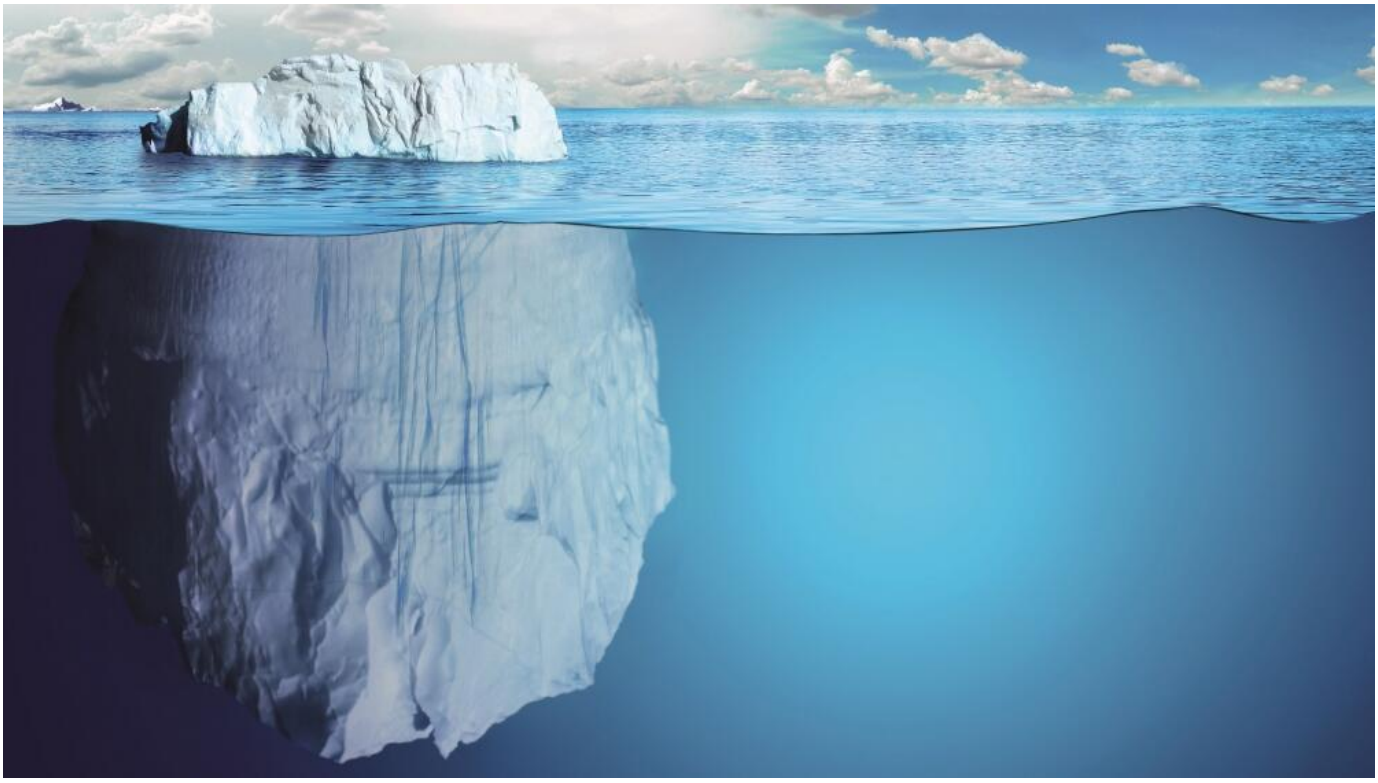
What lies beneath

Management of taxes



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Anton Lane explains how to manage accelerated payment notices

Key Points

What is the issue?

Representations against APNs and judicial review are far from straightforward and incur further professional fees, which may aggrieve clients in the future.

What does it mean to me?

For advisers, care needs to be taken to ensure best advice is provided to manage client expectations and avoid complaints.

What can I take away?

A suggested approach to clients being issued with APNs, to assist with providing best advice.

Whether you agree with the principles behind accelerated payment notices (APNs) or not, with HMRC expecting to issue some 64,000 of them the fact is they are here to stay.

Managing APNs, therefore, is an increasingly pressing issue and decisions on whether to make representations against them or to seek judicial review need careful consideration. References are to Finance Bill 2014 unless otherwise specified. The question is whether the opportunity to delay or prevent paying tax before discovering whether the historic planning has been deemed legitimate is worth the cost to the client of the representations or judicial review. And of course these challenges do not change what is underneath – the disputed tax planning and its legitimacy or otherwise.

APNs have placed tax advisers in a difficult position, having to counsel clients not only on the merits of representations against the APN and judicial review, but also whether the disputed tax should be settled. Advisers are increasingly likely to come across APNs with new clients for whom they have had no involvement in the initial planning.

I would contend that simply ‘defending against APNs’ is not providing the client with best advice. Instead, I follow this approach:

1. Review the planning to which the APN relates, then ascertain HMRC’s lines of challenge and whether those challenges have merit, given the current decisions in the courts, before reporting to the client (preferably in writing).
2. Explain to the client that representations to an APN do not make the potential liability go away and are likely to be met with a rejection letter, although this is not the end of the matter.
3. Set out the process for judicial review, including the costs as well as the likelihood of success or at least a summary of other possible outcomes.

4. Confirm in writing that a client has made a decision of their own accord in light of the facts presented by the adviser.

It is recommended to take this approach because a client who has entered tax planning and then pays fees for defending this, for APN representations and for judicial review may eventually feel they were poorly advised if the planning fails. Also, if similar planning is later upheld in the courts, they might be annoyed they had not opted to stand against HMRC.

Representations

As most will know you cannot appeal against an APN. Instead, s 222 permits representations to be made. Written representations must be made within 90 days of the date that notice is given. The representations can object to the APN because the conditions for issue have not been met, because the amount specified as disputed tax, or for any other reason. Once HMRC has received and studied the representations, it must confirm the APN, withdraw it or amend it to specify a new amount.

Given there is no right to appeal, representations will generally be based around the grounds on which judicial review (the next possible step) may be sought. These are:

- the decision maker has acted ultra vires: exercising a power wrongly or without authority or misdirecting itself in law;
- the decision is irrational: it is unreasonable;
- statutory procedures or natural justice have been breached; or
- breach of legitimate expectation – a doctrine that protects a procedural or substantive interest when a public authority rescinds from a representation made to a person.
- A logical representation is therefore whether the conditions under which an APN can be issued have been met. Section 219 sets out three, broadly:
- Condition A: there is a tax enquiry in progress or an appeal (not concluded in any manner) in relation to a relevant tax;
- Condition B: the return, claim or appeal is made on the basis that a particular tax advantage results from particular arrangements; and
- Condition C: One or more of these requirements are met:

1. a relevant follower notice is or has been given; and/or

2. the arrangements are related to DOTAS; and/or
3. a relevant GAAR counteraction notice has been given.

It should be easy enough to identify whether condition A is met but B and C are not so straightforward.

One claim made in *Rowe and Others v HMRC* [2015] was that condition B had not been met because: 'The amounts claimed do not result from the chosen arrangements since they do not result directly from an increase or reduction of an item in the partnership return. Further, absent legitimate enquiries, no tax will ever become "due and payable" within the meaning of FA 2014.' The challenge was rejected.

On condition C, there appears to be a number of possible uncertainties where (a) is not met. Both (b) and (c) require arrangements to be notifiable and for a reference number to be given or required to be given by the promoter. An issue is that, when the DOTAS regime was introduced, advisers sought to register planning and obtain DOTAS numbers to protect themselves regardless of whether the planning was technically a notifiable arrangement. The position is complicated further when considering the responsibility of a promoter to register a proposal under DOTAS or where the promoter had to determine that a subsequent piece of planning was substantially the same as an earlier notifiable arrangement.

The DOTAS rules have changed since their introduction, creating a further issue: at which point, for the purposes of condition C, are the DOTAS rules considered? Is it at the time the planning was registered, implemented or now? If considering s 306 of FA 2004 along with the regulations today, the scope of DOTAS is different. HMRC's view is that if planning was notifiable it remains so for the purposes of applying condition C now even though it may not be notifiable. However, at the end of May reports emerged that HMRC had withdrawn 2,000 APNs in relation to a Montpellier EBT arrangement based on representations that it was not within DOTAS.

Another representation relates to HMRC's approach to issuing the APN. Section 220(3) of FA 2004 reads: '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.'

So it would be fair to expect this officer to have gone to some lengths to inform their belief on how much is owed. However, what seems to happen is that, although the

officer’s name appears on the APN, it is driven from the directorate. You could argue that this approach means there is not a designated officer who determines the understated tax.

An APN demands a person to deposit funds with HMRC for something historically implemented, often entirely innocently and without expectation of the introduction of a legal process with no right of appeal and unaccompanied by policy. For those who implemented planning, APNs are retrospective or retroactive, draconian and a game changer, all of which could be seen as unlawful, unreasonable and in breach of natural justice, the doctrine of legitimate expectation and human rights.

Some of these points were considered at the recent unsuccessful judicial review in *Walapu v CRC QBD* on 23 March 2016. In *Biffa Waste Management Services Ltd v Commissioners for HMRC* (2016), the doctrine of legitimate expectation was considered. That case related to HMRC having provided a ruling and later relinquishing it. The case might have limited assistance when APNs are issued unless it can be demonstrated that HMRC had relinquished a position it had accepted previously, based on sight of all material facts.

If you decide to make representations, they will need thorough explanation with reference to the specific circumstances. If those representations are successful one might hope for the withdrawal of the APN – but anticipate a newly issued one. HMRC has been known to withdraw them. More often, though, the approach is either to extend payment time or reject the representations and seek settlement.

A rejection letter may also become the subject of judicial review, although it might be better to challenge the rejection first. Rejections are often light on detail so a challenge can provide an opportunity to request evidence for HMRC’s position, for example to show it has met the requirement of s 220(3) of FA 2004.

Aside from representations the next step is judicial review, a negotiated settlement or the prospect of penalties.

Judicial review

The grounds for seeking judicial review reflect some of the reasons for making representations in relation to APNs:

- the decision maker has acted ultra vires
- the decision is irrational or unreasonable

- statutory procedures or natural justice have been breached
- breach of legitimate expectation.

Success of judicial review at present is not encouraging. The cost also has to be considered. Is it merely buying time without dealing with the underlying tax issue?

Dealing with the underlying tax issue

The underlying tax issue should not be forgotten and the client should be reminded of the exposure and potential route to settlement. The problem with entering into a settlement for tax on planning subject to APNs is the lack of flexibility. The officers are policy-driven as to the basis of settlement. Although presenting technical arguments is necessary, it may be unlikely to sway HMRC, which appears willing to issue APNs then deal with representations and litigation.

The likely reason for policy-driven settlements is not only to treat all users of schemes equally but also to change how taxpayers and advisers view the legitimacy or risks associated with them. I strongly believe that the current approach is intended to change the way tax planning operates in the UK. The good news is that there is some flexibility on payment arrangements.

An adviser should ensure those with APNs understand the areas HMRC will attack in court and how the courts might view those risks before incurring the costs of representations and judicial review. If an adviser is not able to themselves, they should encourage the client to speak to a specialist. This may be difficult if the adviser introduced the planning or if the promoters are offering representations. However, it is important to ensure the client is advised independently.