Neutral Citation Number: [2016] EWHC 1797 (Admin)

Case No: CO/2227/2015

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/07/2016

Before :

MR JUSTICE CHARLES

Between :

R (On the application of)

Vital Nut Co. Limited ("Vital Nut")

and

Zerenex Molecular Limited ("Zerenex")

(and the Claimants as listed in Appendix 1)

Claimants

v

The Commissioners for Her Majesty's Revenue and Customs

Defendant

Jessica Simor QC (instructed by **Pinsent Masons**) for the Claimants
Gemma White QC (instructed by **HMRC**) for the Defendant

Hearing dates: 18 and 19 May 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE CHARLES

Charles J :

Introduction

1. This claim for judicial review relates to Chapter 3 of the Finance Act 2014 which enables the Defendant (the Revenue) to serve an accelerated payment notice (an APN) requiring a taxpayer to pay money to the Revenue. For present purposes the effect of this is that if they are enforceable the APNs require the Claimant taxpayers to pay to the Revenue sums equal to the corporation tax they argue is not due because they can claim relief for payments made to Employer-Financed Retirement Benefits Schemes (EFRBS).

2. If their argument is correct the sums paid pursuant to the APNs will be repaid with interest by the Revenue. Prior to the introduction of the power to serve an APN the Claimant taxpayers would not have had to pay the tax they assert is not due until their claims for relief had been decided.

3. So, as was obviously intended, the giving of a valid APN changes the position on who holds the tax that taxpayers assert they do not have to pay pending the resolution of the taxpayers' claims for relief.

4. The accelerated payment scheme introduced by Chapter 3 part 4 of the Finance Act 2014 has been the subject of two recent decisions. The first is a decision of Simler J, *(R) Rowe and others v HMRC* [2015] EWHC 2293 (*Rowe)* and the second is a decision of Green J, *(R) Walapu v HMRC* [2016] EWHC 658 (Admin) (*Walapu*). In both cases the claims for judicial review were dismissed. Permission to appeal has been given in both cases.

5. The background to the cases before me concerns different taxation legislation but they raise a number of points that have been addressed in *Rowe* and *Walapu.* Indeed, it is accepted by the Claimants that three of the grounds upon which they were given permission to bring this judicial review cannot be pursued before me on the basis that I should follow the judgment of Green J in *Walapu.* However, the Claimants have indicated that they will seek permission to appeal on those grounds so that they can be advanced before the Court of Appeal at the same time as the appeals in *Rowe* and *Walapu* are argued. They also made it clear to me that they reserved the right to argue in the Court of Appeal additional grounds to those advanced before me, in respect of Article 1 of Protocol No 1 to the European Convention on Human Rights (Article 1 Protocol 1).

6. The first ground of challenge before me (Ground 1) was expressed as follows:

> *The Revenue's decisions to issue the APNs were ultra vires ss. 219, 220 and 223 of the Finance Act 2014*

This ground, and the arguments supporting it, were not advanced and the Claimants say did not arise on the facts in *Rowe* and *Walapu.*

7. Ground 1 raises a point of statutory interpretation which does not turn on the facts of the case. Naturally, once the true meaning and effect of the legislation has been determined it has to be applied to those facts.

8. The other two grounds of challenge before me (Grounds 2 and 3) were expressed as follows:

> *The decision to issue the APNs was unlawful under section 6 of the Human Rights Act 1998 (the HRA) as in breach of the Claimants' right to property as guaranteed by Article 1 Protocol 1.*
>
> *The decision to issue the APNs in the circumstances of this case were issued in breach of the principles of natural justice and were otherwise unreasonable and unfair*

Ground 2 has two stages. Firstly, it was argued that Article 1 Protocol 1 was engaged and that either (a) I should distinguish the conclusions in *Rowe* and *Walapu* that it was not, or (b) I should part company from those decisions on the basis that I was "convinced that they were wrong" (see *R v Greater Manchester Coroner ex p Tal* [1985] QB 67). The second stage of Ground 2 relates to the legality, necessity and proportionality of issuing the APNs and overlaps with Ground 3. On those issues, it was asserted that both the factual and legal circumstances and the context in these cases is significantly different from those in *Rowe* and *Walapu* and so I should distinguish them.

Ground 1 – statutory construction

The most relevant provisions relating to accelerated payment notices

9. The APNs issued to the Claimants state that they were made under s. 219(4)(b) of the Finance Act 2014, that is on the basis that the 'chosen arrangements' (as defined in section 219(3)) were "DOTAS arrangements" (Condition C). The APNs further state that the Revenue is permitted to issue them because Conditions A-C are met. Specifically, the APNs state that Condition A is met because a tax enquiry under s. 219(2)(a) is open and Condition B is met because: "the return is made on the basis that a tax advantage ("the asserted advantage") results from the "DOTAS arrangements".

10. Sections 219 and 220 of the Finance Act 2014, with highlighting of the provisions set out in the APNs provide:

> 219 Circumstances in which an accelerated payment notice may be given
>
> (1) HMRC may give a notice (an "accelerated payment notice") to a person ("P") if Conditions A to C are met.
>
> (2) Condition A is that—
>
> (a) **a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax,** or
>
> (b) P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax but that appeal has not yet been—

(i) determined by the tribunal or court to which it is addressed, or

(ii) abandoned or otherwise disposed of.

(3) Condition B is that **the return or claim** or, as the case may be, appeal **is made on the basis that a particular tax advantage ("the asserted advantage") results from particular arrangements ("the chosen arrangements").**

(4) Condition C is that one or more of the following requirements are met—

(a) -------

(b) **the chosen arrangements are DOTAS arrangements;**

(c) ---------

(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).

(6) ----------

(7) ----------

220 Content of notice given while a tax enquiry is in progress

(1) **This section applies where an accelerated payment notice is given by virtue of section 219(2)(a) (notice given while a tax enquiry is in progress).**

(2) The notice **must**—

(a) specify the paragraph or paragraphs of section 219(4) by virtue of which the notice is given,

(b) **specify the payment required to be made under section 223 and the requirements of that section,** and

(c) explain the effect of sections 222 and 226, and of the amendments made by sections 224 and 225 (so far as relating to the relevant tax in relation to which the accelerated payment notice is given).

> (3) **The payment required to be made under section 223 is an amount equal to the amount which a designated HMRC officer determines, to the best of that officer's information and belief, as the understated tax.**
>
> (4) "The understated tax" means the additional amount that would be due and payable in respect of tax if—
>
> (a) in the case of a notice given by virtue of section 219(4)(a) (cases where a follower notice is given) ----------
>
> (b) **in the case of a notice given by virtue of section 219(4)(b) (cases where the DOTAS requirements are met), such adjustments were made as are required to counteract what the designated HMRC officer determines, to the best of that officer's information and belief, as the denied advantage;**
>
> (c) in the case of a notice given by virtue of section 219(4)(c) (cases involving counteraction under the general anti-abuse rule), ----------
>
> (5) "The denied advantage"—
>
> (a) in the case of a notice given by virtue of section 219(4)(a), has the meaning given by section 208(3),
>
> (b) **in the case of a notice given by virtue of section 219(4)(b), means so much of the asserted advantage as is not a tax advantage which results from the chosen arrangements or otherwise**, and
>
> (c) in the case of a notice given by virtue of section 219(4)(c), means so much of the asserted advantage as would be counteracted by making the adjustments set out in the GAAR counteraction notice.
>
> (6) If a notice is given by reason of two or all of the requirements in section 219(4) being met, the payment specified under subsection (2)(b) is to be determined as if the notice were given by virtue of such one of them as is stated in the notice as being used for this purpose.
>
> (7) ----------

11. Section 201(2) defines "Tax advantage" as including relief or increased relief from tax, and a "designated HMRC officer" is defined in s. 229 as "an officer of Revenue and Customs who has been designated by the Commissioners for the purposes of this Part".

12. As Simler J recounts in paragraphs 40 to 42 of her judgment in *Rowe*:

> 40 Within 90 days of the date of the notice the taxpayer may make written representations to HMRC in relation to the notice under s. 222(2):
>
> (a) objecting to the notice on the grounds that Conditions A, B or C in section 219 was not met,

(b) objecting to the amount specified in the notice —

HMRC must consider any representations made in accordance with s. 222(2) and having done so, must determine whether to confirm or withdraw the notice, and/or determine whether a different amount (or no amount) ought to have been specified, and then confirm, vary or withdraw the notice: s.222(4).

41 By s. 223 payment of the amount stated in the notice ("the accelerated payment") must be made to HMRC and

"the accelerated payment is to be treated as a payment on account of the understated tax;" s. 223(3)

It must be made before the end of the "payment period". Where no representations are made under s. 222, the payment period is 90 days beginning with the day on which the notice was given. Where representations are made, the payment period is extended to the period of 30 days beginning with the day on which HMRC's determination of the representations are notified, if that is later than the 90 day period: s. 223(5).

42 Under s. 226 if the taxpayer does not pay before the end of the payment period there is an automatic 5% penalty. A further 5% penalty accrues at the end of a further five months and another 5% at 11 months from the end of the payment period.

13. As set out in paragraph 56 of the Claimants' Grounds, I accept that the objective of DOTAS was to notify HMRC of tax arrangements that potentially took advantage of 'legal loopholes' in order to enable those loopholes to be closed by subsequent legislation. The recent Guidance on DOTAS (with my emphasis) confirms that as the objective:

2.1 Objectives

The objectives of the disclosure rules are to obtain:

□ early information about tax arrangements and how they work

□ information about who has used them

2.2 The effect of disclosure

On its own the disclosure of a tax arrangement has no effect on the tax position of any person who uses it. However, a disclosed tax arrangement may be rendered ineffective by Parliament, possibly with retrospective effect.

14. I also accept that it is important to remember that neither registration under DOTAS nor the opening of an enquiry indicates that the Revenue disputes the validity of the claimed tax advantage. Indeed, the recent Guidance on DOTAS specifically states:

2.3.2 Summary: Income Tax, Corporation Tax and Capital Gains Tax

> Under the rules, a tax arrangement may need to be disclosed even if HMRC is already aware of it or it is not considered to be avoidance. A tax arrangement should be disclosed where:
>
> - it will, or might be expected to, enable any person to obtain a tax advantage (see paragraph 6.2)
> - that tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement (see paragraph 6.3)
> - it is a hallmarked scheme ----------

15. In short, a DOTAS arrangement may be lawful and effective in the way the taxpayer asserts and if Parliament decides that it is and that the tax advantage it gives rise to is a loophole that should be removed it may do that retrospectively or prospectively by legislation.

16. As mentioned later (a) a prospective change was made by the Finance Act 2011 in respect of EFRBS, and (b) the availability of the relief claimed by the Claimants is founded on a short point of statutory construction of the earlier legislation and the answer to the point will show whether, or the extent to which, that statutory change was needed.

The policy objective or underlying intention of Parliament

17. The Revenue puts great emphasis on the point that in enacting the legislation relating to APNs Parliament intended to remove the cash flow advantage of participating in DOTAS arrangements and to change the presumption of where the tax sits during a dispute. It is clear that this was the intention but in my view it tells one very little about the checks and balances enacted by Parliament in respect of the trigger to that change by the giving of a valid APN in respect of a DOTAS arrangement.

18. Those checks and balances and thus the circumstances in which the power to give an APN can be exercised, the terms relating to the valid exercise of that power and so what the APN must contain, are found in the relevant sections of the Finance Act 2014 and the principles of public law.

19. In argument counsel for the Revenue made several references to the Summary of Responses to the Consultation Document. In response to my enquiry as to the validity and helpfulness of this she referred me after the hearing to paragraph 76 of the judgment of Sales LJ in *R (Best) v Chief Land Registrar* [2016] QB 23 where he concluded that a similar response to consultation had a similar status to a White Paper and so is a legitimate source for guidance as to the policy objective of the legislation. I accept that. But to my mind it does not either:

    i) advance the issue as to how Parliament achieved that policy objective by the legislation, or

    ii) remove the danger of interpreting the words Parliament has used by reference to, or primarily by reference to, that policy objective and so without due attention to their normal meaning in their context.

Indeed, to my mind there is particular danger in a Department that was responsible for putting forward legislation basing its arguments on the policy objective without close attention to the words actually used by Parliament in their context.

20. Particular reliance was placed on paragraphs 20 to 25 of the judgment of Simler J in *Rowe* which reflect paragraphs 26, 270, 217 and 284 of the Summary of Responses in March 2014. In paragraph 19 of her judgment Simler J also refers to the consultation paper in which it was asserted that "most structures that are notified under DOTAS have characteristics or hallmarks of avoidance" and "DOTAS provides a clear and objective criterion for this policy which can be readily operated by taxpayers and their advisers". This is part of the background to paragraphs 2.1 to 2.6 and 4.4 of the Responses cited by Simler J. Having referred to the high level of "complexity and contrivance" that make marketed avoidance schemes difficult to analyse and challenge, at paragraphs 2.6 and 4.4 the Responses state:

> 2.6 The Government's proposals therefore have the simple objective of changing the presumption of where the tax sits, so that anyone who enters into an avoidance scheme will have to pay over the tax in dispute. -------
>
> 4.4 -------- DOTAS provides an objective criterion to apply the measure and, in the majority of cases, is an indicator of avoidance activity. There are no other legislative criteria that could provide the same level of certainty and objectivity

21. Pausing there it is apparent that, as one would expect, the policy objective relates to a wide range of schemes and situations. With that in mind and remembering (a) that not all DOTAS schemes are complicated and some may be registered out of caution, (b) the breadth of the definition of a tax advantage (e.g. a claim for relief from tax) and (c) that the Revenue will accept that some DOTAS schemes are effective under the existing relevant legislation, it seems to me that those Responses and their identification of the policy objective do not tell you what the position as to the giving of a valid APN is if and when, for example, there is full disclosure of a scheme that is not complicated and is based on a short point of statutory construction. To my mind, on this material a guide to the answer is in the use of the words "tax in dispute" in paragraph 2.6.

22. Further, to my mind the heavy reliance of the Revenue on the Responses to Consultation opens the door to the responses of the Minister on 17 June 2014 in respect of the Finance Bill. These include, with my emphasis:

> The final criterion is DOTAS, and in this case there was a wider range of views. Let me set out our thinking. First, DOTAS is clear and objective; the scheme has been disclosed and allocated a reference number and the taxpayer has been told about the disclosure and number. That is clear and easy to apply. Secondly, DOTAS is about tax avoidance schemes. I know that there are concerns that some people disclose arrangements just in case they might fall into DOTAS. I am pleased that they do so, and they should carry on doing so. Where there is no extra tax to pay, HMRC will be able to agree that fairly quickly and there will be no accelerated payment. It will, of course, be in the interests of advisers and taxpayers to provide complete information to HMRC as soon as possible.

> I have been very disappointed by the assertions made in a number of letters in my postbag. They claim that HMRC will have almost unfettered power to demand what they described as arbitrary sums of tax. That objection is misconceived. Taxpayers and their advisers need to work with HMRC to get to the right figure of disputed tax, but where that cooperation is not forthcoming, HMRC will have to take the decision. I know that robust governance is being put in place by HMRC requiring scrutiny at senior levels. HMRC takes its responsibility very seriously in this regard. I am also aware that this measure may be seen as penalising those who disclose against those who do not. Let me be clear: we will take robust action against those who choose not to disclose when they should. Our new measures against high-risk promoters, which we will come to shortly, will be part of tackling that behaviour, and in the summer we will consult on further improvements to DOTAS. -----
>
> I shall make two points in response to my Hon. Friend. The first is one that I made a moment ago: disclosure under DOTAS does not necessarily mean that someone will be affected by the accelerated payments regime. HMRC will look at the particular scheme and assess whether it is effective. There may well be circumstances in which HMRC will look at a particular scheme and say, "A DOTAS disclosure has been made, but as far as we can see this scheme is entirely consistent with the law. It is effective and there is no tax under dispute, so no accelerated payment will need to be made." If there is no tax under dispute there is no accelerated payment. ---------
> ----------

23. These answers provide clear and expected confirmation of the view that it was not intended that an APN should be given simply because a scheme has been registered under DOTAS and that that is particularly the case if and when there has been full disclosure. The Claimants assert that they have made such full disclosure and this has not been disputed by the Revenue.

24. Those answers of the Minister also provide clear support for the view that before giving an APN the Revenue must be satisfied that there is a dispute as to the existence of the claimed tax advantage (here relief from corporation tax), or that they do not have sufficient information to determine how the relevant taxation provisions of the legislation apply.

The construction of the legislation

25. The power or vires to give an APN arises if and when Conditions A to C in s. 219 exist. Here it is not disputed that they do.

26. Section 220 relates to the valid exercise of that power and it provides what the APN "must" specify but does not provide what the effect of a failure to comply with those terms is to be.

27. Such statutory requirements must be "obeyed down to the minutest detail" (see Lord Hailsham of St Marylebone LC in *London and Clydeside Estates Ltd v Aberdeen*

District Council 1980 SC (HL) 1 at 30; [1980] 1 W.L.R. 182 at 189F). The answer to the question whether a breach of such a statutory provision has the effect of invalidating subsequent steps, and so a notice, depends on whether it was the legislator's intention that it should have that effect: see *R v Soneji* [2005] UKHL 49; [2006] 1 AC 340. For example, Lord Steyn at paragraph 23 concludes that the rigid mandatory and directory distinction has outlived its usefulness, that the issue is one of statutory construction and that "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity".

28. Section 222 provides a process for challenging the APN.

29. Writing in the relevant definitions (and in italics what they represent in these cases), the relevant requirement relating to the validity of an APN (the Notice Requirement) is that it must specify as the sum to be paid an amount equal to:

> what the designated HMRC officer determines, to the best of that officer's information and belief, to be so much of the asserted advantage (*the claimed relief from corporation tax*) as is not a relief from tax (*corporation tax*) which results from the chosen arrangements (*the EFRBS*).

30. This is clearly a requirement for each APN and so is case specific. Here the sum is relatively easy to calculate because it is equal to the relief claimed by reason of the payment of what are said by the taxpayer to be "qualifying benefits".

31. At its highest the Revenue argue that the Notice Requirement requires only a calculation of the asserted advantage and that, subject to the qualification referred to in the next paragraph, an APN can be validly given without consideration of whether, on the information it has, the Revenue and / or the designated officer consider that the claim for the tax advantage (the relief) is available.

32. The qualification is that if the Revenue or the designated officer is of the view, on the information they have, that the claim to the tax advantage (the relief) is available under the taxation legislation an APN cannot properly be given.

33. So, at its highest and subject to that qualification, the Revenue argues that a valid APN can be given without any view being taken, on the information available to the Revenue, whether a claim for relief under a DOTAS arrangement is lawful and available to the taxpayer.

34. Acknowledging the intention to change the presumption of where the tax sits during a dispute I consider that this would be a remarkable result and one that, in the context of the APN regime, would fail to give proper regard to the following:

i) The tax advantage will be based on a view of the interpretation and application, and so the effect, of the relevant taxation legislation to the disclosed and accepted facts of the case.

ii) The Revenue can be expected to hold a view on what the relevant legislation means and on whether or not it has sufficient information to apply that interpretation of the legislation to the facts of a given case.

iii) Significant problems faced by the Revenue were difficulties in obtaining information about and unravelling complicated schemes that the Revenue considered, on its interpretation of the taxation legislation, would or may be unlikely to achieve the claimed tax advantage when the facts had been established.

iv) As expressed, the policy objective refers to a presumption and so something that will not always apply.

v) As expressed, the policy objective refers to a dispute and so at least to something that is not accepted by the Revenue as a matter of fact or law.

vi) The policy objective, and the legislation that introduces APNs, covers a range of schemes and situations.

35. In my view, the factors listed in the last paragraph support the view on both a linguistic and purposive approach that the Notice Requirement for the issue of a valid APN cannot be satisfied unless, to the best of his information and belief, the designated officer is of the view that he is not satisfied that as a matter of law and fact the claimed tax advantage is lawfully available and so should be allowed and so, in that sense, the designated officer has determined that the claimed tax advantage is disputed. I shall refer to this as the determination.

36. As set out later, the Claimants' argument was based on the assertion that no determination had been made rather than an assertion that a determination which was based on the wrong test had been made. Accordingly, neither the Claimants nor the Revenue invited me to determine the test to be applied in assessing the "efficacy" of the arrangement or the validity of a claim for relief and so in making the "evaluative assessment" the Claimants said was required and had not been carried out.

37. However, there were a number of exchanges about this test during the hearing.

38. I consider that my formulation in paragraph 35 recognises that the circumstances to be taken into account in determining whether the claim is not accepted, and so is disputed, will be case sensitive. For example, the determination may turn on the lack of information, or a need for more investigation of information that has been provided, or a point of statutory interpretation. The factors to be taken into account and the procedure by which that determination is reached, applying my formulation (or any other), will be open to challenge applying public law principles.

39. In my view, a failure to make any determination or one based on the correct test is not a vires point but one directed to the validity of the exercise of the power given by s. 219 FA 2014.

40. Applying the approach referred to in paragraph 27 above, the impact of any such failure will be relevant to the question whether it results in the APN being invalid. As will the interpretation and application of the ability to make representations conferred by s. 222.

Ground 1 application to the facts of these cases

41. The Claimants asserted that this case is distinguishable from *Walapu* because the Revenue has not made any determination whether or not the Claimants have a tax liability and may decide that they do not.

42. Putting it another way, the Claimants assert that neither the Revenue nor a designated officer of the Revenue has determined to the best of their information and belief that the Claimants are not entitled to the relief from corporation tax that they claim.

43. In large part the Claimants base their assertion of fact that no determination has been made on the position taken by the Revenue in its summary and detailed grounds of defence and in its evidence. I acknowledge that there is some force in the arguments that these documents should be interpreted in the way that the Claimants suggest. However, in my view, a fair reading of them does not found the assertion of fact made by the Claimants and, as became clear during oral submissions, the passages in the Revenue's documents upon which the Claimants placed particular reliance were directed to:

    i) the Revenue's concerns relating to the application of Chapter 3 Part 4 of the Finance Act 2014 in a wider context, and

    ii) the Revenue's wish to guard against a probability or likelihood test being introduced under the description of an "efficacy" test that would hamper or undermine the application, and so the achievement of the policy objective, of the APN regime. In contrast to a concern to establish that the Revenue is not under any obligation to, or would not, or did not wish to form a view on the underlying points of statutory interpretation that were engaged by any claim to a tax advantage.

EFRBS and the rival arguments on the application of the relevant taxation legislation

44. EFRBS are governed by Chapter 2 of the Income Tax (Earnings and Pensions) Act 2003 as amended by the Finance Act 2004. The arrangements or schemes in question in the cases before me were marketed by two promoters.

45. In my view, it is clear from in particular:

    i) Spotlight 6: Employer-Financed Retirement Benefits Scheme, published by the Revenue on 6 August 2010,

    ii) the amendment to s. 1292(5) of Corporation Tax Act 2009 by the Finance Act 2011, and

    iii) the offer letters sent out by the Revenue in November 2013 in respect of EFRBS entered into before 6 April 2011 together with their enclosures

    that, for the reasons explained in Spotlight 6 and the frequently asked questions annexed to the offer letters sent out in November 2013, the position of the Revenue is (and for many years has been) as stated in those letters that the Revenue "strongly believe" that EFRBS entered into before 6 April 2011 did not enable the companies who set them up to claim relief from corporation tax for employer contributions paid

to the EFRBS as "qualifying benefits" defined by s. 1292(5) of the Corporation Tax Act 2009.

46. Prior to its amendment in 2011 that definition of "qualifying benefits" was a payment or transfer made under an EFRBS.

47. It is clear that the Claimants were advised by the promoters, who relied on and informed the Claimants of advice from leading counsel who specialised in tax law, that the arrangements they entered into were EFRBS that should in their view enable:

i) the Claimants to claim relief from corporation tax for their employer contributions on the basis that they were "qualifying benefits" as defined, and

ii) would not give rise to income tax and NICs until benefits were paid to individuals by the EFRBS.

48. One can see why prior to its amendment in 2011 the taxation legislation could be interpreted in this way. Commonly these schemes were used to fund loans to directors and employees or back to the company and so, as a result, the relief from corporation tax was used by those directors or employees without incurring liability to PAYE or NIC or by the company.

49. For present purposes, the amendment made by the Finance Act 2011 provided that employer contributions were not qualifying benefits unless they gave rise to an employment income tax charge. This clearly removed the asserted and marketed benefits that a company that set up an EFRBS could claim relief from corporation tax for the payments it made into it without a charge to income tax and NIC liability being incurred until benefits were paid from the EFRBS to an individual.

50. The Revenue's argument has for a long time been that prior to the amendment the payment or transfer referred to in the original definition of "qualifying benefits" should be interpreted as a transfer that could give rise to an employment income charge (see for example Spotlight 6). This is based on the context of the definition.

51. So to a large extent the underlying dispute of statutory interpretation is between a literal and a purposive approach. It is a short point and it highlights:

i) the existence of arguments relating to the inter-relationship between a claim for relief from corporation tax and an employment income charge being incurred, and so

ii) the relevance of whether an employer contribution to an EFRBS gave rise to an employment income charge (or per Spotlight 6 could do so).

As appears below, these issues re-emerge in the context of limitation and the settlement offers that have been made by the Revenue.

Why has this short point of statutory construction not been litigated and resolved?

52. I have not found a convincing explanation of why this strongly held view of the Revenue on this short point of construction was not litigated and decided before the Finance Act 2014 introduced accelerated payments.

53. Since then the Revenue has sought to explain the further delay by reference to the significant amount of work to be done in respect of that regime. It asserts that the regime was directed to problems arising as a result of participation in marketed tax avoidance schemes, that such schemes are complex and that they are designed to take advantage of (or as the Revenue more emotively assert exploit) certain features of the tax system.

54. I accept that the level of complexity of some schemes means that they are difficult to analyse and challenge, that investigations into them can take a considerable time to resolve, that during that time users of the schemes were able to enjoy the benefit of the tax that they were asserting they are entitled to avoid, and that the APN regime changes the position as to where the tax sits pending determination of an investigation.

55. However these points are generic and they were advanced in a generic way by the Revenue. I will assume that a number of EFRBS are complicated and the facts relating to them may require investigation but that does not seem to be the position on the facts disclosed in respect of the schemes in these cases. In any event, the Revenue has not explained why it is.

56. Rather, it seems that the determination of the underlying and short point of statutory construction would resolve these cases, and many like them, without the need for the detailed examination of complicated arrangements or at least that the determination of that short point would limit or focus any such investigations.

57. The fact that this short point has been live since before August 2010, the history of the offers made by the Revenue and the absence from the Revenue's evidence of any indication of when the Revenue would issue closure notices and so trigger appeals to the First-tier Tribunal in these cases show that there have been significant delays by the Revenue in enforcing the payment of corporation tax that the Revenue has for a long time strongly asserted is due.

58. At my specific request during the hearing counsel for the Revenue sought instructions on when the Revenue would crystallise the interpretation issue on "qualifying benefits" as it has said it would, for example, in its offer letters sent in November 2013 and January 2015 and thereby trigger the determination of that issue by initially the First-tier Tribunal. The answer was that it planned to do so in a month. I hope that this has been done.

The limitation problem

59. The delays have given rise to a limitation problem if as a result of a factual or a legal analysis of a case the Revenue concludes, or it is found by a court or tribunal, that the employer contributions gave rise to an employment income charge (and so PAYE and NICs).

60. In letters written in 2014, the Revenue made the point to companies that had entered into EFRBS (including the Claimants) that in the Revenue's view "contributions made to an EFRBS under the arrangements disclosed may be earnings subject to PAYE tax and Class 1 NICs" and issued Notices of Decision in respect of Class 1 NICs for the period and Determinations in respect of the PAYE tax due for the tax

year April 2010 to 2011. These assessments are referred to by the Revenue as protective assessments and it sought a standstill in respect of them.

61. The letter to the first named Claimant (Vital Nut) dated 9 October 2014 included the following paragraphs:

> Although you can choose to appeal to the Tribunals Service I suggest that you do not do so at this time. This is because HMRC is already seeking to litigate a number of such schemes. These cases used similar arrangements to your company, and whilst a decision in any particular case may not be definitive, it will at least inform all parties concerned in other cases of the wisdom of a legal challenge through the Tribunals.
>
> Choosing not to take your appeal to the Tribunals Service while similar cases are litigated will not affect your rights as set out in HMRC 1. Either party can still pursue an appeal hearing at any time it feels necessary. HMRC would start the process by offering you a review and you could start the process by asking us for a review or notifying your appeal to the Tribunals Service. Until such time I would, of course, keep you informed of any progress.
>
> Your cooperation in this matter would be appreciated and do not hesitate to telephone the above extension if you require any further clarification or information on this matter. I also recommend that you discuss this with your agent and the promoter of the scheme in the first instance.

62. In its evidence the Revenue states that no such schemes have been litigated as indicated in the first quoted paragraph. No good explanation for this was given.

63. The problem referred to in those letters that triggered those determinations is a recognition that in some cases employer contributions may be earnings (or as I understand it that their application by the EFRBS may satisfy the Revenue's purposive argument on what is a qualifying benefit or mean that they are earnings) with the result they would be deductible for corporation tax purposes and subject to claims for PAYE and NICs that would be time barred.

64. Although, contrary to the main arguments advanced thus far by both the Revenue and the taxpayers concerning the nature and effect of employer contributions, and so whether they give rise to an employment income tax charge or could do so, the possibility that it might be found that they did put taxpayers in a win / win situation because:

i) the relief claimed from corporation tax would be available, and

ii) no PAYE and NICs would be paid on the contributions (earnings) because they were time barred.

The double payment problem

65. A mirror image lose / lose problem for taxpayers arises on the terms of the settlement offers. It relates to the risk that taxpayers might have to pay PAYE and NICs twice

and it founded Option 2 in the letters sent in November 2013 which, like Option 1 in those letters, is addressed in the document headed "Employee Financed Retirement Benefit Schemes (EFRBS) Resolution Opportunity. Frequently Asked Questions".

The alleged inconsistency

66. The Claimants asserted that the assessments made and issued in respect of PAYE and NICs were mutually inconsistent with a view that the Claimants' claim to relief from corporation tax was invalid and this showed, or supported the conclusion, that the Revenue either accepted that the claim for relief was valid, or at least that the Revenue had not reached a view that it did not accept that the claim for relief was valid.

67. I disagree.

68. The underlying issues, and the win / win situation for taxpayers, go back to the underlying points of statutory interpretation relating to whether (as was later provided by the amendment made by the Finance Act 2011) employer contributions have to give rise to an employment income charge to satisfy the definition of "qualifying benefits".

69. So, the underlying issues may lead to an argument of fact or law that (a) an employment income tax charge arose that is now barred by limitation, and (b) that statute barred charge means that the claim for relief from corporation tax is valid.

70. The existence or possible existence of that argument shows that anyone who is aware of it would or should appreciate that the assessments for PAYE and NICs are, as the Revenue asserts, protective and do not show that a primary argument that the claim for relief from corporation tax is not valid has been abandoned, or that a claim for that relief is accepted as valid, or that no view has been taken on the efficacy of the claim for relief from corporation tax.

The Revenue's position on the effectiveness of the relevant arrangements and so whether they are or are not satisfied that the relief claimed is lawfully available and the Claimants' awareness of the Revenue's position

71. To my mind the evidence (and in particular the documents I have referred to in paragraph 45(i) and (iii) above) and common sense mean that the assertions made by and on behalf of the Claimants that (a) the Revenue has not formed a view on the efficacy of their claim for relief, and (b) they are or were unaware of the Revenue's view and so its position on:

    i) their ability to claim relief from corporation tax, and further or alternatively

    ii) their liabilities or potential liabilities to income tax and NICs in respect of payments under the arrangements (the EFRBS) they have entered into

    have no foundation.

72. This is because:

i) these Claimants entered into marketed schemes with the benefit of advice and in the knowledge that they were based on a view of the promoters of the schemes, who relied on advice, that the arrangements (the EFRBS) enabled the Claimants to claim relief from corporation tax and only gave rise to income tax and NICs when a benefit to which the Income Tax (Earnings and Pensions) Act 2003 applied, and as a result thereof,

ii) with or without the benefit of advice these Claimants are aware of (or certainly ought to be aware of) the Revenue's well publicised position that is also set out in offer letters, and

iii) the inconsistency of approach that they assert does not support the proposition they seek to establish.

73. Support for the conclusion that the Claimants are aware that:

i) the Revenue's view and primary argument on the information the Claimants have provided is that their claims to relief from corporation tax are not valid, and that

ii) this position is based on the interpretation of the relevant taxation legislation

is found in what seem to be standard paragraphs in the evidence sworn by directors of the Claimants in support of the claims of their companies where (taking Vital Nut as the example) it is said:

> At all times, and on the basis of advice from OneE, I believe that Vital Nut was entitled to the CT deduction and this was a tax efficient way to create and manage a portfolio of long-term investments for future retirement benefits for employees of the company. I never thought that doing so could amount to some sort of unacceptable tax avoidance. ---------
>
> Despite the stark difference between the settlement offered and the current extreme financial demands being made by HMRC, I chose not to accept this settlement opportunity because I have been advised that the correct view in law is that contributions into the EFRBS are not "earnings" subject to PAYE and NICS and further that Vital Nut was correct in deducting contributions to its EFRBS from profits for the purposes of assessing its corporation tax liability. ----------

These assertions make it clear, as one would expect, that these Claimants entered into their EFRBS on advice from promoters and others and that they have had the benefit of continuing advice relating to the effectiveness of the arrangements they entered into to achieve a deduction for corporation tax purposes whilst not incurring a charge to PAYE and NICs. I do not accept that these Claimants are not aware of the published views of the Revenue, or of the "ins and outs" of the potential arguments of fact and law relating to the claimed relief from corporation tax without incurring a charge to PAYE and NICs and so of the possibility that it might be argued that the win / win situation for taxpayers described in paragraph 64 above exists.

74. Whilst the Claimants held onto the disputed tax it is easy to understand why they would not complain about the long delays in resolving the underlying issues of statutory interpretation or take steps to trigger their resolution.

75. It is also understandable that now that APNs have been served they are and would be unhappy with continuing delays and certainly with continuing delays of the length that have occurred thus far. But what they cannot do is support those and other complaints on an assertion that they have not known what the Revenue's view on the interpretation of the relevant taxation legislation is and so their claims for relief were not accepted and may well have to be litigated.

76. Accordingly, in my view at the application stage of Ground 1 the parts of the Claimants' arguments that are based on assertions that the Revenue has not made any determination as to the efficacy of the EFRBS that the Claimants entered into are based on a mirage and are flawed.

77. Rather, and although there have been significant delays, the Revenue has made clear and the Claimants have known for a long time that:

i) A dispute exists between the Revenue and the promoters of EFRBS and so taxpayers (including these Claimants) on the interpretation of the relevant taxation legislation in particular as to what are "qualifying benefits" as defined prior to the prospective amendment in 2011.

ii) That dispute relates to the underlying legal basis for their claims to relief from corporation tax.

iii) This general point applies to the Claimants and in particular to the facts that they have disclosed to the Revenue about their EFRBS.

iv) The arguments relating to whether employer contributions are qualifying benefits are linked to the question whether they give rise to an employment income charge and these arguments found the possibility of the win / win position for taxpayers described in paragraph 64 above.

v) The assessments issued by the Revenue for PAYE and NICs are, as the Revenue asserts, protective and do not show that the Revenue has not made up its mind or has changed its mind on the interpretation of the underlying taxation legislation.

vi) The Revenue's expressed view and position is that it strongly believes that the interpretation of the relevant taxation legislation that is relied on by the Claimants to claim relief from corporation tax for employer contributions is not correct and so their claims for relief are disputed.

The designated officer

78. That leaves the question whether the designated officer has failed to determine to the best of his information and belief that he does not accept that the Claimants are entitled to the relief from corporation tax that they claim.

79. On the assumption that the designated officer has not himself analysed the point of statutory construction I am nonetheless of the view that under the system put in place by the Revenue he should be, and in any event is entitled to be, informed by and act in accordance with:

i) the published view of the Revenue that the Claimants' underlying argument of statutory construction is not correct, or at least is not accepted as being correct, and

ii) the present intention of the Revenue to argue the point.

80. So, although I accept that the designated officer is a particular and defined individual who has a particular statutory role, on the facts of these cases there is nothing in the point that he has not carried out a personal analysis of the relevant point of statutory construction. This is because he can act on the view and intention of the Revenue referred to in the last paragraph and so on the basis that, on the information that the Revenue and he have, the Claimants' claims for relief from corporation tax are disputed in at least the sense referred to in paragraph 35 above.

81. In my view:

i) the system put in place by the Revenue and applied in these cases has the consequence that this is what both (a) the person presenting the case details and relevant calculation to the designated officer for authorisation, and (b) the designated officer in authorising the calculation of the amount to be included in each of the APNs, have done in these cases, and so

ii) the Notice Requirement (see paragraph 29 above) has been met.

82. Further, if that is wrong it seems to me that it is at least arguable that applying the approach in the *Sonaji* case the APNs would not be invalid. But this was not an issue that was argued before me and I have not formed a view on it.

Conclusion on Ground 1

83. In my judgment Ground 1 is not established.

Ground 2

84. The Claimants argue that the *Rowe* and *Walapu* cases should be distinguished on the basis of the same mirage that they rely on to establish that the Revenue has not reached a decision on the efficacy of their individual schemes. So this argument fails.

85. In those circumstances, the arguments on the interpretation and application of the judgment of Vos LJ in *AVPCO 19 Limited v HMRC* [2015] EWCA Civ 648 on the question whether Article 1 Protocol 1 is engaged are best left to the Court of Appeal. In any event, I do not consider that the decisions in *Rowe* and *Walipu* are plainly wrong or that I should depart from them on the issues relating to legality, necessity and proportionality.

86. Accordingly, the Claimants have failed to establish Ground 2.

Ground 3

87. This is also founded on the same mirage. The Claimants do know the case against them, and they have known it for a long time. Also they have known the reasons for the PAYE and NIC assessments for a long time. The reasons for those assessments mean that they are not unfair or abusive, rather they are protective.

88. I agree that there have been significant delays but for understandable reasons the Claimants have not sought to crystallise the dispute of statutory construction before the APNs were given. However, I do not accept that the implementation of the APN regime in all the circumstances of this case is an abuse of power. Rather, it reverses the cash flow advantage of further delay which is what it is designed to do and what Parliament intended and it includes protective assessments. I agree that having given the APNs the Revenue should avoid further delays in resolving the underlying point of statutory construction and this is why I asked the question referred to in paragraph 58 above.

89. Accordingly, the Claimants have failed to establish Ground 3.

Postscript

90. I was sent an exchange of correspondence that post-dates the hearing on the issue whether the relevant EFRBS were notifiable. I have not been asked to hear argument on this issue or to address it.

Overall Conclusion

91. I dismiss these claims.