer pending the outcome of proceedings to determine whether the tax was indeed due.

209. The appellant's reasoning, if accepted, would permit any taxpayer to circumvent
15 the evident intention of Parliament as to who should hold the tax pending the final determination of the tax liability by allowing taxpayers to institute multiple proceedings in different fora. It would also result in the Tribunal entertaining collateral challenges to the underlying tax liability in penalty proceedings which cannot have been the Parliamentary intention. The statute requires that the taxpayer
20 in the interim while the underlying liability, if challenged, can be resolved. If the taxpayer is successful in their challenge to the liability they will receive the appropriate rebate from HMRC.

(vi) Whether the Tribunal is able to exercise its limited jurisdiction to alter HMRC's decision on "special circumstances

25 210. For same reasons explored above in relation to reasonable excuse, the Tribunal considers that HMRC's view that the appellant's circumstances did not constitute special circumstances was not flawed. Therefore, there is no jurisdiction to exercise in which to apply a special reduction.

211. The appellant took issue with HMRC not having considered special
30 circumstances before issuing the penalty on 16 July 2015. However, the Tribunal agrees with the decision of Judge Anne Redston in *Bluu Solutions Ltd v HMRC* [2015] UKFTT 0095 (TC) at paragraphs 103-111 and 130-139. Special circumstances do not have to be taken into account before the penalty is issued but can be considered by HMRC at any time after the penalty is raised.

35 212. In its review letter of 18 March 2016, HMRC considered special circumstances and stated the fact that the Accelerated Payments legislation was new and the appellant had made a judicial review claim against HRMC did not constitute special circumstances that would warrant a special reduction of the penalty.

213. The Tribunal would only be permitted to interfere with that decision if it
40 considered it be flawed on judicial review grounds. The Tribunal accepts Mr

Gordon's submissions that the reasoning on special reduction contained in the letter is bare and does appear to 'copy and paste' a response regarding judicial review claims akin to *Rowe*.

214. Nonetheless, consideration was given by the HMRC officer in the review letter of 18 March 2016 to the appellant's ongoing litigation and underlying belief in underlying merits of his claim that he had no tax liability in rejecting the claim to reasonable excuse and the same reasoning would inevitably have been relied upon to reject the claim for a special reduction.

215. The Tribunal is of the view that it is inevitable that the decision maker in HMRC, like the Tribunal itself, would have come to the same conclusion that no special circumstances applied to enable a special reduction of the penalty.

Conclusion

216. For the above reasons, the appellant's appeal should be dismissed. The penalty is affirmed.

217. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 17 NOVEMBER 2017

Appendix A

	Appellant's Statements of Fact	HMRC's response as at 25 September 2017
1.	The Defendants[3] issued the Appellant, under the provisions of FA 2014, Schedule 32, paragraph 7 and section 226(2), with a late payment penalty in the amount of £5,002.74 and that was dated 16 July 2015 (the "**Penalty**") in regard to an accelerated partner payment of £100,054.80 that was due on or around 12 June 2015.	Agreed
2	The Penalty assessment did not name, on the face of it, the officer who issued it.	Agreed, but the penalty notice did note the office from which it was sent, to which the Appellant addressed his appeal which was received and responded to.
3	The Appellant appealed against the decision of HMRC that the penalty be issued and as to the amount of the penalty payable by the Appellant. The grounds also included that the Appellant had a reasonable excuse and/or that special circumstances existed.	Agreed
4	The Defendants did not consider the FA2009, Schedule 56, paragraph 9 'special circumstances' issue before the issue of the Penalty	Not admitted.
5	The Defendants did not consider the FA2009, Schedule 56, paragraph 9 'special circumstances' issue in their view of the matter letter dated 4 September 2015	In the letter referred to, HMRC state that they do not consider that special reduction applies.
6	The Appellant calculated his own self-assessment for the purposes of his 2004/05 self-assessment return	Agreed that the Appellant submitted his own calculation.
7	The Appellant's made a claim (the "**claim**") to carry back losses of £250,137 in a letter to the Defendants. The claim was made under the provisions of ICTA 1988,	Agreed that a loss carry back claim was made by the Appellant. The provisions relevant to a claim to carry back losses include paragraph 2 of Schedule 1B.

	section 381. All the losses were to be carried back to 2001/02. The claim is governed by the provisions of TMA 1970, Schedule 1B, paragraph 2	
8	The Defendants gave effect to the carry back claim by making a repayment to him of £100,054.80 before the Appellant submitted his 2004/05 return (and consequently before he made his self-assessment for that year in the return form)	Agreed as to timing.
9	In Box 18.3 on Page 7 of the Appellant's 2004/05 tax return a figure of £1,308.26 was entered	Agreed.
10	Box 18.3 is headed "*Total tax, Class 4 NICs and Student Loan Repayment due for 2004-05 before you made any payments on account (put the amount in brackets if an overpayment)*"	Agreed
11	The figure in Box 18.3 is the Appellant's self-assessment for 2004/05 for the purposes of TMA 1970, sections 9(1)	Not agreed. HMRC do not consider the Appellant's self-assessment to be limited to the figure inserted in Box 18.3.
12	The Appellant complied with the requirement of TMA 1970, section 9(1) such that the provisions of TMA 1970, section 9(3) were not applicable	Agreed that the Appellant's return included a self-assessment and that HMRC did not need to make the Appellant's assessment, but see the Respondents' response to 11.
13	The Defendants did not attempt, pursuant to the provisions of TMA 1970, section 9(3), to make an assessment on the Appellant's behalf on the basis of the information contained in the return and send the Appellant a copy of the assessment which if they had would have been treated as a 2004/05 self-assessment of the Appellant as included in his return for 2004/05	Agreed

14	The Defendants produced the Tax Calculation Guide 2004/05 (Form SA151w). It is in the form of a worksheet. The worksheet confirms on Page 2 that "*The working sheet in this Guide will take you through all the necessary steps to get to your tax bill.*" and "*The working sheet sets off any tax deductions, allowances and reliefs in the way most beneficial to you, and charges tax at the rates set by law...*". The Guide confirms on Page 2 that the calculation process it set out, in Steps 1 to 4, will alone give the taxpayer the figure to enter into Box 18.3 on Page 7 of the Tax Return. Step 4 ends on Page 9 of the Guide and the figure in Box w83 is transferred to Box 18.3	The passage quoted is accurate in so far as it goes. A complete copy of SA151w is in the Bundle
15	There was no box in Steps 1 to 4 for the Appellant to have included the relief for the carry back of losses (to reduce his income in 2004/05 by £250,137) or the effect of such claim (of £100,054.80) in the calculation of his 2004/05 self-assessment	See the response at 14 above
16	Box w88 on TCG Page 11 is the box whose figure is copied to Box 18.5 on Page 7 of the 2004/05 return. It is within Step 5 of the calculation process and not part of the calculation process set out in Steps 1 to 4	See the response at 14 above
17	In Box 4.14 on Page P1 of the Appellant's 2004/05 tax return a figure of £250,137 was entered (in respect of the losses said to have been suffered in relation to Ingenious Film Partners LLP)	Agreed
18	In Box 4.15 on Page P1 of the Appellant's 2004/05 tax return a figure of £0 is shown (in	No figure has been entered

	relation to Ingenious Film Partners LLP losses)	
19	In Box 4.16 on Page P1 of the Appellant's 2004/05 tax return a figure of £250,137 was entered (in relation to Ingenious Film Partners LLP losses)	Agreed
20	In Box 4.17 on Page P1 of the Appellant's 2004/05 tax return a figure of £0 is shown (in relation to Ingenious Film Partners LLP losses)	No figure has been entered
21	Since the Appellant submitted his 2004/05 (including his self-assessment of £1,308.26 as included in his return at Box 18.3) no amendments to the Appellant's self-calculated 2004/05 self-assessment of £1,308.26 have been made (or have attempted to have been made) under TMA 1970, sections 9ZA, 9ZB (which is a section that specifically permits amendments for obvious errors or omissions in the return including self-assessment (whether errors of principle, arithmetical mistakes or otherwise), 9C, 12ABA, 12ABB, 28A, 28B, 28C, 30B	Agreed that HMRC has not yet amended the Appellant's 2004/05 self assessment. HMRC is not precluded from doing so. Additionally, the italicised words "including self-assessment" do not appear in the original version of s9ZB legislation (Para 2 Sch 29 FA 2001) that would, in principle, apply to the loss carry back claim.
22	The Defendants have not issued a discovery assessment under TMA 1970, section 29 in relation to the claim and/or the Appellant's self-assessment for 2004/05 or issued an assessment under TMA 1970, section 30.	Agreed
23	The Appellant's self-assessment of £1,308.26 was made on the basis and/or in accordance with the practice generally prevailing at the time, as set out in SA151w, when he submitted his return	The Respondents do not understand the relevance of "practice generally prevailing" in relation to the entry made by the Appellant in Box 18.3 of his return.
24	The current SA100 (Tax Return), SA103 (Partnership Pages) and SA110 worksheet (Tax Calculation Guide	A copy of the tax return pages are in the Bundle

	equivalent) issued by HMRC still do not permit carry back loss relief to be included in the self-assessment calculation of the year the loss was suffered	
25	The Defendants did not open a TMA 1970, Schedule 1A, paragraph 5(1) in relation to the claim. The Defendants are now out of time to issue such an enquiry	Agreed that no Schedule 1, para 5(1) enquiry was opened into the claim.
26	The Defendants have no power to issue an assessment under TMA 1970, Schedule 1A, paragraph 8(1) in respect of the claim	The paragraph consists of a contention of law.
27	The Defendants opened an enquiry into the Ingenious Film Partners LLP 2004/05 partnership return under the provisions of TMA 1970, section 12AC (the "Partnership Enquiry")	Agreed
28	The opening of the Partnership Enquiry resulted, pursuant to TMA 1970, section 12AC(6), in a deemed TMA 1970, section 9A enquiry being opened on the same day into the Appellant's 2004/05 return (including his self-assessment)	Agreed
29	The Defendants issued, under TMA 1970, section 28B a closure notice in respect of the Partnership Enquiry on 30 November 2012. The closure notice denied all trading losses claimed by the partnership for 2004/05	Agreed
30	The same closure notice stated that one of HMRC's conclusion was that "the partnership was not carrying on a trade or business with a view to profit and is not within the charge to Income Tax."	Agreed
31	The Defendants have not issued a section TMA1970, section 28B(4) notice to the	Agreed that no notice has yet been issued under section 28B(4). HMRC are not

	Appellant notwithstanding there is a mandatory duty placed on them by section 28B(4) once they have issued a section 28B(2) notice to give effect, in the partner's return, to the amendments made at the end of the Partnership Enquiry (and notwithstanding that if subsequent amendments are made by a Tribunal on an appeal of the section 28B(2) closure notice then the Defendants have a further mandatory duty placed upon them to give effect, in the partner's return, to the amendments made to the post section 28B(2) partnership statement at the conclusion of the appeal process (under TMA 1970, section 50(9))	precluded from issuing such a notice in future. HMRC's approach is set out in guidance at EM7205 which is applicable to the Appellant's circumstances (**BD2/54/547**); and see the judgment in *Cockayne* at [42] and [43] **(BA/)** .
32	The Partner Payment Notice related to the claim and for which the Penalty under appeal relates (the "**PPN**") was issued to the Appellant by the Defendants on 17 October 2014 (which was after 30 November 2012 which is the date on which the Defendants concluded that **all** trading losses claimed by the partnership were to be denied in full)	Agreed
33	Immediately before the PPN was issued the Appellant's [self-calculated and unamended] self-assessment for 2004/05 (for the purposes of TMA 1970 section 9(1)) was £1,308.26	Admitted that the entry at Box 18.3 of the Appellant's return has not been amended. However, see the response at 11 above.
34	Immediately before the PPN was issued the relevant amount for the purposes of TMA section 59B(1)(a) was £1,308.26	See the response at 33 above.

35	Immediately before the PPN was issued the Appellant's self-calculated and un-amended self-assessment for 2004/05 never as a matter of fact included in its calculation, in respect of the claim, relief of £250,137 against his income in 2004/05 and/or a reduction of £100,054.80 in the amount he was chargeable to tax for 2004/05	See the response at 33 above.
36	Immediately before the PPN was issued the Appellant's self-calculated and unamended self-assessment for 2004/05 was the same figure it would have been had the claim not been made or the claim had been made and the Defendants had denied **all** losses claimed	See the response at 33 above.
37	The payment required by the PPN as shown on the PPN (as required by FA 2014, Schedule 32, paragraph 4(1)(b)) was £100,054.80. The relevant designated officer had therefore determined that £100,054.80 of additional tax would become due and payable by the Appellant if the claim was counteracted to the extent he/she had determined	Agreed as to the amount.
38	In HMRC's skeleton in *Cockayne* [[2016] EWHC 3230 (Admin)], Aparna Nathan (on 7 November 2016) for HMRC submitted in response to Mrs Cockayne's argument that, in relation to a Partner Payment Notice, no amount of tax could become due and payable as a result of the cancellation of the impugned tax advantage (which related to a ICTA 1988, section 381 carry back loss claim by her in respect of losses said to have been suffered by Ingenious Film	HMRC maintain the position they took in *Cockayne* but submit that the inclusion of material relating to that case is inappropriate in this appeal.

	Partners in 2004/05) that in fact additional tax would become due and payable on a counteraction from the application of TMA 1970, sections 28B(4) and 59B(5)	
39	For the purposes of the calculation required by FA 2014. Schedule 32, paragraph 4(2) the PPN implicitly evidences that all the losses of £250,137 claimed by the Appellant were to be counteracted (i.e. the claim was to be denied in full)	Agreed that the losses claimed by the Appellant were to be counteracted in full
40	For the purposes of the calculation required by FA 2014. Schedule 32, paragraph 4(2) the counteracting of all the losses would remove, as part of the adjustments required, any loss relief (or effect of such loss relief) previously included in the Appellant's 2004/05 self assessment of which there was none	HMRC agree that the counteraction of all the losses would remove all the losses included in the Appellant's 2004/05 return ie the share of the LLP's losses that are included in Box 4.16 of his return.
41	For the purposes of the calculation required by FA 2014. Schedule 32, paragraph 4(2) the Appellant's 2004/05 self-assessment before any counteraction was £1,308.26	See the response at 11 above.
42	For the purposes of the calculation required by FA 2014. Schedule 32, paragraph 4(2) the Appellant's 2004/05 self-assessment after counteracting all the losses was £1,308.26	See the response at 11 above
43	For the purposes of the calculation required by FA 2014. Schedule 32, paragraph 4(2) the Appellant's self-assessment for 2004/05 both before and after the counteraction did not include within its calculation, in respect of the claim, relief of £250,137 against his income in 2004/05 and/or a reduction of £100,054.80 in the amount	See the response at 11 above

	he was chargeable to tax	
44	For the purposes of the calculation required by FA 2014. Schedule 32, paragraph 4(2) there was no additional tax which would ever become payable by the Appellant as a result of the amendment to his 2004/05 self-assessment under TMA 1970, section 28B(4) (or 50(9)(a)) given his self-assessment before and after amendment for the paragraph 4(2) calculation was the same (i.e. £1,308.26)	This paragraph consists of a contention of law which HMRC do not accept.
45	For the purposes of the calculation required by FA 2014. Schedule 32, paragraph 4(2) the actual lawful amount of additional tax that would become due and payable by the relevant partner in respect of tax was not £100,054.80	See 44 above
46	In its defence of a judicial review application made by a Mr Robert Astley (Astley - CO/2636/2017) following HMRC issuing Mr Astley with a TMA 1970, section 28B(4) notice after reducing losses said to have been suffered by a partnership of which he was a member, HMRC assert in their Summary Grounds of Defence (dated 30 June 2017 as drafted by Vikram Sachdeva QC and Marika Lemos) at [12] that "it is clear, pursuant to De Silva, that whether or not an amount of loss relief is included in a taxpayer's own calculation, the claim for relief is taken into account in the Self Assessment as a matter of law." And at [13] "Thus it does not matter the	The Respondents maintain their position in Astley which is based upon a correct interpretation of the relevant provisions including s 9(1) TMA 1970. However, the Respondents submit that the inclusion of material relating to that case is inappropriate in this appeal.

	Claimant's calculation of tax repayable to him did not include the loss relief sum, which had already been paid to him."	
47	As part of the same judicial review HMRC asserted, on 28 April 2017, in their response to a letter before claim at [25] 22 that "*…HMRC does not dispute that your own calculation did not show the loss relief as reducing the amount of your tax liability for 2006/07. But it does not follow that your self-assessment did not take into account the loss relief claim relating to 2006/07. That is the effect of the judgment of the Court of Appeal in De Silva where Lady Justice Gloster held at paragraph 49 that.."* and at [26] *"Thus it does not matter that your own calculation for 2006/07 did not include the amount which had already been repaid to you: De Silva confirms that the claim was required to be included in the 2006/07 return because "if valid, [it] will affect the tax chargeable and payable in the later year."*	See 46 above
48	The Defendants had never issued the Appellant, on or before 17 October 2014, with any notice, statements of account or Tax Calculations showing that his self-assessment for 2004/05 (or his TMA 1970, section 59B(1)(a) figure) was minus £98,746.54 (and not £1,308.26) which it would be had the claim for relief been taken into account in his 2004/05 self-assessment *as a matter of law* notwithstanding the fact the Appellant's own calculation did not include the amount (i.e. the Box 18.3 figure of £1,308.26 minus the loss relief of £100,054.80). Furthermore, the Defendants have never issued such notices, statements of account or Tax Calculations since 17 October 2014	Agreed that the alleged notices were not issued but the rest of this paragraph contains submissions based on premises which HMRC do not accept. See the response at 11 above.

49	The Defendants have produced statements of account and/or Tax Calculations that show the Appellant's self-assessment for 2004/05 was, the amount he self-calculated it for the purposes of TMA 1970, section 9(1) – i.e. £1,308.26.	See the response at 48 above.
50	The Defendants have never issued statements of account and/or Tax Calculations to the Appellant that simultaneously show the Appellant's self-assessment for 2004/05 as both £1,308.26 and minus £98,746.54.	Agreed that such statements and/or tax calculations have never been issued but see the response at 48 above.
51	The Defendants have never issued any interest calculations that simultaneously show the Appellant's self-assessment for 2004/05 as both £1,308.26 and minus £98,746.54 and charge interest on the positive value and give repayment supplement on the repayment amount for the same period.	Agreed that such calculations have never been issued but see the response at 48 above.
52	The Defendants have produced no guidance that a claim for loss relief will be taken into account in a self-assessment as a matter of law notwithstanding the fact the taxpayer's self- calculated self-assessment did not include the amount and as a matter of fact there is no mentioned at all of the possibility in the HMRC published manual entitled "Self Assessment: the legal framework". It is relevant fact that it has never been mentioned as a possibility in any decision of the First-tier Tribunal Tax; the Upper-tier Tribunal; the High Court; Court of Appeal or Supreme Court.	HMRC question the relevance of the alleged "facts". See also the response at 48 above.
53	The Defendants have never issued the Appellant with a	Agreed that a repayment in the alleged amount has never

	repayment under the provisions of TMA 1970, section 59B(1) in the amount of £98,746.54 (i.e. the Box 18.3 figure of £1,308.26 minus the loss relief of £100,054.80) which it would be required to do had the claim for relief been taken into account in the self-assessment as a matter of law notwithstanding the fact the Appellant's own calculation did not include the amount.	been issued to the Appellant. The rest of this paragraph consists of contentions of law which HMRC do not accept.
54.	The Defendants have never issued any communication to the Appellant stating that they were using their powers at TMA 1970, section 59B(4A) to not make a repayment to the Appellant of £98,746.54 (i.e. the Box 18.3 figure of £1,308.26 minus the loss relief of £100,054.80) on or before the day given by sub-section 59B(4A)(a) or that they were making a repayment of £98,746.54 on a provisional basis before that same date.	Agreed that no such communication has been issued.
55	If, for the purposes of the calculation required by FA 2014. Schedule 32, paragraph 4(2) the Appellant's self-assessment for 2004/05 was minus £98,746.54 (which it would be had the claim for relief been taken into account in the self-assessment as a matter of law notwithstanding the fact the Appellant's own calculation did not include the amount) then on 17 October 2014 and at the payment date of the PPN the Appellant would have been in credit by £98,746.54 from tax advantage to be counteracted and that amount would have been set-off against the amount shown as payable under the PPN (which is a payment on account of the	This paragraph is purely hypothetical and therefore not "fact".

underlying potential tax charge) such that the penalty would have not been £5,002.74 and instead would have been £65.41.