



Challenging Accelerated Payment Notices

HMRC strikes the first blow in the challenges to APNs

The High Court has refused to order injunctions preventing HMRC from issuing accelerated payment notices ("APNs") or enforcing existing APNs.

Introduction

Earlier this year investors in the Ingenious film finance schemes won the right to challenge the legality of HMRC's power to issue APNs. While the outcome of this challenge is awaited, HMRC's assault on structured tax planning has been temporarily impaired, with HMRC being required to sign up to a moratorium against issuing further APNs to Ingenious investors.

However, while HMRC's advance has been slowed, one of the ways some had hoped to resist APNs has failed. In *Dunne v HMRC (2015)* the High Court refused to grant injunctions restraining HMRC's powers to issue APNs and levy penalties for breaching them while the underlying dispute (that the APNs were invalid) was resolved.

The Finance Act 2014

Various provisions in the Finance Act 2014 caused a great deal of controversy. APNs in particular caused disquiet among tax planners and advisors, who viewed them as little more than a unilateral power to pressure taxpayers economically so that they would pay disputed tax liabilities rather than pursue their dispute with HMRC.

An APN requires the taxpayer to pay a specified sum up front. If the taxpayer ultimately succeeds in showing that the disputed tax was not payable, the sum paid pursuant to the APN will be returned. If HMRC succeeds the sum will be retained by HMRC (if the final quantum of the tax due is different there will be a balancing payment). In other words, an APN requires the taxpayer to pay some or all of the disputed tax on account while the dispute is litigated in a tax tribunal.

Those fears were no doubt compounded by the fact that there is no right to appeal against an APN (only a limited right to make representations to HMRC), leaving the taxpayer with the difficult (and costly) option of judicial review as the only means of challenge.

HRA incompatibility?

This led many tax advisors and professionals to spill a great deal of academic ink trying to think of ways to challenge APNs.

At the more ambitious end of the scale is an attempt to have the whole APN regime invalidated. This is the challenge brought by the investors in the Ingenious schemes, who have argued that APNs infringe the Human Rights Act and should be declared illegal and be struck down.

That challenge is set to be heard in summer 2015 and the outcome is eagerly anticipated.

Precautionary DOTAS based APNs

Other less direct avenues of challenge have also been proposed. One of the grounds upon which an APN can be issued is if the tax planning it relates to is a notifiable arrangement under DOTAS.

Due to the way the DOTAS legislation has evolved over the last 10 or so years, many professionals have taken to notifying tax planning arrangements under DOTAS on a precautionary basis. That is to say, where there is a risk that tax planning may fall within DOTAS, people have tended to notify in order to reduce the risk of incurring the penalties associated with a failure to notify.

HMRC has used the register of DOTAS notified arrangements as the basis for issuing vast numbers of APNs. This has led some to query whether an APN can be validly issued if, as a matter of fact, the arrangement in question is not actually a DOTAS arrangement and was only notified as one on a precautionary basis.

This argument has been raised in the *Dunne v HMRC* case but the Court did not comment on the merits of this argument at this stage.

Due to the absence of a right to appeal the issue of an APN, some considered whether it would be possible to seek an injunction restraining HMRC from using its APN powers in cases where the taxpayer believed the APN to be invalid. However, this now appears to be an unlikely avenue of challenge.

This was the argument pursued by Dunne. That case actually concerned partner payment notices (“PPNs”), which are effectively APNs for use against partnerships and the same rules apply to them. Dunne sought injunctions preventing HMRC from:

- issuing further PPNs;
- giving notices in response to representations against a PPN (unless the notice had the effect of rescinding the PPN); and
- levying penalties for breach of the PPNs that had been issued.

However, as referred to above, the Court had serious doubts as to whether it could grant such an injunction. To restrain HMRC in this way would appear to require HMRC to act in contravention of the mandatory language of the Finance Act, which would not be within the Court’s power.

The Court decided it did not need to reach a decision on whether it has the power to grant an injunction. As in this case it appeared to the Court that even if it did have the power to award an injunction, on the facts of the case it should not do so. The Court will only award an injunction where it considers that the circumstances the injunction will alleviate for the applicant is balanced to (or of greater weight than) the restrictions or injury it will place on the enjoined party (the “**balance of convenience**”). In this case, while the injunction would alleviate the financial implications for Dunne of facing further PPNs, the injunction would prevent HMRC from fulfilling its statutory obligations, which it had to fulfil by law. Therefore the Court considered that the balance of convenience lay in HMRC’s favour.

A reasonable approach

While HMRC has been granted draconian and far reaching powers under the Finance Act to tackle perceived tax avoidance, the case of Dunne gives hope that HMRC are not intending to use these powers as indiscriminately or capriciously as some feared they would.

While HMRC strongly resisted an injunction preventing them from using their powers, they voluntarily agreed to withhold enforcing Dunne’s PPNs pending the outcome of the case if Dunne could demonstrate that meeting the APN would cause hardship.

This is effectively the same as the hardship exception provided for on VAT appeals that is written into the VAT legislation but which was so notably absent from the APN legislation.

HMRC’s willingness to adopt this approach of its own volition suggests an intention to use the powers responsibly and only pursue them vigorously when dealing with the more clear-cut forms of tax avoidance.

Conclusion

APNs are a controversial topic and the loud opposition they received when the Finance Bill 2014 was in consultation has clearly found some traction. Both in the form of an apparent level of restraint shown by HMRC and the challenge by the Ingenious investors.

With various legal challenges instigated and no doubt many more being contemplated, the next 6 to 12 months promise to be interesting.

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