Dr. Walapu v Her Majesty's Revenue & Customs

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Administrative Court)

Judgment Date
23 March 2016

Case No: CO/1948/2015

High Court of Justice Queen's Bench Division Administrative Court

[2016] EWHC 658 (Admin), 2016 WL 01086018

Before: Mr Justice Green

Date: Wednesday 23rd March 2016

Hearing dates: 23rd – 24th February & 15th March 2016

Representation

David Southern QC and Rebecca Murray (instructed by GRM Law) for the Claimant.
Akash Nawbatt (instructed by HMRC Solicitor's Office) for the Defendant.

Judgment

Mr Justice Green:

A. Introduction: Issues and conclusion

1. This claim for judicial review concerns the scope and effect of Chapter 3 of the Finance Act 2014 which entitles the Defendant (" *HMRC* " or the " *Revenue* ") to impose upon persons suspected of tax avoidance an obligation to, in effect, pay on account the amount the Revenue considers represents understated tax. Under existing rules promoters of tax avoidance schemes must notify the schemes to HMRC which can then allocate a reference number to the scheme which taxpayers who are members of the scheme must then include on tax returns. In this way the Revenue is alerted to the fact that a taxpayer is party to a notified tax avoidance scheme. The Act requires parties to tax avoidance schemes to pay the disputed tax within a fixed period of time from receipt of an "accelerated payment notice" ("APN") which may be issued and payment required *before* the tax is assessed. The express objective of the Chancellor of the Exchequer, in promoting this legislation, was to alter the economics of tax avoidance by stripping from parties to such schemes all of the liquidity advantages that they, hitherto, enjoyed. An important consideration leading to the new provisions was the experience of HMRC of dealing with aggressive delaying tactics and strategies engaged in by tax avoidance scheme promoters. Documentary evidence placed before this Court by the Revenue showed that, not infrequently, the unravelling of tax avoidance schemes could take many years prior to HMRC being in a position to assess a taxpayer's liability and then obtain payment. In the interim participants held money that HMRC considered was due to the State and promoters of tax avoidance schemes continued to be in a position to promote their schemes as having longevity.

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2. The legality of the APN system introduced by the Finance Act 2014 was challenged by a taxpayer who had been formally assessed but which was subject to appeal in *Rowe et ors v The Commissioners for HM Revenue & Customs [2015] EWHC 2293 (Admin)* (" Rowe "). In that case it was argued that the system was unlawful because, in essence, it violated legitimate expectations, defeated natural justice, infringed Article 6 of the European Convention on Human Rights ("ECHR"), denied citizens access to the courts, and infringed the fundamental right to property set out in Article 1 of the First Protocol to the ECHR ("A1P1"). In a cogent and careful judgment Mrs Justice Simler rejected all of these arguments. A further, and particular, aspect of the scheme was considered by the Court of Appeal in *R(on the application of De Silva) v The Commissioners for Her Majesty's Revenue & Customs [2016] EWCA Civ 40* where the Court of Appeal upheld the position adopted by the Revenue.

3. There is however an important factual distinction between the present case and those that have preceded it. In these earlier cases the Revenue had formally assessed the claimant's tax liability and from then onwards what was in dispute (through the appeal process) was a crystallised tax liability owed by the Claimant to HMRC. In the present case, the Claimant has in his tax return claimed relief against past income tax assessments but he has not yet had the present claim formally assessed. The APN which has been imposed upon him requires – he submits — the payment on account of an unassessed tax liability that has not accrued. It is argued that this is a fundamentally different position to the case of an assessment which is under appeal. Mr David Southern QC, who appeared for the Claimant, argued that to require a citizen to pay to the Revenue a sum which was not a sum assessed for tax constituted a profound violation of the citizen's private rights. The new system created by the Finance Act 2014 conferred a draconian power upon the HMRC which they now deployed in relation to a targeted segment of society (tax avoiders) in an unfair and unjust way which involves diluted and ineffective procedural protections. Mr Southern QC did not shy away from seeking a declaration of incompatibility of the new system with the Human Rights Act 1998 ("HRA 1998").

4. I should, before going on, say a word about the manner in which the present dispute has evolved. In its initial form the claim for judicial review was, in substantial part, identical to that addressed in Rowe and the importance of the distinction between an APN issued during an enquiry, on the one hand, and an APN issued following assessment but pending appeal, on the other hand, featured only lightly. However, in the light of the case law referred to above the Claimant's case changed and a new case emerged only shortly prior to the oral hearing of this judicial review. The Revenue, pragmatically, has taken the view that it is better to address the new arguments now instead of seeking an adjournment to permit the case properly to be pleaded and particularised with the concomitant delay in clarification of the law. In the event, the Claimant was allowed considerable latitude and, indeed, one argument (concerning the scope and effect of the transitional arrangements relating to notifiable tax avoidance schemes) only took real shape halfway through the hearing. Again, the Revenue agreed to address the argument and gave "overnight" disclosure to the Claimant of certain documents in order that a properly formulated written submission could be prepared and served. The emergence of the point necessitated a second oral hearing to address the issue. I am grateful to the Revenue for the sensible approach it has adopted to the resolution of this dispute.

5. The conclusion that I have arrived at is that the claim, in its various forms, fails. The reasons are analogous to those articulated by Simler J in Rowe . However, given the differences in the factual context and the evolved nature of the arguments advanced, I have not simply followed the ruling in Rowe . I have arrived at my own conclusions, though having full regard to the logic of the judgment in Rowe .

6. Mr Southern QC described the nub of his client's objections as " *due process* ". He accepted that his various Grounds were, in material respects, different ways of advancing a single core objection. It is, in this regard, helpful to stand back from the *minutiae* of the argument. The Claimant does not (nor could) challenge the legitimacy of the objective pursued by Chapter 3 of the Finance Act 2014 , namely to alter the economics of tax avoidance. The Treasury estimates that tax avoided amounts to c. £14 billion. One way of attacking tax avoidance schemes is to unravel them individually by assessing the tax due and then fighting the scheme promoters through the Courts and Tribunals in protracted litigation. But an alternative approach is, *ex ante* , to negate the incentive for such schemes to be entered into in the first place. HMRC says that they win over 80% of the cases that they fight to a litigated conclusion and settle many more along the way. They have now introduced a detailed and systematic internal process designed to enable them, at a much earlier stage, to form a clear conclusion as to the

understated tax. They are confident in the robustness of the procedure devised. By imposing the APN before a full assessment the Revenue conveys the signal to potential participants in tax avoidance schemes that: (a) the ultimate prospects of success are small; and (b), there will be no, or at least a greatly reduced, liquidity benefit from participating in a scheme pending a final determination of the legality of the scheme through litigation.

7. By this new system, the Revenue seeks to reduce the incentive for taxpayers to subscribe to tax avoidance schemes. Lawyers, accountants and others advising upon such schemes will be bound, in accordance with their professional obligations, to advise promoters and their prospective clients of this different state of affairs. The experience of the HMRC is that the effect of the Finance Act 2014 has already led to a substantial downturn in the number of new tax avoidance schemes being notified to it.

8. The new arrangements thus: pursue a legitimate objective; are targeted precisely upon the class of persons who engage in the activity sought to be suppressed; and incorporate a vigorous process whereby the APN is likely to correlate to the actual tax position. These factual conclusions go a long way to answering the Claimant's criticisms. However, some Grounds are more specific and concern an alleged omission of particular procedural rights within the legislative scheme. Specifically, the Claimant objects to the absence of a right of representation prior to the issuance of the APN and the absence of a right of appeal. Neither argument is, in my judgment, sustainable. Both the statutory framework and the internal procedures introduced by HMRC provide ample opportunity for addressees of APNs to make their views known comprehensively to the Revenue. There is nothing deficient or unfair in these arrangements which could, remotely, amount to a denial of a right of representation. As to the alleged deficiency of the right of appeal there is, again, nothing in the point. If a taxpayer is aggrieved by the issuance of the APN procedure he may seek judicial review of it, or, compel (via the procedure laid down in Section 28A(4) Taxes Management Act 1970 ("TMA 1970")) HMRC to issue a closure notice within a specified period, upon which occurrence the normal rights of appeal are engaged.

9. In any event, in relation to both of these Grounds, the Claimant has identified nothing upon the particular facts of his own case which raise even an arguable complaint that *he* has been denied the chance to put *anything* that he wished to advance to HMRC and/or that he has an argument which he has been unable to advance before the High Court in this judicial review or that he would (in the event that he wished to take this matter to appeal) be denied the right to put any grievance that he has to the appellate tribunal. The arguments thus take form and shape at the level of abstraction, but not reality.

10. The other argument advanced (cf. Section H, Ground 5 below) is a technical argument and, in essence, questions whether the particular tax avoidance scheme that the Claimant participated in is substantially the same as an earlier scheme that was notified to the HMRC and, for that reason, is now exempt from being notifiable. If the Claimant is correct it would prevent the Revenue from issuing APNs in respect of over 1000 individuals whom the Revenue estimate have understated tax to the extent of about £220 million. If the Claimant is right the Revenue must instead proceed by what the Claimant considers to be the normal route, namely an assessment followed by statutory appeals. For the reasons that I have set out later in this judgment. I do not accept the submission. Accordingly, the Revenue had the right to issue an APN to the Claimant in the present case.

B. The facts

(i) The Disclosure of Tax Avoidance Schemes regime – "DOTAS"

11. The central mechanism used by the Revenue to alert it to tax avoidance schemes is the "DOTAS" regime. The Disclosure of Tax Avoidance Schemes ("DOTAS") regime was introduced by Part 7 of the Finance Act 2004 entitled "Disclosure of Tax Avoidance Schemes". Pursuant to these provisions certain persons, normally the promoters of tax avoidance schemes, were required to provide HMRC with information about "arrangements" and "proposals for arrangements" (i.e. the tax avoidance schemes): where that arrangement or proposal might be expected to provide a person with a tax advantage in relation to a specified tax; where the tax advantage might be expected to be the main benefit, or one of the main benefits, of using the

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scheme; and, where the scheme fell within certain descriptions contained within the Regulations. There have been changes to the Regulations since 2004 and the scheme now in force was introduced in 2006.

12. In circumstances where a scheme is notifiable the promoter is required to provide specified information to HMRC. The obligation to notify normally accrues within 5 days of the marketing of the scheme or the making of the scheme available to clients for implementation. HMRC may issue a Scheme Reference Number ("SRN"). If so the promoter is required to pass the SRN on to the scheme users who, in turn, are obliged to notify HMRC of their use of the scheme. They do this normally by including the SRN upon their tax return. This enables HMRC to identify the users of a particular scheme.

(ii) The position of the Claimant

13. The Claimant was, prior to retirement, a consultant in public health. He retired in August 2013 but had previously spent 27 years working within the NHS as a doctor. In early 2008 he was introduced to a business opportunity known as "Liberty Syndicate 21" (" *the* Syndicate Scheme"). The promoter of this scheme was the Mercury Tax Group (" *the Promoter* "). The introduction was made by his accountant who was also his appointed tax agent and he completed the Claimant's self-assessment tax return. The Claimant was aware when he entered into the Syndicate Scheme that it was a tax avoidance scheme. However, he was informed that the favourable opinion of leading counsel had been obtained upon its efficacy for tax purposes. He was also aware that the basic model for the Syndicate Scheme had been notified to the Revenue at an earlier point in time. The Syndicate Scheme commenced on 1st February 2008 and ended on 20th March 2008. During this period, the scheme made a net business loss attributable to the Claimant for tax purposes of £370,688. The Claimant was notified that the scheme had been allocated the SRN: 55413422.

14. When completing his self-assessment tax return for the year ended 5th April 2008, and in accordance with guidance given by the Revenue, his accountant entered the scheme reference number on to the self-assessment tax return. After the end of the tax year the Promoter supplied the Claimant's accountants with the entries for his tax year for the year ending 5th April 2008. The self-employment pages of the return were completed and in box 75, under the heading "losses", the sum of £370,688.00 was inserted. In addition, in box 76, in relation to "loss from this tax year set-off against other income for 2007" the figure of £50,475.00 was inserted. In box 77, in relation to "loss carried back to previous year(s) and set-off against income (or capital gains)" a sum of £277,127.00 was inserted. And in box 78, in relation to "total loss to carry forward after all other set-offs", a figure of £43,086.00 was inserted. Under the heading "any other information" the Claimant set out the basis upon which he claimed £327,602.00 as being available for sideways relief.

15. As Mr David Southern QC, for Dr Walapu, candidly explained during the course of his submissions:

> "If one looks at Dr Walapu's tax return it could not have been plainer that there was something funny going on".

The return showed that a repayment of £106,016.74 was due to Dr Walapu.

16. The return was submitted electronically on 5th September 2008. A "free standing credit" of £86,706.66 was entered by the Revenue on the Claimant's statement of account and the sum of £106,016.74 was repaid to him. This included a further £19,309.86 claimed as an overpayment of tax for 2007/08.

17. The circumstances giving rise to the payment are of relevance to some of the grounds advanced by the Claimant. Evidence before the Court on this was given in the form of a Witness Statement from Mr Walker, Technical Lead, Counter-Avoidance Directorate, HMRC. He explained that the repayments came to be made:

> "5. Dr Walapu's Tax Return for the year ended 5 April 2008 was filed online with HMRC on 5 September 2008.
>
> 6. The repayment of £106,016.74 was made to Dr Walapu by Payable Order on 8 September 2008.
>
> 7. A repayment is automatically issued, unless either a computer signal has been set on the taxpayer's self-assessment record to prevent the repayment or the repayment is selected for a security repayment check. This is under the "process now, check later" approach of self-assessment.
>
> 8. At the time that Dr Walapu's repayment was made, a signal had not been set on his self-assessment record to prevent the repayment arising from his participation in the Liberty Avoidance scheme.

> 9. Subsequently on 23 September 2009 a note was placed on Dr Walapu's self-assessment record: " *Do not repay any losses arising from scheme 55413422, trading in financial instruments."* A signal was set to prevent any repayment from that date.
>
> 10. An enquiry was opened into Dr Walapu's 2008 Tax Return under Section 9A TMA 1970 on 9 February 2009.
>
> 11. The repayment was made due to the short delay in setting the signal on Dr Walapu's self-assessment account to prevent a repayment being issued. The signal was set just a little under 3 weeks after the Tax Return had been filed online.
>
> 12. The letter opening the enquiry on 9 February 2009 clearly set out that HMRC was enquiring into Dr Walapu's return. This was reiterated in the subsequent letters issued to Dr Walapu dated 2 September 2011 and 19 November 2012".

18. Work conducted by HMRC has revealed that payments were made in a number of cases additional to that of Dr Walapu. Payments were issued in ten cases (including that of Dr Walapu) with the sum of these repayments totalling £529,309.64 which includes the payment of £106,016.74 to Dr Walapu. All but two of the other nine repayments in Liberty Syndicate 21 were made automatically within a few days of the receipt of the individual's tax return before a signal had been set to prevent repayment. The total number of payments represents 9.43 % of all Liberty Syndicate 21 users and the actual amount paid represents 3.5 % of the tax at stake in relation to this syndicate.

(iii) HMRC raises an inquiry in relation to Dr Walapu's tax return

19. On 9th February 2009 the Revenue wrote to Dr Walapu informing him that an enquiry was to be conducted into his tax return. The letter stated:

> "My enquiry is into your claim to loss relief of £370,688.00 arising from your trading in financial instruments. This is a tax avoidance scheme (disclosure reference: 55413422) and will be considered by a joint team of inspectors…
>
> As you are a participant in a disclosed tax avoidance scheme I intend to exercise my discretion not to give effect to your claim by repayment until this enquiry is complete".

20. The letter stated that Dr Walapu had a right to appeal against the part of the Notice requiring the disclosure of documents within 30 days of receipt and the appeal was required to be in writing and to state the Grounds of any such appeal. It was explained that his appeal would be referred to the independent Appeal Commissioners who would decide whether the requirements set out in the Notice were reasonable. Further details were set out as to the process of appeal. He was, in addition, given an address within the Special Civil Investigations Unit, Leeds, for correspondence. He was given the name of a specific individual with whom to correspond.

21. On 2nd September 2011 the Revenue wrote to the Claimant to update him on the investigation. It confirmed that the Revenue did not accept that the scheme was effective. It explained that a small sample of participants had been selected for in-depth investigation under the terms of a Representative Sample Arrangement ("RSA") (see below). The letter then stated:

> "On 2 June 2011 a formal notice was issued to an entity which participated in an earlier variant of Liberty, signalling the completion of HMRC's enquiries into that earlier variant. On 27 June 2011 Mercury lodged formal appeal against the said notice. I am hoping therefore that we shall know soon when the appeal against this earlier variant of the Liberty scheme will be heard by First Tier Tribunal. The majority of HMRC's challenges to that earlier variant are likely to have equal application to your participation in a Liberty syndicate. Thus, whereas it will be necessary to prepare for litigation of the sample members participation in the Liberty syndicates, inevitably future conduct of the litigation may well be influenced by the Tribunal's findings in relation to that earlier variant.
>
> Additional liabilities which may arise when the appeal becomes final
>
> You will be conscious of the fact that should HMRC be successful in the litigation then, to the extent that you have had the benefit of any of the disputed tax relief, either by repayment or set-off, there will be interest bearing charges which will be recoverable from you with interest running potentially from the original dates for the relevant tax year. Moreover the tax becoming due will be liable to surcharges if it is not paid within the prescribed statutory period.

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I am reminding you of this fact in case you wish to take steps now to mitigate any exposure you may have to these prospective charges and would suggest that you consult your professional adviser on this if you need any further advice on the matter".

22. The Claimant was informed that should he have queries regarding the investigation he should contact HMRC and was given a contact name and number.

23. On 19th November 2012 HMRC provided a further update. The letter recalled that the Claimant had signed a RSA with HMRC, through the Promoter, when he first participated in the Syndicate Scheme. A copy of the original RSA was provided to the Claimant for information. The letter, in addition, sought confirmation that the Claimant wished to continue to accept the terms of the RSA given that HMRC was preparing for possible litigation in relation to the Syndicate scheme. The letter stated as follows:

"As part of the preparation for possible litigation of the Syndicate scheme, I wish to seek your confirmation that you will continue to accept the terms of the Representative Sampling Arrangement you previously signed up to. In other words, I wish to have your signed agreement that you accept that the findings of law in the sample litigation of individual users will apply equally in settling the enquiry into your own participation in the Syndicate scheme. For HMRC's part, we are satisfied that your participation in the scheme is the same, in all material aspects, to all other individual participants in the Syndicate scheme. By giving and maintaining your written agreement to abide by the decision on any sample litigation for individual participants in the Syndicate scheme you will, at the same time, obtain HMRC's agreement not to separately litigate your involvement in the Liberty Syndicate scheme. You would, therefore, be required to do nothing other than await the outcome of any sample litigation on the Syndicate scheme. You must not, however, dispose of any documents relating to your participation in the Syndicate scheme until the enquiry or enquiries into your use of the Liberty Syndicate scheme have been settled.

Please note that if you indicate that you do not wish to be bound by any sample litigation on the Syndicate scheme, either by expressly saying so on the form or by failing to respond by the stated date, then I shall have to approach you and third parties to produce documents and provide information in relation to the Syndicate scheme, with a view to bringing separate litigation regarding your participation in the Liberty Syndicate scheme.

I attach a form to enable you to provide your answer. Please ensure that this is returned to me by 19 December 2012. Clearly, I hope that you will respond by indicating your intention to be bound by the sample litigation, so that the material costs that would be involved for both sides in repeat litigation can be avoided".

24. Once again, HMRC provided the Claimant with a contact name and number should he wish to discuss the matter further. Finally, he was warned that should HMRC prevail in litigation then to the extent that the Claimant had enjoyed the benefit of the disputed tax relief either by repayment or set-off, there would be interest bearing charges which could be recoverable from him with interest running, potentially, from the original dates of the relevant tax year. Further, that the tax becoming due would be liable to surcharges if it was not paid within the prescribed statutory period.

25. On 27th November 2012 the Claimant re-signed the RSA confirming his desire to remain bound by the original RSA. In so doing he accepted that legal findings in relation to the sample of individual cases chosen under the RSA in respect of this type of scheme would apply equally to his own participation in the Syndicate Scheme.

(iv) The issuance by HMRC of an APN to Dr Walapu

26. Dr Walapu received a warning letter on 15th January 2015 from the Revenue. The letter stated as follows:

"We are writing to tell you that you will soon need to make a payment of the amount that relates to your use of the tax avoidance scheme shown in this letter.

Tax legislation that affects users of tax avoidance schemes was introduced on 17 July 2014.

The legislation means that those who have used the tax avoidance scheme may have to pay the amount that relates to their use of the scheme **before** the final amount has been agreed, or determined by a tribunal or court. Such payments are known as "accelerated payments"".

27. It was explained to the Claimant that he would, within the next 1–4 weeks receive an APN setting out the amount which the Revenue believed related to his use of the tax avoidance scheme. It was stated that the APN would explain to the Claimant how the Revenue had worked out the amount in question. The letter then stated:

"Once you receive the Notice, you will be legally required to pay the amount shown in it within 90 days of the date that you receive it. That date may change if you make representations objecting to the Notice".

28. The letter went on to explain the possibility for the Claimant to settle his tax affairs without the enquiry proceeding. It emphasised that whether he settled or not was entirely a matter for him but that if he did not wish to settle " *...the current compliance check will remain open* ". It was explained that there was no right of appeal against the APN but that if he disagreed with the notice he could make representations to the Revenue objecting. He was directed to an information brochure which explained how to make representations. In relation to formal rights of appeal the letter stated as follows:

"About your appeal rights for the current compliance check

The legislation introduced on 17 July 2014 does not affect your appeal rights to the tribunals and courts in relation to your tax liability. This means that, when you pay the amount due on the accelerated payment Notice, you will still have your full appeal rights if you do not agree with the outcome of the current compliance check.

If you pay the amount shown on the accelerated payment Notice and a tribunal or court later decides that this scheme does produce the intended tax advantage, we would normally repay the amount that you have paid in respect of the Notice; with any interest due…".

29. The letter explained that if the Claimant had any problems paying then he should contact the Revenue immediately. Further, if there was anything about his health or personal circumstances which made it difficult for him to deal with the matter, he was, again, urged to let the Revenue know.

30. On 30th January 2015 an APN was issued to the Claimant showing the amount due of £106,842.02. Accompanying the APN were tax calculations for the 4 years ended 5th April 2008 which purported to calculate the tax advantage for each year.

31. In a Witness Statement served by Dr Walapu he has explained that due to altered personal and financial circumstances he is not in a position to pay the amount demanded in the APN together with the interest associated with it.

(v) The loss schemes

32. I turn now to the details of the loss schemes in issue in these proceedings. At issue in the present proceedings are two DOTAS notifications. The first was notified by Mercury Tax Strategies Limited (i.e. the Promoter) and I refer to it hereafter as the "Partnership Scheme". It was confirmed that the scheme amounted to a "Loss scheme" within the meaning of Regulation 12 of the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 . Regulation 12(b) defines a loss scheme as, *inter alia* , one whereby:

"(b) The arrangements are such that an informed observer (having studied them) could reasonably conclude –

i) that the main benefit of those arrangements which could be expected to accrue to some or all of the individuals participating in them is the provision of losses, and

ii) that those individuals would be expected to use those losses to reduce their liability to income tax or capital gains tax".

33. Under the heading "Summary" in the notification the Promoter described the arrangement in the following terms:

> "An individual joins a partnership as a limited partner. The partnership acquires rights to dividends payable to a company registered in the BVI. The dividends are distributions declared by a subsidiary of the BVI Company. The subsidiary is registered in Cayman".

34. Under the heading "Explanation", the following is stated:

> "The acquisition of the dividend rights by the partnership is part of its normal trading activity and this is carried out in the UK. s730(1) ICTA 1988 says that the rights to the dividends remain the income of the BVI Company, as the shareholder, for all the purposes of taxation and therefore whilst the distribution received by the partnership is income as part of its trade it is not income of the partnership for the purposes of taxation as it is held by s730 to be income of the BVI Company and it cannot be income of any one else at the same time. As such whilst the partnership makes a profit on the dividend trades the profit for tax purposes must exclude the dividend income and so there is a loss for tax purposes. (This is because the cost of acquiring the dividend rights is part of the normal trading experience and so taken into account in the tax computation but the income is excluded)".

35. It is further explained that the individuals who participate in the scheme, as partners of the partnership, are allocated a proportion of any overall trading profit and any tax loss in ratio to their capital invested in the partnership and, pursuant to Sections 380 or 381 ICTA 1988 , the individual is able to claim loss as appropriate.

36. On 20th March 2007 the Promoter notified the second tax avoidance scheme with the title "Liberty 2 (Syndicate)" – i.e. the Syndicate Scheme. Under the summary and explanation the Promoter gave, in more or less identical terms, a description matching that of the earlier Partnership Scheme.

37. It was in a version of the later Syndicate scheme that Dr Walapu participated. The actual Syndicate Scheme trade in which the Claimant was involved commenced on 1st February 2008 and ceased on 20th March 2008.

(vi) Decision of the Special Commissioners in relation to the Partnership Scheme (2009)

38. HMRC laid an Information against the Promoter of the Partnership Scheme upon the basis that as the promoter of a tax avoidance scheme it had failed properly to notify the same pursuant to Section 308 Finance Act 2004 and the Tax Avoidance Schemes (Information) Regulations 2004 . HMRC sought the imposition of a financial penalty. In The Commissioners for Her Majesty's Revenue and Customs v Mercury Tax Group Limited (SPC00737, 17th February 2009) (the " Mercury case ") the Special Commissioner held, however, that the Partnership Scheme was not notifiable pursuant to the legislation as it was then in force. The Commissioner described the Partnership Scheme in terms which are materially similar to those described in both of the notification forms themselves to which I have made reference above. He stated:

> "2. The scheme in outline consists of high income individuals forming a Jersey Limited partnership (Liberty 1) for carrying on a financial trade and contributing capital equal to the tax loss they wish to create. An offshore parent company (SPV 1) has a subsidiary (SPV 2). SPV 2 declares a large dividend out of its share premium account. SPV 1 sells the right to the dividend to Liberty 1 for an amount equal to the dividend, which is paid for by the partner's contributions, following which Liberty 1 receives the dividend. The scheme is said to work (it is no part of these proceedings to decide whether it does work) because s730 of the Taxes Act 1988 provides that the seller of the right to the dividend (SPV 1) is taxable on it and not the recipient (Liberty 1), while the cost of purchasing the dividend is deductible on general principles as being an expenditure incurred in the course of the financial trade of Liberty 1. The issue in these proceedings is whether the scheme is notifiable within the Regulations (which have been superseded by 2006 Regulations)".

39. It is not necessary to delve further into the decision of the Commissioner. As observed, he concluded that, though the issue was not free from doubt (ibid paragraph [11]), the Partnership Scheme was not notifiable under the terms of the Regulations as they then stood (viz the 2004 Regulations). Accordingly, there could be no penalty imposed (ibid. paragraph [12]).

(vii) HMRC process for determining whether to issue an APN and the computation of the amount

40. The actual process by which HMRC arrives at a decision to issue an APN is relevant to a number of grounds advanced and in this section I set out a summary of the procedure now adopted in enquiry cases.

41. In late July 2014 (the week following the coming into force of the Finance Act 2014) HMRC put in train procedures for the processing of APNs during the inquiry stage. According to documents before the Court HMRC was, at that point in time, contemplating issuing approximately 50,000 APNs. HMRC proposed to phase the issuance of the notices over a 20 month period. By October 2014 HMRC proposed to issue approximately 2,500 per month. An internal document identified the logistical problems facing HMRC:

> "Even with this phasing, there are considerable numbers to issue; decisions around which notices to issue [which] will need careful consideration and the computations for calculating the amount to be entered on each notice can be complex. We have therefore been putting in place strong governance around the processes for issuing notices so that we can assure proportionate use of these new powers.
>
> We will also be looking closely at the outcomes of issuing notices – in some cases there will be JR challenges, and in others the issue of a notice will prompt requests for closure notices. So that neither we, nor the Tribunals, are swamped with particular types of outcomes, we will be using the Governance Controls to regulate what types of notices are issued at what stage".

42. Decisions, of a governance nature, surrounding the issuance of APN, and their timing and the principles to be applied in determining the calculation of amounts to be used in relation to each scheme, were to be overseen by a Workflow Governance Group comprising senior civil servants from HMRC. In relation to the computation of the sum to be included in the APN the procedure to be followed was described in the following way:

> "This will be signed off by the technical lead for…each scheme – always at G6 level. Second, under the relevant legislation, there was one task which needs to be carried out by a "designated officer" – determining the exact amount to be entered on each accelerated payment notice. This needs to be done in relation to all the estimated 50,000 notices. The computations themselves will be done by a team working to the designated officer, and the officer will be responsible for agreeing these amounts.
>
> In reality, the designated officer role will be limited to agreeing the precise amount to be entered on to the notice in each case, taking into account the individual circumstances of each case (for example, the marginal tax rate), but based on principles agreed by the senior Governance Group and detailed instructions in respect of the particular scheme set down by the G6 officer in charge of technical issues for that scheme".

The schedule of users of the Syndicate Scheme submitted to the Workflow Governance Board totalled 1,100 users with only two cases being appeal cases and all the rest enquiry cases. The enquiry cases therefore represented 99.81% of the total Syndicate Scheme users.

43. The role of "Designated Officer" is mandated by the Finance Act 2014 (under Section 220(3)). Within HMRC two Commissioners were appointed to approve the role of the Designated Officer.

44. In order to process notifications upon an efficient basis HMRC produced guidance notes covering the prioritisation of the issuance of APNs. The prioritisation process required the relevant official to complete a computerised "survey" under 19 different headings. It is evident from the documentation before the Court that the officials were required to address themselves to, *inter alia* : whether the nature of the tax advantage was " *well understood* "; the number of persons who were covered by particular notified schemes; the number of such enquiries which were closed; whether full documentation in relation to the scheme had been obtained; whether legal and technical advice on the scheme had been obtained; whether the scheme was a DOTAS scheme; whether there were positive judicial decisions upon the scheme (whether final or not); whether the scheme was " *a closely related variant* " to a scheme still being sold; whether the scheme had been fully investigated; whether there were current settlement opportunities; whether there were settlements opportunities which were now closed; and, the point in time when HMRC last had contact with the users of the scheme.

45. In relation specifically to the Syndicate Scheme documents before the Court show that the officer described the exercise of calculating the size of the liability in individual enquiries as " *straightforward* ". He confirmed that full documentation had been obtained and that the scheme was a DOTAS scheme. The officer considered that the scheme was not still being sold. He confirmed that it had been fully investigated but that there were no settlement opportunities. He identified the tax outstanding as £186.81 million. At the end of the form, the official stated:

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"The tax outstanding figure is an estimate based on experience; we do not hold accurate figures for this. Calculation of tax will be straightforward, but identifying whether the FSC has been given on carry-back cases will take time. Technical and legal opinions have not been obtained (tech submission is imminent), but have been obtained on a very closely-related earlier variant which is currently awaiting FTT hearing".

46. At the end of the form the officer gave an "Assessment Score" of 51 which rating was then used as part of the prioritisation process.

47. Pulling the threads together HMRC have identified a six-stage process leading up to the issuance of an APN. I summarise the stages as follows:

i) Stage 1: HMRC publishes upon its website a list of DOTAS schemes on which advanced payments might be charged. HMRC excludes from that list schemes which are accepted to be effective, and obsolete schemes with no users. The first list was published on 15th July 2014 and has been updated subsequently on 30th October 2014 and on 30th January 2015.
ii) Stage 2: The officer responsible for overseeing the investigation of a particular scheme completes the internal "survey". The survey requires answers to questions designed to enable HMRC to rank the scheme according to its suitability for the earlier issue of APNs. The details of the survey are referred to above at paragraphs [44] – [46].
iii) Stage 3: Schemes are then ranked into a preliminary order and placed into categories according to the range within which their score falls. Thereafter, schemes are prioritised within categories by reference to the answers to particular survey questions.
iv) Stage 4: Each identified scheme is then subject to a more detailed review the purpose of which is to identify any reasons why notices should not be issued to users including whether the particular circumstance of any user are such that, exceptionally, no APN should be issued. In the present case no circumstances were identified in relation to the Claimant. Copies of the Detailed Review Template ("DRT") used for this exercise were before the Court.
v) Stage 5: Following the completion of the detailed review each scheme is considered by the Workflow Governance Group. The minutes of the meetings of this Group relevant to the schemes in issue were also before the Court. The Group exercises, from the perspective of a wide range of expert disciplines, supervision of the information collection process ensuring good governance.
vi) Stage 6: The Designated Officer thereafter determines the amount of the understated tax to the best of his/her information and belief. The officer reviews a "Designated Officer Authorisation form" and computations provided by the official responsible for issuing the APN. If satisfied the official countersigns the Designated Officer Authorisation form. The relevant forms relating to the Claimant were once again before the Court. These set out the understated tax. The document has attached to it a "Calculation Summary". This provides the details of the computation. The Claimant was provided with tax calculations relating to all relevant tax years when he was issued with the APN..

C. The anti-avoidance measures contained within the Finance Act 2014: Policy considerations

48. I turn now to the policy underlying the introduction of the Finance Act 2014 . As set out in the introduction to this judgment the Finance Act 2014 introduced significant changes to the existing tax avoidance regime. The reasons which lie behind the Act are relevant to a number of the Claimant's Grounds of challenge. In this section I set out the basis and rationale for the legislation.

49. The Revenue estimates that tax avoidance amounts to in excess of £3 billion per annum. The Finance Act 2014 is designed to bring forward the payment of tax in dispute by those engaged in avoidance schemes. The avowed objective is to alter, fundamentally, the economics of tax avoidance so that disputed tax sits with the Exchequer rather than the taxpayer pending formal assessment or settlement. Put bluntly, it seeks to strip from the putative taxpayer the liquidity benefit of entering into tax avoidance schemes.

50. The rationale behind the introduction of new statutory measures was explained in the Witness Statement of Ms Julie Elsey, Deputy Director (Policy and Technical) of Counter Avoidance Directorate, which is part of Enforcement and Compliance within the Revenue. She is the senior responsible officer for the implementation of the Accelerated Payment regime which is under challenge in this litigation. In her Witness Statement she encapsulated the issue in the following way:

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> "7. There is a particular problem in relation to marketed tax avoidance schemes. In short, promoters devise schemes which are often complex and contrived and attempt to exploit certain features of the tax system. The high level of complexity means that the schemes are difficult to analyse and challenge. Although at the end of the day HMRC succeeds in around 80% of cases in which the taxpayer chooses to press the point to litigation (many taxpayers settle before litigation), success often follows several years of enquiry, investigation and litigation during which time the majority of the taxpayers involved have been able to enjoy the use of the tax that they were seeking to avoid. The total value of the tax under dispute by HMRC related to marketed avoidance cases is estimated to be around £14 billion. There is no established principle that the tax should sit with the taxpayer during the course of a dispute – as set out above, for taxpayers subject to PAYE tax, the process would be for them to make a repayment claim, which HMRC would not pay in cases of suspected avoidance. In relation to VAT, before a taxpayer could take a case to Tribunal to settle the merits of a claim to VAT avoidance, the tax due would need to be paid up front. The Government therefore decided to introduce legislation which would, if passed, remove the cash flow benefit created by the processes I have described above".

51. It became apparent that the DOTAS regime introduced by the Finance Act 2004 could be improved. In the course of 2012 and 2013 the Government consulted on a series of proposals to improve and strengthen the regime. In particular, it focused upon two tax avoidance issues. The first concerned "high-risk promoters"; and the second was focused upon taxpayers who had used avoidance schemes which had been defeated in litigation brought by third parties (so-called "Follower" cases). In relation to Follower cases the view of the Government was that the taxpayer should amend their returns accordingly to reflect the litigated result. They proposed to impose a tax geared penalty upon taxpayers who could not demonstrate that there was a reasonable explanation for not making an amendment.

52. In the 2013 Autumn Statement (December 2013) the Chancellor announced that he would impose "pay now" notices to "Follower" taxpayers whose schemes had already been defeated but that he would, in addition, consult upon the scope for widening the criteria for "pay now" notices.

53. On 24th January 2014 HMRC issued a consultation document entitled "Tackling Marketed Tax Avoidance". In the foreword the following was stated:

> "Around 65,000 people and businesses have used marketed tax avoidance schemes that need to be investigated and litigated. But when an avoidance scheme is challenged in court, the tax system currently allows taxpayers to hold on to the disputed tax, no matter how tenuous their scheme and how unlikely they are to succeed. The taxpayers and scheme promoters are incentivised to sit back and delay as long as possible – despite evidence that in the vast majority of cases, when the dispute is resolved, tax is due.
>
> Our proposals to tackle "High Risk Promoters" were one step in addressing these behaviours. At Autumn Statement 2013 the Chancellor announced another: new measures to require taxpayers to pay the tax they owe if they have used the same avoidance scheme (or similar scheme) as one which a court or tribunal has already ruled against. If they continue the dispute in the face of the evidence they risk a penalty.
>
> This is a start, but there is more to do. This consultation puts forward possible ways to extend the accelerated payment proposals. The measures we propose would change the economics of engaging in tactical tax avoidance promoted by some advisors".

54. The consultation paper explained, explicitly, that HMRC intended to fundamentally change the economics of tax avoidance. The approach was to be aggressive and pragmatic. HMRC explained that it had a successful track record of challenging and counteracting marketed avoidance and that over 80% of avoidance cases heard in the courts and tribunals had been won by HMRC in the last financial year. In addition:

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> "…piloting of behavioural change work has resulted in hundreds of users approaching HMRC to withdraw from avoidance arrangements, some as early as the start of HMRC's investigation".

The more aggressive stance adopted by HMRC had led to ever more tenuous schemes being advanced which stood, in HMRC's view, little chance or prospect of achieving their aim of avoiding tax. However, the tax system currently permitted taxpayers to hold on to the disputed tax until the matter was resolved " *…creating little incentive for the taxpayer or promoter in question to progress or resolve the dispute* ". As of January 2014 HMRC was currently investigating approximately 65,000 individuals and small businesses that had used marketed avoidance schemes. An important consideration was the long tail of legacy cases which remained unresolved. Approximately 85% of the avoidance occurred more than 4 years earlier reflecting the vibrancy of the market for avoidance products that had been active in earlier years and the ability of promoters to use delaying tactics to keep schemes alive. The 65,000 taxpayers had deployed a wide range of avoidance schemes to reduce their liability to SDLT, Capital Gains Tax, Corporation Tax, Income Tax and National Insurance Contributions. The largest areas of legacy avoidance included partnership losses whereby individuals borrowed money to invest in a partnership and claimed tax loss upon the whole investment.

55. On 27th March 2014 the Government published its Summary of Responses to the Consultation. The document explained the rationale for accelerated payments in the following way:

> "At its heart is the proposition that there is no presumption that the taxpayer should hold disputed tax while an avoidance dispute is being resolved, particularly in the light of increasing evidence that those disputes will be resolved against the taxpayers involved".

56. In his budget speech on 19th March 2014 the Chancellor announced that those who had carried out or implemented disclosed tax avoidance schemes would be required to pay their taxes up front and that this would also apply to schemes covered by the GAAR.

57. The Office for Budget Responsibility set out in the Budget Report (Treasury Red Book) the final impact of these changes. The extension of the accelerated payment regime to DOTAS regimes and the GAAR was calculated to result in an expected yield of £340 [1] million in 2014–15; £1.23 billion in 2015–16; and £1.3 billion in 2016–17.

58. The Finance Act 2014 which introduced the APN system received Royal Assent upon 17th July 2014.

D. Ground 1: Natural Justice — Failure to accord a proper right to representation

(i) The issue: Claimant's submissions

59. The first ground advanced is that the rules in Chapter 3 Finance Act 2014 fail to confer a lawful right of representation. Mr Southern QC submitted that in the present case to be full and lawful the right had to exist prior to the APN being issued. Since the APN was issued before any right of representation was granted then the APN was unlawful. The Finance Act 2014 took away important civil rights and the denial of a right to be heard was offensive to the rule of law and to natural justice, especially where, as here, draconian power was now vested in an executive agency and the absence of a right of representation was coupled with no right of appeal. This new regime has excited comment. As Ms Shabana Mahmood MP (Lab) observed:

> "Our legal system has well established principles of natural justice and procedural fairness, which retrospection would, in its nature, offend.

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One of our biggest concerns about the balance of power relates to the removal of a right of appeal".

60. Michael Conmarty MP observed on 1st July 2014:

"Under this legislation, once the decision has been made, there is no appeal … The system will not be fair, but completely and utterly repressive – designed to give all power to HMRC and the Government but none to the private individual".

61. In enquiry cases, given that HMRC has not committed itself to any definite course of action before issuing the payment notice fairness required and compelled that the person concerned should have an opportunity of making representations before its issuance and before HMRC pre-emptively required the sum to be paid on account of tax. The principle governing the right to make representations was not in dispute:

"The decided cases on this subject establish the principle that the courts will readily imply terms where necessary to ensure fairness of procedure for the protection of parties who may suffer a detriment in consequence of administrative action".

(R v Secretary of State for the Environment, ex p. Hammersmith and Fulham LBC [1991] AC 521 at paragraphs [598D-G])

(ii) The law

62. There is no real dispute about the legal principles to be applied. Where an administrative action is prone to cause material disadvantage to a person then *prima facie* that person should be given notice that the adverse decision is to be taken, and , a chance to make representations: See e.g. R v Secretary of State for the Environment ex parte Hammersmith and Fulham LBC [1991] AC 521 at page [598D-G]. Unless an Act expressly or by implication excludes the right of representation it will, usually, be implied into the Act. However, the ultimate litmus test is fairness and what is fair is fact and context specific.

63. In *Bank Mellat v HM Treasury [2014] AC 700* Lord Sumption summarised the basic and familiar " Doody " ground rules:

"29. The duty to give advance notice and an opportunity to be heard to a person against whom a draconian statutory power is to be exercised is one of the oldest principles of what would now be called public law. In Cooper v Board of Works for the Wandsworth District (1863) 14 CB (NS) 180 143 ER 414 , the Defendant local authority exercised without warning a statutory power to demolish any building erected without complying with certain preconditions laid down by the Act. "I apprehend", said Willes J at 190, "that a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects is bound to give such subject an opportunity of being heard before it proceeds, and that rule is of universal application an founded upon the plainest principles of justice.

30. In *R v Secretary of State for the Home Department Ex p Doody [1994] 1 AC 531* , 560, Lord Mustill, with the agreement of the rest of the Committee of the House of Lords, summarised the case-law as follows:

My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

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> 31. It follows that, unless the statute deals with the point, the question whether there is a duty of prior consultation cannot be answered in wholly general terms. It depends on the particular circumstances in which each direction is made".

64. In Bank Mellat the factual circumstances which led the Supreme Court to strike down the administrative act in question (the imposition of sanctions upon a bank said to be providing financial services to interests in Iran connected with nuclear proliferation) were: (i) the number of people affected and the highly specific targeting of the measure in question; (ii) the extent of the harm imposed by the administrative act in question; (iii) the degree of notice given before the measure became effective; (iv) the extent to which the giving of notice would have created practical difficulties; and (v), the extent to which notice and a right to make representations might or would have improved the quality of the administrative decision being made. The facts were extreme as can be seen from the analysis of those facts by Lord Sumption in paragraph [32]:

> "In my opinion, unless the Act expressly or impliedly excluded any relevant duty of consultation, it is obvious that fairness in this case required that Bank Mellat should have had an opportunity to make representations before the direction was made. In the first place, although in point of form directed to other financial institutions in the United Kingdom, this was in fact a targeted measure directed at two specific companies, Bank Mellat and IRISL. It deprived Bank Mellat of the effective use of the goodwill of their English business and of the free disposal of substantial deposits in London. It had, and was intended to have, a serious effect on their business, which might well be irreversible at any rate for a considerable period of time. Secondly, it came into effect almost immediately. The direction was made on a Friday and came into force at 10.30 a.m. on the following Monday. It had effect for up to 28 days before being approved by Parliament. Third, for the reasons which I have given, there were no practical difficulties in the way of an effective consultation exercise. While the courts will not usually require decision-makers to consult substantial categories of people liable to be affected by a proposed measure, the number of people to be consulted in this case was just one, Bank Mellat, and possibly also IRISL depending on the circumstances of their case. I cannot agree with the view of Maurice Kay LJ that it might have been difficult to deny the same advance consultation to the generality of financial institutions in the United Kingdom, who were required to cease dealings with Bank Mellat. They were the addressees of the direction, but not its targets. Their interests were not engaged in the same way or to the same extent as Bank Mellat's. Fourth, the direction was not based on general policy considerations, but on specific factual allegations of a kind plainly capable of being refuted, being for the most part within the special knowledge of the Bank. For these reasons, I think that consultation was required as a matter of fairness. But the principle which required it is more than a principle of fairness. It is also a principle of good administration. The Treasury made some significant factual mistakes in the course of deciding whether to make the direction, and subsequently in justifying it to Parliament. They believed that Bank Mellat was controlled by the Iranian state, which it was not. They were aware of a number of cases in which Bank Mellat had provided banking services to entities involved in the Iranian weapons programmes, but did not know the circumstances, which became apparent only when the Bank began these proceedings and served their evidence. The quality of the decision-making processes at every stage would have been higher if the Treasury had had the opportunity before making the direction to consider the facts which Mitting J ultimately found".

65. In the present case the Claimant relies further on *R (Khatun) v Newham LBC [2005] QB 37* at paragraph [30] – [31] for the proposition that where the administrative decision in question takes something away from a citizen (such as his money) as opposed to where the citizen is applying for something (such as a future licence), then the presumption that notice of the decision to be taken and a right of representation be granted before the decision is a very strong and, it was submitted, compelling one. However, Khatun did not create any sort of hard and fast rule. It merely highlighted, as Laws LJ made clear (ibid paragraph [31]), what might in any event be thought of as common sense, namely that as a matter of fact the case for implying a right of representation will generally be stronger in a case of deprivation than of grant. But the test remains one of elementary fairness which is fact and context sensitive. And indeed the principle could work the other way around, again as was recognised by the Court of Appeal: " *There may be cases where refusal of the application (for example, the refusal of a passport) will carry adverse implications for other rights or interests which the applicant may expect to enjoy* " (ibid).

(iii) Analysis and conclusion

66. I do not accept the Claimant's submission. In my judgment in context the provisions in the Finance Act 2014 are perfectly fair and adequate. There is no need for the Court even to consider the need for supplementation through the implication of additional duties.

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67. First, the Finance Act 2014 creates a statutory right of consultation. This does *not* take effect prior to the APN being issued but it *does* afford the addressee a right of representation *prior* to the APN becoming effective. The procedure is set out in section 222 Finance Act 2014 . This provides:

"222 Representations about a notice

This section has no associated Explanatory Notes(1) This section applies where an accelerated payment notice has been given under section 219 (and not withdrawn).

(2) P 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 section 219 was not met, or

(b) objecting to the amount specified in the notice under section 220(2)(b) or section 221(2)(b).

(3) HMRC must consider any representations made in accordance with subsection (2).

(4) Having considered the representations, HMRC must—

(a) if representations were made under subsection (2)(a), determine whether—

(i) to confirm the accelerated payment notice (with or without amendment), or

(ii) to withdraw the accelerated payment notice, and

(b) if representations were made under subsection (2)(b) (and the notice is not withdrawn under paragraph (a)), determine whether a different amount ought to have been specified under section 220(2)(b) or section 221(2)(b), and then—

(i) confirm the amount specified in the notice, or

(ii) amend the notice to specify a different amount,

and notify P accordingly".

68. According to this scheme the addressee can make representation about all of the matters which go to the computation of the tax and this therefore includes the applicability of Conditions A, B or C and all matters going to quantum. The Revenue has a duty to consider such matters. And then the Revenue is under a duty to determine whether to confirm the APN or amend it or withdraw it.

69. Second, issuance of an APN is not a bolt from the blue (as it was in Bank Mellat). In cases such as the present, involving DOTAS notifications, it is, systemically, "on the cards". The subject matter of the dispute is a scheme which fits the statutory definition of tax avoidance. Scheme promoters must notify their arrangements under the DOTAS Regulations . The forms used for that notification enable promoters to describe their scheme and set out facts upon which they rely in order to persuade the Revenue that the scheme is effective and not tax avoiding. When a taxpayer submits a tax return which (as in this case) seeks to claim relief from tax already paid on the basis of a notifiable scheme that taxpayer inevitably knows and expects HMRC to become professionally interested. Indeed the taxpayer must include the SRN on the return to highlight the fact that the return may reveal tax avoidance. As I have already observed Mr Southern QC candidly accepted that on the face of the Claimant's tax return itself there was " *something funny going on* " (see paragraph [15] above). In these circumstances there is no question of administrative action coming out of the blue.

70. Third, the fact that the APN is issued without a right of representation is not in itself significant, given that it does not become effective until after representations have been made and considered. Indeed, there is practical merit in the right of representation post-dating issuance. I find it difficult to see how the addressee could make realistic representations without first having had sight of the notice and the calculations which accompany it which explain the HMRC calculation and

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workings. Given that this information is necessary to enable the addressee to know how it should make representation on Conditions A, B or C and/or especially as to computation, the issuance of an APN with the accompanying information is an important first step in the ability to make effective representations. There is an analogy to be drawn here with Government consultations where in law a distinction is drawn between predisposition (which is perfectly valid) and predetermination (which is not). The former is valid because for the decision maker to set out in the consultation paper its provisional view (the predisposition) and the information and evidence it is relying upon for this provisional view gives consultees a target to aim at and this has been held to improve the quality of the consultative exercise and process.

71. Fourth, there is no reason to extend the statutory representation process by implying into it further common law duties. There are before the Court some striking internal HMRC documents which evidence the aggressive nature of scheme promoters who pro-actively seek to delay and deter the Revenue from taking decisions and this was also evident from the pre-legislative consultation exercise. The statutory procedure provides a 90 day period for representations and it has not been suggested that this is too short. In my judgment it is a fair period. It strikes a balance between making the right of representation a genuine one and preventing addressees from engaging in undue delay tactics.

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 Mrs Justice Simler at paragraph [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 Schedule 32 paragraph 5) is adequate to ensure that fairness is preserved. This allows representations to be made challenging the rationality of the designated officer's determination, based on his information and belief, both as to the efficacy of the tax avoidance arrangements and as to the amount. For example, as Mr Eadie QC submitted, if there was clear judicial authority (at whatever level) that a particular tax scheme was legally effective to produce the tax advantage asserted, that would be a basis for challenging the rationality of the officer's determination in relation to a PPN involving the identical tax scheme. However, it does not allow representations on the wider basis contended for by the claimants, in effect challenging the merits of the decision by reference to the efficacy of the tax avoidance scheme itself. The merits of the underlying tax dispute is a matter to be dealt with in the statutory appeal. I agree with Mr Eadie that affording such a right would be inconsistent both with the purpose of the preserved statutory appeal rights, and the limited nature of the representations allowed under FA 2014 . It is no part of the statutory scheme that before giving a PPN, there must be some final determination of the merits of the underlying tax avoidance scheme itself”.

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* ” (i.e. 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.

74. In any event (and I deal more fully with this point at Section F Ground 3 below), the remedy of judicial review exists if the representation process is in actual fact inadequate and does not enable a genuinely aggrieved addressee of an APN to make representations about some justiciable public law error on the part of HMRC.

75. Sixth, there are additional facts and matters which support the above conclusion. The facts of this case show quite clearly that from the outset HMRC formally communicated to the Claimant its determination to object to the Syndicate Schemes: See paragraphs [19] – [29] above. When the Finance Act 2014 came into force in July 2014 it must surely have been only a matter of time before APNs were issued and the Syndicate schemes were exactly the sort of arrangement that was in the Treasury's aim. It can also be seen from the correspondence that HMRC did not operate behind a closed door and was perfectly willing to accept comments and representations from the Claimant. In each letter the Claimant was told how to make contact with

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relevant officials. I was also informed by Mr Southern QC that the Syndicate Scheme Promoter had in actual fact made representations to the HMRC upon issuance of the relevant notices and no argument was advanced to me that the exercise of this right was ineffective or inadequate. Plainly the HMRC did not accept the validity of whatever was submitted by the Promoter; but that is a different point going to the *merits* of the substantive decision and it does not go to the question of the *ability* to make effective representations.

76. Similar arguments were advanced to the High Court in Rowe in relation to post-assessment APNs issued in relation to Partnership Schemes which are governed by Finance Act 2014 Schedule 32 . But the underlying principles are the same. Simler J also rejected the argument. Having described the relevant statutory regime (cf. ibid. paragraph [58]) she made the following points which apply, *mutatis mutandis* , to the pre-assessment enquiry stage APNs. First, the accelerated payment does not involve any determination of final liability, but rather, addresses where the tax should be held pending resolution of the dispute. Parliament has specifically addressed procedural fairness, and prescribed a procedure whereby there is a right to make representations before any payment obligation arose (ibid. paragraph [61]). Second, the notices do not deprive the claimants of their statutory right to challenge the underlying tax liabilities by way of appeal to the First Tier Tribunal (“FTT”) and do no more than temporarily deprive the claimants of the benefit of keeping the money pending resolution of the underlying appeal (ibid. paragraph [62]). Third, the requirement to make an accelerated payment does not itself deter the exercise of appeal rights. Fourth, there is also protection available to a recipient of a notice through the availability of judicial review to challenge the lawfulness of the decision to give a PPN (ibid paragraph [68]). Finally, Parliament had enacted a statutory scheme intended to operate broadly across a wide range of tax avoidance schemes to remove the cash flow advantage pending appeal. The recognition of additional common law requirements would frustrate the purpose of the statutory scheme and cut across its practical operation.

77. For all of the above reasons this ground fails.

E. Ground 2: Violation of the Claimant's legitimate expectation/non-retroactivity

(i) The issue

78. The Claimant argues that the APN frustrates his legitimate expectations and operates in an unlawfully retrospective manner. The nature of the legitimate expectation asserted by the Claimant evolved during argument. In its final form the Claimant advanced two factual propositions as the basis for his complaints. First, that because of the delay between the furnishing of the return and the issuance of the APN during which the Revenue failed to take action, the Claimant was entitled to expect that the Revenue would not impose any payment notice until such time as it had made a formal assessment of the tax claim. The second submission was that because the Revenue made payment to him (see paragraphs [16] – [17] above) he was entitled to expect that the disputed sum would only be required to be repaid following a formal assessment.

(ii) Observations upon the factual premises: identification of real issue

79. I start with observations about these evidential submissions.

80. With regard to the suggestion that the Revenue was quiescent and that during this period the Claimant came to expect that he could enjoy the use of the money pending a formal assessment it is clear from the facts as set out above (see paragraphs [19] – [30]) that this is simply not so. At all times the Revenue made clear to the Claimant that it challenged his tax return and that it was only the complexity of unravelling the scheme and the exigencies of litigation which prevented earlier action by HMRC. There can never, on any rational or sensible basis, have been any expectation (legitimate or otherwise) on the part of the Claimant that the passage of time was relevant or significant to the question as to *when* HMRC would seek payment. The Claimant knew that the Revenue challenged his tax return and that in all likelihood it would at some point seek repayment. It is true that when he submitted his return the law *then* was that payment could be sought only after an assessment but that is a different issue relating to retroactivity (addressed at paragraph [97] below) which has nothing to do with the amount of time taken by the Revenue to process the return.

81. As to the fact that repayment of the claimed sums was made, again, this has nothing to do with the point in time at which payment to the Revenue of the disputed sum might be sought. HMRC has explained that the repayments were made automatically and, in effect, due to the APN scheme not having adequately been factored in to the automatic repayment mechanism. Following the repayment the Revenue continued to send letters and communications to the Claimant making it plain that they challenged the Syndicate Scheme. The payments were procedural; they did not, nor could reasonably have been construed as, amounting to a course of conduct that even came remotely close to any form or promise or practice that the

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Revenue would not in due course seek to recoup those payments under the legislation that applied. In my view the Claimant mischaracterises the nature of the repayments; they carried with them no form of promise or representation.

82. The nub of the Claimant's point must in reality boil down to a submission that the Claimant had a legitimate expectation that the Government would: (a) not change the law; and/or (b), if the Government *could* change the law it nonetheless could not do so to the prejudice of those who had entered into notifiable schemes or submitted tax returns *prior* to the law change.

(iii) The law

83. A legitimate expectation can be procedural or substantive: *R v North and East Devon Health Authority, ex p Coughlan [2001] QB 213* (" Coughlan ") at paragraphs [88]-[99]. However for a justifiable legitimate expectation of any type to arise there must exist a settled course of conduct which exhibits a sufficient degree of certitude. It must amount to "… a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured": *Bhatt Murphy v Independent Assessor [2008] EWCA Civ 755* per Lord Justice Laws at paragraph [43]. He also observed that (paragraph [46]) that previous case law illustrated " … *the pressing and focussed nature of the kind of assurance required if a substantive legitimate expectation is to be upheld and enforced"* . In *Preston [1985] AC 835* at pages 866 – 867 Lord Templeman referred to *"conduct ... equivalent to a breach of contract or breach of representations"*. In Ex p Baker [1995] 1 AER 73 reference was made to a " *clear and unambiguous representation"*. In *R (on the application of Wheeler) v Office of the Prime minister et ors [2008] EWHC 1409 (Admin)* Lord Justice Richards said:

> "39 …. In order to found a legitimate expectation, a representation must in general be "clear, unambiguous and unqualified" (*R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd [1990] 1 WLR 1545* , 1570B). As stated in *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence [2003] QB 1397* , at para 72, "it is clear that it will only be in an exceptional case that a claim that a legitimate expectation has been defeated will succeed in the absence of a clear and unequivocal representation". The implied representation relied on here depends for its application on an essentially political judgment as to whether, in the context of a decision as to the holding of a referendum, a later treaty is substantially similar to, or materially different from, the Constitutional Treaty. Such a representation, however, lacks the precision that is needed if it is to be capable of being enforced by the courts as a matter of public law; and there is nothing exceptional about the case that could enable the claim to succeed in the absence of a clear and unequivocal representation".

84. When what is being attacked is the abrogation or a change of a policy the starting point is that once a policy is promulgated and said to be settled there needs to be a rational ground for terminating it: Bhatt Murphy (ibid paragraph [34]). See also *R (Solar Energy Holdings Limited et ors) v Secretary of State for Energy and Climate Change [2014] EWHC 3677 (Admin) paragraph [72] upheld on appeal [2016] EWCA Civ 117* (" Solar Energy ") at paragraphs [49], [50]. But there is no presumption that policy cannot change; on the contrary it plainly can do so and frequently does. So the issue becomes whether there can be identified a representation of sufficient certitude that the policy will *not* be changed *regardless* of surrounding circumstances howsoever compelling they might be.

85. And *even if* a sufficiently certain promise or representation has been made that a policy *will* continue in force there is a balance *still* to be struck between the retention of that policy and the strength of the (*ex hypothesi*) rational policy grounds which have arisen and which now are said to necessitate a reversal to or change of that prior representation or promise. The litmus test is fairness and whether the change amounts to an abuse of power. In Bhatt Murphy Lord Justice Laws stated (at paragraph [42]):

> "…In the paradigm case of procedural expectations it will generally be unfair and abusive for the decision-maker to break its express promise or established practice of notice or consultation. In such a case the decision-maker's right and duty to formulate and re-formulate policy for itself and by its chosen procedures is not affronted, for it must itself have concluded that that interest is consistent with its proffered promise or practice. In other situations – the two kinds of legitimate expectation we are now considering – something no less concrete must be found. The cases demonstrate as much. What is fair or unfair is of course notoriously sensitive to factual nuance. In applying the discipline of authority, therefore, it is as well to bear in mind the observation of Sir Thomas Bingham MR as he then was in Ex p Unilever at 690f, that "[t]he categories of unfairness are not closed, and precedent should act as a guide not a cage".

86. In determining whether it is fair to change a policy the size of the affected group of persons is a relevant consideration. The smaller and more focussed the group to whom a representation or promise has been made the more likely it is that the

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change of policy will be unfair. The converse is that a change of policy adopted towards a larger group of persons is more likely to be fair, provided it is based on rational, sound, policy reasons: Bhatt Murphy (ibid) paragraph [46]:

> "46. … I should add this. Though in theory there may be no limit to the number of beneficiaries of a promise for the purpose of such an expectation, in reality it is likely to be small, if the court is to make the expectation good. There are two reasons for this, and they march together. First, it is difficult to imagine a case in which government will be held legally bound by a representation or undertaking made generally or to a diverse class".

87. In Ex p Coughlan (paragraph [71]) Lord Woolf MR stated: " *…the broader the class claiming the expectation's benefit, the more likely it is that a supervening public interest will be held to justify the change of position complained of …* ".

88. In Ex p Begbie Lord Woolf said *:* (paragraphs [1130G] –[1131B]):

> "In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear… In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players… The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes".

89. In *R (Department of Education and Employment) ex parte Begbie [2000] 1 WLR 1115* Lord Justice Peter Gibson concluded that whilst detrimental reliance was not an essential component of a legitimate expectation it would be " *very much the exception, rather than the rule, that detrimental reliance will not be present when the court finds unfairness in the defeating of a legitimate expectation* " (page [1124B]). It was said that detrimental reliance could be relevant (i) as part of the evidence establishing the existence or the extent of the expectation; and, (ii) to the decision of the authority whether to revoke the representation.

(iv) Analysis and conclusion

90. I reject the submissions that the issuance of the APN thwarts the Claimant's legitimate expectation either generally or in the light of the repayments; but even if it did I would conclude that the thwarting was in any event lawful and not an abuse of power or otherwise unfair.

91. First, there has never been any promise or representation that the policy of imposing payment notices only following assessment or in Follower cases would not be expanded. The succession of consultation exercises in this field makes very clear that the game of hide and seek played between scheme promoters and the Revenue is one of long duration and is a game the rules of which are well understood by those who devise and promote such schemes. Common sense indicates that in this particular context legislative and other policy changes *will* be put in place to counter new types of tax avoidance scheme as they evolve. As already observed the two facts asserted by the Claimant do not establish any sort of promise or representation of the type required.

92. Second, the Treasury consulted all affected persons on the proposal to empower the issuance of payment notices during inquiries and thereby change the payment regime. No one has suggested that the consultation was unfair or in any way inadequate. All procedural expectations were honoured.

93. Third, the affected group is large; said to amount to about 65,000 persons engaged in tax avoidance. Chapter 3 of the Finance Act 2014 serves a legitimate and important purpose and Treasury estimates are that the funds affected run into billions.

94. Fourth, in relation to the particular issue surrounding repayment no promise was ever made or could be deduced or inferred from the facts that an APN would not be issued to require repayment of the repaid sums. The most that can be said is that the Claimant was the temporary beneficiary of a failure on the part of HMRC efficiently to apply joined up thinking to the repayment system and the self-assessment. Further, there was no detrimental reliance. This dispute concerns liquidity only; if the Revenue is correct and the Syndicate Scheme is an unlawful tax avoidance scheme then the Claimant will have to pay the sum anyway, together with interest. And if it is not then the Revenue will have to repay the disputed sum, again

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together with interest. In his Witness Statement the Claimant has complained that he does not have the money required by the APN to be paid over to the Revenue. But this is nothing to the point. First, there is in any event no statement of means to support the contention and it is bare assertion. Second, there is no suggestion that the Claimant's financial difficulties are connected to the APN or would in any way be different if the HMRC were to continue to an assessment and then issue an APN to him. Thirdly, if and in so far as there are difficulties, it has always been the position of the HMRC that it is prepared to enter into appropriate payment arrangements, for example periodic payments.

95. Fifth, even if a legitimate expectation of a general or a specific nature did arise, in my judgment it is fair, and not an abuse of power, for it to be thwarted. Tax avoidance is a substantial problem and the provisions of the Finance Act are specifically designed to attack, at source, a longstanding problem which includes numerous “legacy” cases (see paragraph [54] above). On balance, the policy reasons far outweigh the relatively limited private interest in retention of the money pending formal assessment. If the Claimant's purported legitimate expectations were to trump the obligation to “pay now”, then Parliament's legitimate policy would be defeated.

96. For these reasons I reject any suggestion that the Government was not allowed to change the law or apply an APN following repayment.

97. The Claimant also argued that the change was unfairly retroactive. I will deal with this briefly. HMRC submits that it is not retroactive since the basis for the imposition of tax has not changed; all that is new is the point in time at which payment must be made. In my judgment the change in the Finance Act 2014 is retroactive only in the very limited sense that there are new payment rules being applied which alter the position that taxpayers hitherto were subject to. It is doubtful whether this is properly to be categorised in law as retroactivity since it merely changed the consequences of acts and/or omissions from those which would have been expected at the time (see by way of analogy per Floyd LJ in Solar Energy (ibid.) at paragraph [71]). But even if it is retrospective it operates at the very lowest point of severity. In the context of tax avoidance it is a change justified by a legitimate policy and it is fair and reasonable in all the circumstances (see Solar Energy at paragraphs [91] – [98] in the High Court, endorsed as the test in the Court of Appeal at paragraphs [73], [74]). Indeed, as already observed, it would defeat in a substantial way the Parliamentary purpose of introducing the legislation which covered “legacy” disputes if it could not be applied to extant notified schemes. The principle is also said to be, at heart, one of statutory construction. On this basis there can be little doubt but that in the Finance Act 2014 Parliament intended the new regime to apply to extant legacy tax avoidance schemes.

98. In Rowe Simler J set out analogous reasons for rejecting a legitimate expectation in respect of post-assessment notices pending appeal: See ibid paragraphs [88] – [96]. In Rowe the Revenue had also made repayments (see ibid paragraph [92]). As to these the Judge stated:

> “94. I do not accept these arguments. First there is simply no evidence of a practice that was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to the claimants of continued treatment in accordance with it. Even if HMRC made “carry back” repayment claims in circumstances where it was open to HMRC not to do so, this did not prevent HMRC from opening (either then or subsequently) actual or deemed (by virtue of s.12AC(6) TMA) s.9A TMA enquiries into those losses contained in partner returns to challenge the efficacy of the tax planning. I have already concluded that such enquiries are sufficient to challenge any claims for loss relief flowing from such losses (whether sideways or carry back). Indeed, as recognised at paragraph 14(6) of Appendix II to the claimants' skeleton argument, simply because the claimants received a set-off or a repayment of tax did not give rise to any expectation that this was conclusive. Rather as they accept they “understood that the relief claimed could be disputed if enquired into”. The position in relation to the tax represented by the repayment remained open to challenge, and there is no evidence of anything said or done by HMRC to suggest otherwise”.

99. For all the above reasons, I reject the submissions made on the basis of legitimate expectations or any rule or presumption against retrospection.

F. Ground 3: Denial of right of access to a Court (Article 6 ECHR)

(i) The issue: Claimant's submissions

100. The Claimant next argues that Chapter 3 Finance Act 2014 violates Article 6 ECHR . Article 6(1) provides (in summary) that in the determination of a person's civil rights and obligations, or any criminal charge against him, a person is entitled to a fair trial before an independent and impartial tribunal.

101. The Article 6 argument was linked in substance to the omission from the Finance Act 2014 of a right of appeal against the issuance an APN.

102. For there to be a violation of Article 6 two conditions must be met. First, the dispute in question must be capable of being categorised as "civil". Secondly, if it is, then there must be a denial of the right of access to a court or to a fair hearing.

(ii) Analysis and conclusion

103. In my judgment this ground is not sustainable. First, this is not a "civil" dispute; but secondly, even if it is, there is no substantive violation of the duty.

104. First, in my judgment no "civil" right is engaged in the dispute. This is because under Article 6 it is recognised that tax matters form part of the hard core of public authority prerogatives, with the *public* nature of the relationship between the taxpayer and the tax authority predominating. In Ferrazzini v Italy (Application 44759/98) [2001] ECHR 464 the European Court of Human Rights held (by a 11:6 majority):

> "26. The Convention is, however, a living instrument to be interpreted in the light of present-day conditions (see, among other authorities, Johnston and Others v. Ireland , judgment of 18 December 1986, Series A no. 112, pp. 24–25, § 53), and it is incumbent on the Court to review whether, in the light of changed attitudes in society as to the legal protection that falls to be accorded to individuals in their relations with the State, the scope of Article 6 § 1 should not be extended to cover disputes between citizens and public authorities as to the lawfulness under domestic law of the tax authorities' decisions.
>
> 27. Relations between the individual and the State have clearly evolved in many spheres during the fifty years which have elapsed since the Convention was adopted, with State regulation increasingly intervening in private-law relations. This has led the Court to find that procedures classified under national law as being part of "public law" could come within the purview of Article 6 under its "civil" head if the outcome was decisive for private rights and obligations, in regard to such matters as, to give some examples, the sale of land, the running of a private clinic, property interests, the granting of administrative authorisations relating to the conditions of professional practice or of a licence to serve alcoholic beverages (see, among other authorities, Ringeisen v. Austria , judgment of 16 July 1971, Series A no. 13, p. 39, § 94; König , cited above, p. 32, §§ 94–95; Sporrong and Lönnroth v. Sweden , judgment of 23 September 1982, Series A no. 52, p. 29, § 79; Allan Jacobsson v. Sweden (no. 1) , judgment of 25 October 1989, Series A no. 163, pp. 20–21, § 73; Benthem v. the Netherlands , judgment of 23 October 1985, Series A no. 97, p. 16, § 36; and Tre Traktörer AB v. Sweden , judgment of 7 July 1989, Series A no. 159, p. 19, § 43). Moreover, the State's increasing intervention in the individual's day-to-day life, in terms of welfare protection for example, has required the Court to evaluate features of public law and private law before concluding that the asserted right could be classified as "civil" (see, among other authorities, Feldbrugge v. the Netherlands , judgment of 29 May 1986, Series A no. 99, p. 16, § 40; Deumeland v. Germany , judgment of 29 May 1986, Series A no. 100, p. 25, § 74; Salesi v. Italy , judgment of 26 February 1993, Series A no. 257-E, pp. 59–60, § 19; and Schouten and Meldrum , cited above, p. 24, § 60).
>
> 28. However, rights and obligations existing for an individual are not necessarily civil in nature. Thus, political rights and obligations, such as the right to stand for election to the National Assembly (see Pierre-Bloch , cited above, p. 2223, § 50), even though in those proceedings the applicant's pecuniary interests were at stake (ibid., § 51), are not civil in nature, with the consequence that Article 6 § 1 does not apply. Neither does that provision apply to disputes between administrative authorities and those of their employees who occupy posts involving participation in the exercise of powers conferred by public law (see Pellegrin , cited above, §§ 66–67). Similarly, the expulsion of aliens does not give rise to disputes (*contestations*) over civil rights for the purposes of Article 6 § 1 of the Convention, which accordingly does not apply (see Maaouia , cited above, §§ 37–38).
>
> 29. In the tax field, developments which might have occurred in democratic societies do not, however, affect the fundamental nature of the obligation on individuals or companies to pay tax. In comparison with the position when the Convention was adopted, those developments have not entailed a further intervention by the State into the "civil" sphere of the individual's life. The Court considers that tax matters still form part of the hard core of public-authority

> prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant. Bearing in mind that the Convention and its Protocols must be interpreted as a whole, the Court also observes that Article 1 of Protocol No. 1 , which concerns the protection of property, reserves the right of States to enact such laws as they deem necessary for the purpose of securing the payment of taxes (see, *mutatis mutandis* , Gasus Dosier- und Fördertechnik GmbH v. the Netherlands , judgment of 23 February 1995, Series A no. 306-B, pp. 48–49, § 60). Although the Court does not attach decisive importance to that factor, it does take it into account. It considers that tax disputes fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer".

105. Given the close run nature of the judgment in Ferrazzini the domestic courts, perhaps not surprisingly, have looked with some caution at the judgment: see for instance the observations of Lord Walker in *Begum v London Borough of Tower Hamlets [2003] UKHL 5* at paragraphs [108] – [111]. He stated that further developments in the case law could be expected in this area (ibid paragraph [112]). Nonetheless Ferrazzini is still treated as stating the law: see e.g. "The Law of Human Rights" Clayton & Tomlinson (2008, 2nded.) paragraph [11.351] page [836]; "Administrative Law", Wade & Forsyth (2014, 11th Ed,) p.380, f44. See for a recent illustration of the now routine endorsement of Ferrazzini by the Strasbourg Court: AK v Liechtenstein [2015] ECHR 655 at paragraph [46].

106. Applying this principle to the facts of the present case the dispute concerns a claim for relief against income tax *already* paid (by way of PAYE) and as such is a paradigm example of a tax dispute as to the sum that is owed by the taxpayer to the state. In this regard it is convenient to record the classic formulation of when a liability to tax arises by Lord Dunedin in *Whitney v Inland Revenue Commissioners [1926] AC 37* at page [52] (" Whitney "):

> "My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable; and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex *hypothesi,* has already been fixed. But assessment particularises the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay".

107. This case might be said to fall within the first stage identified by Lord Dunedin in that it is accepted by the Claimant that he, in accordance with ordinary principles of income tax, is subject to tax and that the quantum thereof is governed by statute and, objectively speaking, that the computation is ascertainable by reference to the statutory criteria. As such there is an existing liability to tax. Putting the analysis in this way simply assists to explain why in the present case there is a tax dispute pre-assessment which on the basis of case law is not a "civil" dispute but a "public" dispute between citizen and state. As such Article 6 is not engaged.

108. If, contrary to the above, the present dispute is "civil" then there is nonetheless no violation of Article 6 . The Claimant is not denied rights of access to a Court either at all or within a reasonable period of time. First, the remedy of judicial review is available. The issuance of an APN involves the taking of an administrative decision by HMRC. This decision is taken following a staged process of evidence collection and evaluation. There is therefore undoubtedly a "decision" in the administrative law sense which in principle is capable of being subjected to judicial review, just as it has been in the present case. Judicial review is, it is now trite to observe, context specific and it will also take account of the existence of other remedies. This might mean that judicial review will be refused until a person has exhausted other remedies, such as an appeal procedure; or it might limit the scope and intensity of review taking into account the existence of other remedies. The important point is that judicial review will provide whatever level of judicial protection is needed to ensure that an individual's Article 6 rights are protected. Secondly, and in any event, by virtue of section 28A(4) TMA 1970 the Claimant can at any time compel the HMRC to make an assessment of the tax liability thereby triggering rights of appeal. Nothing in the Finance Act 2014 takes those existing rights away. In short, the Claimant is surrounded by rights of challenge and he has not identified any particular respect in which it can be said that any of these routes is ineffective or inadequate.

109. Next, in the present case (and consistent with the practice of the Revenue) the Claimant entered into an RSA pursuant to which he has agreed to await the outcome of HMRC's investigation into sample syndicate cases. That investigation is currently on hold awaiting the outcome of HMRC's investigation into sample syndicate cases. That investigation is currently

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on hold awaiting the outcome of pending litigation involving a Liberty Partnership scheme (*in casu* an appeal to the FTT which was heard in 2015 and in respect of which judgment is awaited as of the date of this judgment – see paragraphs [21] – [23] above). The advantage of this is that the Claimant does not personally have to engage in litigation with the Revenue. To this extent, on the facts, the Claimant has addressed himself to his right of access to a court and is exercising it by, as it were, proxy via the RSA.

110. In conclusion there has been no substantive violation of Article 6 .

111. In Rowe , in relation to post-assessment payment notices Simler J took the same position: see ibid paragraphs [149] – [154].

G. Ground 4: Violation the Claimant's property rights: ECHRA1P1 / proportionality

(i) The issue: Claimant's submissions

112. The Claimant submits that the money being demanded is an asset belonging to him and that the APN deprives him of that money. Mr Southern QC submitted: "The extension of the APN legislation to enquiry cases is a bridge too far, and to the extent that the legislation pushes out the boundaries of Payment Notices from cases where there is a tax liability to cases where there is none is incompatible with rights protected … by … Appendix 1 Protocol 1 of the ECHR ". He submitted that a potential or provisional tax liability is not a tax liability. It is merely a liability to hypothetical tax. For a tax liability to arise there must at least be a determinate sum claimed by the tax authority to be payable. It is also said that the APN is disproportionate.

(ii) A1P1

113. Article 1 Protocol No.1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

114. A1P1 contains two basic obligations. The first is a prohibition of deprivation or control of use. The second, which is implicit but not express in A1P1 , is that if deprivation or control of use is allowed it may have to be accompanied by compensation. In this case only the first obligation is in issue. It is to be noted that A1P1 explicitly singles out tax as an exception. The logic is plain which is that tax is a debt owed by the citizen to the state. A1P1 does not however distinguish between an established tax liability and a disputed claim for payment which is not yet a settled tax liability.

(iii) The law

115. First, is a tax dispute an interference with a person's possessions? It is established in case law that an asset can be a possession and it is obvious that money can be a possession. However, where money is a debt owed to another person then it is not the possession of the debtor, but that of the creditor, albeit that it remains in the possession of the debtor. What is the position where there is a dispute over liability? In *Kopecký v Slovakia (2005) 41 EHRR 43* the European Court of Human Rights held (at paragraphs [42] — [52]) that, in principle, an existing asset or a claim could amount to a possession. However, for a disputed claim to be a " *possession* " it had to be more than merely arguable. Case law does not accept that the mere existence of a "genuine dispute" or an "arguable claim" is the litmus test for determining whether there is a right protected by A1P1 . More must be shown: " *where the proprietary interest is in the nature of a claim it may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it* ": (ibid.) paragraph [52]. This has been elaborated upon in domestic law.

116. In *APVCO 19 Ltd and others v HM Treasury & Anor [2015] EWCA Civ 648* Lord Justice Vos held that a claim that was subject to an arguable claim by the Revenue was not a "possession": See paragraph [46]:

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

117. In *ToTel v FTT [2011] STC 1485* Simon J (as he then was) rejected a challenge under A1P1 to the obligation to pay VAT as a pre-condition of bringing an appeal. The decision was subsequently reversed by the Court of Appeal ([2012] EWCA Civ 1401) on different grounds (that the delegated legislation in question was *ultra vires* the enabling legislation). The Court of Appeal did not address the issue under A1P1 . Simon J held (at paragraph [21]):

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

118. In *Huitson v HMRC [2011] EWCA Civ 893* , the Court of Appeal addressed an argument that the first instance court erred in not finding that the claimant had a proprietary interest in a sufficiently established claim to tax relief recognisable under A1P1 . Lord Justice Mummery explained at paragraph [68] that the issue on appeal had changed and the case advanced now addressed the alleged unlawful deprivation by retrospective legislation of the claimant's possession in the form of the alleged proprietary interest in the nature of his claim to tax relief. However, in relation to the status of disputes over tax liabilities he stated (ibid. paragraph [69]):

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

(iv) Analysis and conclusion

119. In my judgment the argument fails, on many levels.

120. First, the present dispute is a classic "tax dispute" whereby the Revenue, after a detailed evaluative process, has concluded that there is understated tax. A dispute about tax suffices to take the sums in question out of the notion of "possessions". Here a dispute has arisen, prior to a final assessment. As set out above, in APVCO 19 Ltd and others v HM Treasury & Anor (ibid.) the Court of Appeal referred to " *an arguable claim* " as excluding A1P1 ; in ToTel v FTT (ibid.) Mr Justice Simon referred to the point in time when the *"issue* " (i.e. the dispute) was " *resolved* " as being the time when the asset emerged; and in Huitson v HMRC the Court of Appeal spoke of a " *genuine dispute* " as not giving rise to an asset protectable under A1P1 . The principle, in my judgment, applies both before and after assessment. This conclusion is consistent with Lord Dunedin's classic formulation of a tax liability in Whitney (cf. paragraphs [106] and [107] above). HMRC has gone through a protracted and thorough procedure to calculate the understated tax and it is confident of its assessment: See paragraphs [40] – [47] above. There can, in my judgment, be no doubt but that the Revenue claim is, at the least, seriously arguable.

121. Secondly, even if the dispute does entail property of the Claimant there was no <u>deprivation</u> but only a requirement that *pro tem* the Claimant pay the money to the Revenue. If he wins it is returned with interest and if he loses it is rightly retained by the state. There is hence no deprivation of the property. In my judgment this is much more akin the control of use case under A1P1 (cf. A1P1 — " *...to control the use of property in accordance with the general interest* "). I was not addressed on this line of authority. I will accordingly summarise the law only very briefly. In control of use cases provided the State acts proportionately then a control of use in the general interest is not treated as violative of A1P1 . In this case there is no challenge to the overall objective sought to be pursued by the Government namely the creation of an alteration in the economics of tax avoidance by removing liquidity advantages from taxpayers and promoters engaging in tax avoiding schemes; and even if there had been such a challenge I would have held in favour of the Revenue, taking into account that in cases such as this the case law accords to the decision maker a broad margin of appreciation. Accordingly the measure pursues a legitimate objective. As to the proportionality of the measure in my view it meets the four part test in *Bank Mellat v Her Majesty's Treasury (No 2) [2013] UKSC 39* at paragraph [20]. In short my reasons are as follows:

i) The measure was introduced fairly following a consultation about which no objection was taken and it is clearly and definitively laid down in primary legislation. The objective is legitimate.
ii) It is a measure targeted precisely at the class of persons whose actions are disapproved of viz., tax avoiders. The class is large and the potential revenue advantage lost to the State through tax avoidance is substantial. The Revenue has a good

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track record of prevailing in litigation with tax avoiders (c. 80%). The Revenue has a discretion under the Finance Act 2014 to issue APNs and applies it through a well thought out and rigorous procedure in order to calculate the understated tax and, without suggesting that there can ever be certainty, the issuance of a APN is on the evidence before the Court likely to reflect an accurate assessment of the actual sums owed to the Revenue. As such the procedure adopted guards against any arbitrary exercise of the power. There is a full and fair right of representation provided to the addressee of the APN, effective judicial supervision exercised via judicial review; and a statutory appellate structure which is available to the taxpayer. The measure is rationally connected to the objective and contains legitimate and effective safeguards to prevent arbitrary application.
iii) It has not been suggested that there is an alternative equally effective but less intrusive mechanism which could be adopted which would secure for the State the legitimate public interest advantages that it presently seeks to obtain;
iv) The Act strikes a fair balance between the rights of the taxpayer and the State by the provision of interest payable to the taxpayer if the taxpayer ultimately prevails.

122. In Rowe (ibid.) Simler J also rejected this argument in relation to post-assessment notices: see paragraphs [111] – [148].

H. Ground 5: The Syndicate Scheme was not notifiable and therefore there was no power on the part of HMRC to issue the APN

(i) The issue

123. I turn now to the Claimant's final ground which is that the APN issued to the Claimant was *ultra vires* . It is submitted that the Syndicate Scheme was not notifiable under the Finance Act 2004 and/or the DOTAS Regulations 2006 and as such there was no power on the part of the HMRC to issue the APN. The gravamen of the issue turns upon whether the Syndicate Schemes are substantially the same as the Partnership Schemes. This flows from an exemption from the duty to notify in Section 308(5) Finance Act 2004 . This provides:

"(5) Where a person is a promoter in relation to two or more notifiable proposals or sets of notifiable arrangements which are substantially the same (whether they relate to the same parties or different parties), he need not provide information under subsection (1) or (3) if he has already provided information under either of those subsections in relation to any of the other proposals or arrangements".

The premise underlying the Claimant's argument is that the Syndicate Schemes did not need to be notified because they are substantially similar to the Partnership Schemes which were notified under the DOTAS Regulations on 15th September 2006 . The reasons why each of the Partnership and Syndicate Schemes are the same are: (i) because the mechanism giving rise to the loss is exactly the same (the purchase of the dividend which gives rise to a trading loss, and the non-taxability of the dividend under section 730 ICTA); and (ii), because the partnership aspect was not the reason for the tax advantage or the DOTAS notification and there is nothing of relevance about the partnership which is transparent for tax purposes as its members are treated as carrying on its activity and the profits or losses are deemed to arise to them.

124. Accordingly because the Partnership Scheme was notified the Syndicate Schemes did not fall to be notified and was not a "notifiable" arrangement under Section 219 Finance Act 2014 and, accordingly, no APN can be imposed.

(ii) The Statutory framework governing the duty to notify

125. I turn now to the relevant statutory provisions.

Finance Act 2014:

126. An APN may be issued to any person if Conditions A to C are met: cf. section 219(1) Finance Act 2014 . Condition A is that a tax enquiry is in progress into a return or claim made by a person in relation to a relevant tax. Condition B is that the return or claim is made on the basis that a " *particular* " tax advantage ("the asserted advantage") results from *"particular* " arrangements ("the chosen arrangements"). There is no doubt that Conditions A and B are met in the present case.

127. Condition C is satisfied if one or more specified requirements are met. One of the specified requirements is that the chosen arrangements are " DOTAS arrangements". Section 219(5) provides:

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"(5) " DOTAS arrangements" means—

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

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

(c) arrangements in respect of which the promoter must provide prescribed information under section 312(2) of that Act by reason of the arrangements being substantially the same as notifiable arrangements within paragraph (a) or (b)".

(Emphasis added)

It is common ground in this case that the dispute centres on (a) and (b) (not (c)) and concerns the concepts of " *notifiable arrangements* " and " *notifiable proposal* ".

Finance Act 2004:

128. Other statutory provisions of relevance are found in Section 306-319 Finance Act 2004 . Section 306(1) provides that " *notifiable arrangements* " means any arrangements which:

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

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

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

129. Section 306(2) provides that a "" *notifiable proposal* " means a *proposal for arrangements* which, if entered into would be notifiable arrangements (whether the proposal relates to a particular person or to any person who may seek to take advantage of it).

130. Section 308(1) is concerned with the duties on promoters in relation to " *proposals* ". It requires promoters to provide HMRC with " *prescribed information* " in relation to a " *notifiable proposal"* within a defined period after the earlier of (i) the date on which the promoter first makes the notifiable proposal available for implementation by any other person; or (ii) the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements implementing the notifiable proposal. The duty is in the following terms:

"(1) The promoter must, within the prescribed period after the relevant date, provide the Board with prescribed information relating to any notifiable proposal."

131. Section 308(3) imposes a duty on the promoter of notifiable arrangements to provide HMRC with prescribed information relating to those arrangements within a prescribed period after the date on which it first becomes aware of any transaction forming part of the notifiable arrangements unless those arrangements *implement* a proposal in respect of which notice has been given under subsection (1) . It provides:

"(3) The promoter must, within the prescribed period after the date on which he first becomes aware of any transaction forming part of any notifiable arrangements, provide the Board with prescribed information relating to those arrangements, unless those arrangements implement a proposal in respect of which notice has been given under subsection (1)."

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132. However, Section 308(5) (set out at paragraph [125] above) provides in its effect that the promoter is not under a section 308(1) or (3) duty if it has already provided information under section 308(1) or (3) in relation to other notifiable proposals or arrangements that are " *substantially the same* " as the new otherwise notifiable proposals or sets of arrangements.

133. Section 311 provides that where a person complies (or purports to comply) with, *inter alia* , section 308(1) or (3) the Revenue " *may* " allocate a reference number (the SRN) to the notifiable arrangements or proposed notifiable arrangements.

134. Section 312 provides that where a promoter provides services to any client in connection with notifiable arrangements it must within 30 days of the relevant date provide the client with, inter alia, the SRN number that has been notified by HMRC in relation to (a) the notifiable arrangements; or (b) any arrangements substantially the same as the notifiable arrangements (whether involving the same or different parties).

135. Section 319 contains transitional provisions which exempt promoters from their section 308 duties in respect of notifiable proposals and notifiable arrangements *, inter alia* , where the notifiable proposal was first made available for implementation prior to 18th March 2004 or the notifiable arrangements include any transaction entered into before 18th March 2004. This provision is relevant to the present case in that HMRC draws a contrast between this provision and the transitional arrangements included in the 2006 DOTAS Regulations (see below). Section 319(3) provides:

"(3) Section 308 does not apply to a promoter in the case of— "

(a) any notifiable proposal as respects which the relevant date, as defined by subsection (2) of that section, fell before 18th March 2004,

(b) *any notifiable arrangements which implement such a proposal,* or

(c) any notifiable arrangements which include any transaction entered into before 18th March 2004.

(Emphasis added)

Relevant DOTAS Regulations:

136. I turn now to the 2006 DOTAS regulations . The regulations which prescribe (under section 306(1)(a) Finance Act 2004) the descriptions of arrangements were the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2004 which came into force on 1 August 2004. These were revoked and replaced by the Tax Avoidance Schemes (Prescribed Descriptions of Arrangements) Regulations 2006 which came into force on 1 August 2006 ("the DOTAS Regulations").

137. Regulation 12 of the DOTAS Regulations prescribes "Loss Schemes". These were not prescribed by the 2004 Regulations but as from 1st August 2006. Loss Schemes were notifiable proposals and arrangements within the meaning of section 306 and, moreover, their promoters were under a statutory duty to notify them to HMRC unless they fell within the transitional provisions of the 2006 Regulations.

138. The transitional provisions are found in Regulation 1(2) and provide (so far as is relevant):

"(2) These Regulations do not have effect—

(a) for the purposes of section 308(1) of FA 2004 (duties of promoter relating to any notifiable proposal), if the relevant date falls before 1st August 2006;

(b) for the purposes of section 308(3) of FA 2004 (duties of promoter relating to any notifiable arrangements), if the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements falls before 1st August 2006".

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139. The "relevant date" for the purposes of section 308(1) is the earlier of the date on which the promoter makes the notifiable proposal available for implementation by any other person or the date on which the promoter first becomes aware of any transaction forming part of notifiable arrangements implementing the notifiable proposal.

(iii) HMRC case

140. HMRC's case is straightforward. They say that the Syndicate Schemes were properly notifiable because they meet the relevant statutory criteria. The Liberty Syndicate 21 scheme, which was the Syndicate Scheme specifically entered by the Claimant, was subject to the APN provisions of the Finance Act 2014 because: (i) it implemented a notifiable proposal within the meaning of section 306(2) Finance Act 2004 ; (ii) it was made first available after 1st August 2006; (iii) it is not excluded by any other statutory provision; (iv) it therefore amounted to a " DOTAS arrangement" within the meaning of section 219(5) Finance Act 2014 ; and (v), it therefore fell within the scope of section 219 Finance Act 2014 , and an APN could in principle be issued, because all three Conditions (A to C) were met.

141. HMRC rejects the Claimant's analysis upon the basis that nothing in the legislative regime applicable to the Partnership Schemes provides an exemption from the duty to notify applicable to the Syndicate Schemes.

(iv) Some key facts relevant to the issue

142. Certain important parts of the chronology are common ground:

i) Pre-August 2006: The Partnership Schemes are first proposed and implemented; they are not notifiable under the 2004 Finance Act / 2004 DOTAS Regulations (cf. the Mercury case set out at paragraphs [38] and [39] above);
ii) 1st August 2006: 2006 DOTAS Regulations become effective and prescribed Loss Schemes became notifiable;
iii) 15th September 2006: The Partnership Schemes were notified by the Promoter to HMRC under the 2006 DOTAS Regulations and were allocated the SRN 84823780;
iv) 2nd March 2007: Section 113 ITA 2007 becomes effective and renders the Partnership Schemes ineffective as a means of avoiding tax;
v) 20th March 2007: Syndicate Scheme proposals were notified to HMRC and allocated SRN 55413422;
vi) 20th March 2007 — 12th March 2008: The Liberty Syndicate Schemes 9–23 were formed. The Claimant entered into Liberty Syndicate 21 in February 2008;
vii) 12th March 2008: Section 60 and Schedule 21 of the Finance Act 2008 becomes effective [2] and render the Syndicate Loss Schemes ineffective as a means of avoiding tax.
viii) 17th February 2009: The Special Commissioner concluded that the Partnership Syndicate Schemes were not notifiable under section 308 Finance Act 2004 the 2004 DOTAS regulations

(v) Legal consequences which flow from the chronology in the light of the statutory framework: Scope and effect of section 308(5) Finance Act 2004

143. There are two key issues to resolve. The first concerns the correctness of HMRC's submission that issues of substantiality under section 308(5) Finance Act 2004 do not arise. The second concerns the analysis of substantiality upon the alternative premise that such issues do arise.

144. I start with my conclusions on the analysis of section 308(5) . Section 308(1) is the provision which applies the duty on the promoter to notify in the present case because Mercury (the Promoter) was concerned with the Syndicate Schemes which were *proposals* at the time the 2006 DOTAS Regulations first applied (see paragraphs [156] – [160] below). Section 308(3) was capable of applying to the schemes which implemented the notified Syndicate Scheme but the promoter was relieved from the duty to notify the implementations because (see paragraphs [130] — [133] above) the duty does not apply where the subsequent arrangement implements a proposal in respect of which notice has been given under subsection (1) . It follows that there was no duty in this case imposed by section 308(3) for the specific Syndicate Scheme entered into by the Claimant to be notified. Section 308(5) therefore does not apply because it has application *only* where there *is* a duty imposed upon a promoter by section 308(3) but it necessarily follows that if there is no duty imposed by section 308(3) then there is nothing to be relieved from by the operation of section 308(5) .

145. Mr Southern QC submitted that section 308(5) was more than a relieving provision but also imposed obligations. I am unable to accept this construction. It is in my view quite clear from the statutory language that section 308(5) simply serves to disapply the duty in section 308(1) or (3) in certain limited defined circumstances. This can be seen from the structure of

section 308(5) . It has three components: (i) a defined scenario (cf. where the promoter is a promoter in relation to two or more notifiable arrangements or sets of arrangements etc); followed by (ii) the relieving measure which relieves the promoter in the defined scenario from the duties in section 308(1) and (3) (" *he need not provide information* "); but which relief is (iii) subject to conditions attached to the availability of the relief (only where he has already provided a notice under section 308(1) or (3)).

146. In the light of this and the chronology set out above certain consequences in law flow. The Partnership Schemes as proposed and implemented prior to 1st August 2006 did not have to be notified under the transitional arrangements in Regulation 1(2)(a) DOTAS Regulations . Further, this extended to any of the Partnership Schemes which were *already in existence* as at 1st August 2006.

147. However, the Promoter was under a duty imposed by section 308(3) to notify to HMRC the *subsequent* Partnerships Schemes that it entered. It did this on 15th September 2006. In this regard, I reject the submission of Mr Southern QC that Regulation 1(2)(b) 2006 DOTAS Regulations provides an exemption for all *future* Partnership Schemes provided they remained, as it were, within the tramlines of the previous old, non-notifiable, schemes. To construe the Regulation this way would create a gaping hole in the efficacy of the Regulations. It would mean that even though specific legislation had been promulgated to enable HMRC to learn about and challenge partnership Loss Schemes, via the back door of the transitional arrangements the old, non-notified, schemes could continue *in perpetuity* (or until new legislation was promulgated to plug the lacuna). A promoter could continue to use the old scheme and provided it was not changed such that a new scheme came into existence it would continue to be effective. This would be so even though any new partnership Loss Scheme which was economically the same as the old scheme would have to be notified. If this were the law then no one (in their right mind and/or properly advised) would do anything other than continue with the old schemes. In my judgment the transitional arrangements make sense only if they are limited to schemes which were extant as at the date of the law change and thereby protect those individuals who had participated in such schemes at a point in time when the law did not recognise such scheme types as avoidance. Such persons are in an altogether different category relative to new members who enter into such schemes knowing that the prevailing legislation treats such schemes as objectionable tax avoidance and ineffective. Support for this conclusion can be found in section 319 Finance Act 2004 (see above at paragraphs [137]). In the 2004 Act the legislature provided an express transitional exemption for all schemes including those which subsequently implemented schemes entered into before the law rules became effective. In other words Parliament addressed itself quite deliberately to the question whether to create transitional arrangements for future implementation of past schemes. However, Regulation 1(2) DOTAS Regulations contains no equivalent exemption. There are, in my view, sound policy reasons for not extending the transitional exemptions in this way and in the absence of an express extension it would be wrong to adopt a construction which does so.

148. In relation to the Syndicate Schemes the Promoter notified the proposed arrangements on 20th March 2007 and the SRN 55413422 was allocated by HMRC to the proposed scheme. The Claimant entered into a subsequent iteration of the proposal (Liberty Syndicate 21). However, there was no obligation for that " *particular* " scheme to be notified because it was the implementation of a prior proposal in respect of which a notice had been sent to the Revenue and therefore the Section 308(3) duty did not apply.

149. In my judgment HMRC is therefore correct. Section 308(5) does not apply. The notification of the Syndicate schemes was in accordance with the law. The subsequent iterations did not need to be notified. However, they all amount to DOTAS arrangements and Condition C in section 219(4) is satisfied and HMRC had the power to issue the APN.

(vi) Substantiality: Are the Syndicate Schemes and the Partnership Schemes substantially similar?

150. If I am wrong in my first conclusion about the inapplicability of section 308(5) then I need to consider the application of that provision to the facts of the case.

151. In my judgment it is clear that the Syndicate Schemes were not substantially similar to the Partnership Schemes. The reasons can be stated very shortly. I accept Mr Southern QC's argument that economically and financially and by reference to the way in which the losses were generated and then distributed the two schemes were very similar. But this overlooks the key point which is that *legally* they are fundamentally different. This is because Parliament drew a distinction between partnerships and syndicates, challenging the former but ignoring the latter. For this very reason the Promoter obtained leading counsel's opinion and it is perfectly clear that counsel advised that by transmogrifying the partnerships into syndicates in the various schemes this would create a sufficient difference radically to alter the legal position: arrangements that were ineffective after the coming into force of section 113 ITA 2007 would be effective henceforward. The difference in the perceived benefit to promoters and their clients could not have been greater.

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152. In such circumstances to say that the syndicate arrangements are substantially similar to the earlier partnership schemes and that the later arrangements did not need to be notified and subjected to scrutiny involves focusing the spotlight only on a portion of the arrangements and, with Nelsonion acuity, overlooking that which in fact makes them fundamentally different. It is necessary to look at this concept contextually. The DOTAS arrangements are a set of administrative measures designed to impose on promoters a duty (subject to serious sanctions if not observed) to provide advance warning to HMRC of tax avoiding schemes. The purpose is so that HMRC can then analyse the arrangements from a substantive legal perspective (through an enquiry) and, if appropriate, issue APNs to the participants. The essence of the scheme is thus to enable HMRC to apply the law to new types of arrangements as they emerge. Set in this context it is clear that a difference that is substantial (at the very least) includes one that changes or might change the legal analysis of the *effectiveness* of the arrangement and it is hence artificial to exclude from consideration or to discount the very legal analysis that differentiates between the effectiveness of two arrangements.

153. I turn now to set out the detailed reasons behind this conclusion.

Contextual facts:

154. On 12 March 2008 legislation was introduced to prevent individuals taking advantage of these types of Syndicate Schemes (See paragraph [142(vii)] above). However in the period between the proposal being notified on 20 March 2007 and 12 March 2008 fifteen syndicates were formed (Liberty Syndicates 9 to 23) to implement the notified proposal. The Revenue estimate that about 1,150 people participated in the fifteen Syndicates and the total alleged understated and disputed tax was about £220 million.

155. The Syndicate Schemes came into being because the Government plugged what it perceived to be a loophole in relation to " *contrived* " partnership Schemes. An Explanatory Ministerial Statement was issued in relation to Partnership Schemes on 2nd March 2007:

> "The Paymaster General (Dawn Primarolo):
>
> This Government are determined to ensure that all individuals pay the proper amount of tax on their employment income, other non-employment income and capital gains. Despite the Government's focus on tackling tax avoidance schemes, there are a minority who continue to seek ways to avoid paying an appropriate share of tax, which is unfair on the majority of taxpayers and can undermine funding of public services.
>
> The Government have continued to see evidence of schemes that use partnerships to generate losses that can be offset by individuals against other income or capital gains using sideways loss relief. HMRC's compliance activity in this area and the disclosures that have been received, following the extension of disclosure rules to cover loss creation schemes from 1 August 2006, have highlighted that this type of avoidance activity is still widespread. Despite the introduction of extensive anti-avoidance legislation in this area, scheme providers are continuing to devise and operate more contrived schemes.
>
> Prompt and decisive action is required to ensure that all taxpayers pay their fair share of tax. The Government are therefore announcing with effect from today two changes to the rules for sideways loss relief.
>
> Currently, the amount of a partnership's trading losses for a tax year for which a non-active partner can claim sideways loss relief is restricted broadly to the amount of capital that the partner has contributed to the partnership. The Government propose to introduce new legislation to exclude certain capital contributions from this amount. The capital contributions to be excluded will be those paid by non-active partners on or after 2 March 2007 where the main purpose, or one of the main purposes, for contributing the capital to the partnership is for the partner to obtain a reduction in tax liability by means of sideways loss relief.
>
> The Government also propose to introduce an annual limit of £25,000 on the amount of trading losses for a tax year for which an individual who is a non-active partner in a partnership can claim sideways loss reliefs. The new limit will apply to trading losses sustained as a non-active partner on or after 2 March 2007.
>
> Legislation will be included in this year's Finance Bill. A technical note with full details of this measure will be issued on HMRC's website today."

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156. In the 2005/2006 and 2006/2007 tax years 895 individuals joined the eleven Liberty partnerships. Section 113A ITA 2007 was enacted with effect from 2nd March 2007 to block these partnership arrangements and the effect was that non-active partners could no longer claim side-ways loss relief in respect of capital contributions where the main purpose (or a main purpose) for contributing capital to the partnership was for the non-active partner to have access to losses for which sideways loss could then be claimed.

157. The law change did not, however, come as a surprise to scheme promoters who were ready and poised to translate old Partnership Schemes into new Syndicate Schemes. For example, an e-mail was sent to the Mercury partnership clients on 9th March 2007 in which it was accepted that the partnerships that the members had entered into might be affected by the new law. The email then said:

> “However, we have had for some time a revised structure that avoids using a partnership and so is not caught by the changes HMRC have implemented. This is by way of a syndicated structure and we are using this to transact further Liberty trades. As you are part of Liberty 9 partnerships, we will re-assign your interest into Liberty Syndicate 9…. You will need to resign from Liberty 9 partnership and we therefore attach a mandate that confirms your resignation…”

158. The new Syndicate Schemes were made the subject of a favourable opinion from Leading Counsel. It is clear that the opinion approved of the change from partnership to syndicates as a viable way around the new legislation. The alteration of the entities through which the trading losses were generated from partnerships to syndicates was – as the email indicates — considered to be pivotal to the continued effectiveness of the transactions and to the analysis of the dividends generating the alleged losses. In this way, by turning partnerships into syndicates, the arrangements were altered to circumvent the new anti-avoidance measures.

159. I turn now to consider the parties' submissions.

HMRC submissions:

160. HMRC submits that the Syndicate Schemes were not substantially similar to the earlier Partnership Schemes.

161. By becoming a member of a Syndicate the Claimant's loss claims were not subject to the rules relating to partnerships in: (i) Section 104 Income Tax 2007 (restricting reliefs for limited partners); (ii) Section 113A Income Tax Act 2007 (excluding amounts contributed to access relief) which brought into force the targeted anti-avoidance rule announced on 2 March 2007; and (iii) Section 103C Income Tax Act 2007 (limit on reliefs in any tax year not to exceed cap for tax year) which introduced the £25,000 annual cap on losses in cases where section 113A did not apply. The Revenue identified the following differences between the Partnership and Syndicate Schemes:

Liberty Partnerships (84823870)	**Liberty Syndicates (55413422)**
1. Partnership scheme was organised into Limited Partnerships. Each individual participant in the scheme was a limited partner.	The Syndicate scheme comprised groups of individuals purporting to trade on their own account (sole traders) with a small number of corporate participants.
2. The Liberty Partnership variant ceased following the enactment of s113A ITA 2007 with effect from 2 March 2007.	The Liberty Syndicate variant came into being as an attempt to circumvent s113A ITA 2007 , which blocked the Liberty Partnership scheme (a further legislative fix for individuals using schemes such as Liberty Syndicates was then introduced on 12 March 2008 by s74(B) ITA 2007).
3. The Dividend Purchase Agreement is entered into by the General Partner of each Limited Partnership	The Dividend Purchase Agreement is entered into with each member of the syndicate listed as a purchaser.
4. All the limited partners simultaneously sell their partnership shares to a single third party. They use the proceeds to repay the loans obtained to fund their capital contributions. This step was used to avoid being caught by anti-avoidance legislation.	This step was not required in the Liberty Syndicate variant.
5. Partners are **not** able to opt out of any transaction. As limited partners, they would be unable to do this without partnership	According to the Information Memorandum, which was circulated to each member before they applied to join a Liberty Syndicate, participants are able to opt out of any transaction.

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losing its limited liability status under the law, and without the limited partner becoming liable as a general partner.	

Claimant's submissions:

162. The Claimant's case concentrates upon the structural and economic similarities between the Partnership and the Syndicate Schemes. It is argued that both entail six identical steps and in both the cash flows are identical: (i) Step 1: the participants take loans from Bank 2 (B2), and the funds so obtained (1,000) are pooled in a partnership or syndicate [LP/LS]; (ii) Step 2: an offshore company [BVI] borrows 1,000 from Bank 1 [B1] and uses those funds to capitalise a subsidiary [BVI2]; (iii) Step 3: BVI sells the right to a dividend from BVI2 to LP/LS for 1,000; (iv) Step 4: BVI repays the B1 loan; (v) Step 5: BVI2 pays a dividend of 1,000 to LP/LS; (vi) Step 6: LP/LS repays the B2 loan.

163. It is also submitted that the cash flows for participants are identical (assuming in each case that the individual partner or individual contributes 100, i.e. the same amount).

164. And it is further submitted that the tax saving effect is the same in that: (i) The member is carrying on a financial trade so the cost of the dividend at Step 3 is a deductible expense; (ii) BVI is non-resident and accordingly no tax charge under section 730(1) is incurred at Step 3; (iii) no tax charge is incurred by the member at Step 5 either by reason of section 730(1) ; (iv) the economic loss for the member is zero but that member has a tax loss of (100) which can then be set off against taxable income for the same tax year or carried back to the three previous years. Finally, it is said that all of the above is confirmed by the fact that the descriptions of the Partnership and Syndicate schemes in the DOTAS notifications was identical.

165. It is accepted that there are points of dissimilarity but it is contended that these are distinctions without difference. It is, for instance, argued that " *other than for legal reasons* " the concept of a partnership and a syndicate are the same. In relation to tax law the distinction is immaterial because:

> "English partnerships always have been and are transparent for tax purposes. Each member of a partnership is treated as a sole trader, just like a membership of a syndicate. The rule is now in Income Tax (Trading and Other Income) Act 2005, s 852(1) :
>
> > '(1) For each tax year in which a firm carries on a trade (the "actual trade"), each partner's share in the trading profits or losses is treated for the purposes of Chapter 15 of Part 2 (basis periods) as profits or losses of a trade carried on by the partner alone (the "notional trade")".

See also Section 848 of the 2005 Act.

166. Mr Southern QC ultimately submitted that in the context of tax legislation as a whole what mattered was economic substance, not legal niceties. The fact that there were some legal differences was immaterial to the broader question of substantiality.

Analysis:

167. The expression " *substantially the same* " in section 308(5) must be interpreted by reference to its context which concerns (i) administrative obligations relating to notification of tax avoidance schemes and payments on account of sums said to represent understated tax; and (ii) tax avoidance legislation. It is designed (as is section 308(3)) to streamline the notification procedure and to reduce the administrative burden on both promoters and HMRC: There is simply no point in the repetitive notification of proposals and arrangements in order to bring to the attention of HMRC insubstantial changes which do not matter. Viewed thus a scheme or proposal is substantially the same if the differences that exist are immaterial to the analysis of whether it is tax avoidance. But, *a fortiori* , a change or difference in a scheme which is considered to be material , for instance because it renders an ineffective scheme into an effective scheme must be substantially different to its notified predecessors. To conclude otherwise would defeat the obvious purpose of the provision. This conclusion is consistent with normal rules of construction. I have already cited (at paragraph [106] above) the famous dictum of Lord Dunedin in Whitney

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that " *a statute is designed to be workable* ". Another, perhaps more modern way of expressing the same sentiment is that statutes should be construed purposively.

168. The facts of this case are stark: I accept Mr Southern QC's submission that the two schemes are very similar economically and financially; but they are fundamentally different in their legal consequences. As such it is possible to form a clear view as to the merits of this issue which is that HMRC was correct. However, it is necessary (in particular because in other cases the facts might not be so clear cut) to remember that this is a judicial review. There is no statutory appeal which applies to the issuance of an APN. The decision to issue an APN is however susceptible to judicial review and hence the question necessarily arises whether in principle a court should decide the point by reference: (i) to its black and white substantive merits; or (ii), to a rationality test which accords to HMRC an appropriate margin of appreciation.

169. Mr Southern QC accepted that HMRC did have a margin of appreciation in this area but he said that in context since there was a choice between only two alternatives and the compass of the evidential dispute was so narrow as to be virtually non-existent that the margin of appreciation was a very narrow one indeed. In substance the Court should decide the case for itself.

170. On the facts of this case that has been possible. But it might well not be so clear cut in another case. This is not an issue which involves wider policy considerations of an economic or political nature. Deciding whether one scheme is substantially similar to another is a decision of a largely administrative nature. But it does require the exercise of some degree of skilled judgment. There is no definition of the phrase in the legislation. In my view HMRC has a modest margin of appreciation to exercise judgment over what is and is not substantially similar. The Court will oversee that decision and will bear in mind that if a promoter fails to interpret the concept correctly that person risks substantial financial penalties. This might, in a proper case, involve the court in looking closely at the facts but the Court might ultimately decide a case on rationality grounds rather than black and white merits. However, these sorts of considerations do not arise in this case and I refer to them to avoid any risk that in forming a definitive conclusion I am to be taken as having rejected a conclusion that HMRC has a margin of appreciation. The issue in this case is stark and based upon essentially common grounds facts and, as such, susceptible to a clear cut definitive answer.

171. I reject this ground of challenge.

I. Conclusion

172. For all of the above reasons, the application for judicial review fails.

Footnotes

1 The figures set out in this Judgment were provided to the Court by the Revenue after verification and correction of certain figures earlier contained in the Red Book. I am satisfied that the figures recorded in the Judgment are the most up to date and accurate estimates.

2 Section 60 is entitled: "Restrictions on trade loss relief for individuals". It reads: " Schedule 21 contains provision restricting relief for losses made by individuals who, otherwise than in partnership, carry on trades in a non-active capacity." Schedule 21 introduces, inter alia, a new section 74B into the ITA 2007 . This provides that if "(a) during a tax year an individual carries on a trade, otherwise than as a partner in a firm, in a non-active capacity …, (b) the individual makes a loss in the trade in that tax year, and (c) the loss arises directly or indirectly in consequence of, or otherwise in connection with, relevant tax avoidance arrangements" then no sideways relief or capital gains relief may be given to the individual for the loss.

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