

## Accelerated Payment Notices

### (P1080 – 8.38 minutes)

In many cases Follower Notice will be swiftly followed by an Accelerated Payment Notice (APN). The APN is the document that triggers a payment of tax. It is a tax demand. As it says on the tin, it accelerates payment. [Partners are subject to partner payment notices (PPNs) rather than APNs, but these follow the same principles and will not be discussed further.]

Various hoops have to be jumped through before an APN can be validly issued. The legislation calls these Conditions A, B and C, all of which must be satisfied.

- Condition A: A tax enquiry is in progress into a return or claim or the taxpayer has made a tax appeal in relation to a relevant tax, but the appeal has not been finally determined by the Tribunal or Court. In short, the person is well aware that their tax arrangements are being challenged and the enquiry into those arrangements is still open.
- Condition B: The tax enquiry is in relation to “chosen” arrangements (these being the arrangements which were entered into using the relevant avoidance scheme which HMRC is targeting).
- Condition C: The arrangements are either:
  - Notifiable under DOTAS;
  - Subject to a GAAR counteraction notice; or
  - The subject of a Follower Notice.

Therefore a Follower Notice is not always required before an APN can be issued (which makes sense as this caters for instances where there is a disclosable avoidance scheme under enquiry but there are no followers).

The APN must specify the sum to be paid. This is an amount equal to what the HMRC Officer determines to the “best of his information and belief” to be the denied tax advantage. The taxpayer must then pay the tax demanded in the APN within 90 days. Therefore, unlike the Follower Notice, the APN cannot be ignored. So even in cases where the taxpayer refuses to take corrective action and stands firm in the confident belief that his tax arrangement is legal and valid, HMRC can still make demand for the tax that their Officer believes is being avoided.

Any late paid accelerated payment does not itself attract interest. However the interest clock that is ticking on the disputed tax will stop when the accelerated payment is made.

A late accelerated payment will however be subject to late payment penalties.

Penalties start to accrue from the due date for payment. The penalties are as follows:

- 5% of the amount unpaid by the due date; plus
- 5% of any tax still unpaid 5 months after the due date; plus
- 5% of any tax still unpaid 11 months after the due date.

This is in addition to the possible penalty of 50% of the tax that could be charged for the non-compliance with the Follower Notice.

Taxpayers who can provide evidence that complying with an APN would cause hardship can make a claim to HMRC for “interim relief”. This will delay enforcement of the APN.

For example, if paying the tax demanded by an APN means that a business is not able to continue to run in its usual manner, interim relief will be granted and collection of the tax will be postponed. However interim relief does not change the due date for the payment of the APN so the normal penalty rules will apply when the APN is eventually paid.

There is no right of appeal against an APN and taxpayers cannot negotiate with HMRC to reduce the amount stipulated in the APN. It is not therefore a tax assessment.

There is however a right to make representations to HMRC on the grounds that either:

- The conditions required for the issue of an APN have not been met; or
- The amount of tax specified in the APN is not correct.

The representation then extends the payment date to 30 days after HMRC has responded.

HMRC has been forced to withdraw over 6,000 APNs so far on the grounds that they were incorrectly issued. This is mainly because the notices were issued in relation to schemes which turned out not to have been notifiable under DOTAS in the first place. It therefore seems that the best defence against an APN is to argue that be that the arrangement was never actually disclosable under the DOTAS regime.

This is perhaps more common than we might think because many practitioners – naturally anxious to be compliant and fearful of the consequences of failing to do so – have taken a belt-and-braces approach and have disclosed planning schemes for which there was no DOTAS hallmark or which did not go far enough to be avoidance arrangements. Even if the disclosed planning scheme turned out not to be successful, any tax due should not have been collected via an APN.

In addition, the linking of APNs to DOTAS disclosures does make one a little sceptical about the Ministerial Statement that “disclosure under DOTAS does not necessarily mean that someone will be affected by the APN regime” as it does appear that one seems follows the other with an unnerving degree of regularity. The fact that 80,000 APNs have so far been issued seems to suggest their usage is perhaps not as selective and targeted as HMRC claimed it would be and that HMRC Officers are pushing the envelope.

Investors in certain packaged or marketed schemes have now been put in a position of having to try and raise funds to meet an APN even where they are confidently advised that they will eventually win once the appeal process has run its course. In such cases the accelerated tax will naturally be repaid if they taxpayer does win, but the cash-flow burden in the meantime could be crippling.

All this has recently been brought to light in various published cases including that involving the Ingenious Media Group. Ingenious Film Partners were involved in the production of a large number of films leading to losses. They claimed that their investors could relieve these losses sideways against their other taxable income. HMRC took the view these losses were artificial, as the partnership was not trading with a view to profit. As such this was not a legitimate investment but was instead a scheme for the avoidance of tax.

This scheme captured the interest of the Press as several of the investors in this scheme were high-earning footballers with large additional rate income tax liabilities who participated in the film scheme on the advice of their financial advisers and agents. Names publicly recorded at Companies House as being investors included David Beckham, Wayne Rooney and Gary Lineker. Other less prominent (and far less wealthy) footballers participated in the scheme “because their mates did”.

The Upper Tribunal found in favour of HMRC in 2017 and APNs and PPNs were subsequently issued to collect the tax. HMRC has since won a judicial review with the Court of Appeal deciding that the notices were validly issued. Appeals along the lines that the issue of APNs was a breach of claimants’ human rights were also rejected.

Whether the Ingenious (or perhaps not so ingenious...) film scheme works remains to be seen. But tax is now being sought from the investors using APNs meaning that they will be compelled to find the money to meet the APN while their case remains unsettled. And there are many more in a similar position. Many high-profile celebs have been outed as tax avoiders by sources like the Paradise Papers published in the Guardian and are no doubt facing similar issues. For example, most of the cast of Mrs Brown’s Boys are alleged to have used offshore companies, overseas trusts and loan arrangements to avoid tax on their UK earnings. Even national treasures like Ant & Dec, Philip Scofield and Joey Barton have been linked with schemes now under investigation by HMRC.

Whilst one probably has little sympathy for those named above, some taxpayers who perhaps misguidedly invested in such schemes on the dubious advice of people close to them, have been issued with APNs which they simply can’t afford to pay and will be faced with IVAs or possible bankruptcy. And no doubt these people paid a hefty fee for the advice in the first place, all of which leaves something of a sour taste in one’s mouth.

Which brings me back to Orwell. I can’t help but feel uneasy about APNs as all this seems...well, just not cricket (although a more appropriate analogy should perhaps be found given that former England cricket captain David Gower was also an investor in Ingenious films).

According to HMRC.... “There is no inherent presumption that tax and/or NICs in dispute should sit with the person, rather than the Exchequer...”. Err.... except this is exactly what we had all assumed until APNs came in and HMRC told us otherwise. Normally we send in a tax return and pay the tax due per the return. HMRC takes umbrage with something in the return and opens an enquiry.

An argument ensues. After a few rounds of sparring, we bow to the greater wisdom of the Tax Officer and agree to amend the return or withdraw the claim. This triggers extra tax (and a bit of interest as “commercial restitution”) which we begrudgingly pay. These are the rules of the game and we’re comfortable with them.

What doesn’t happen is that HMRC issues a S.9A Notice of Enquiry and then staples to it an unappealable demand for payment of the tax which HMRC think should be paid on the assumption that their enquiry will be successful. We assume the taxpayer is innocent until proven otherwise. So the disputed tax does sit with the taxpayer until such time as it is no longer disputed at which point it is either retained by the taxpayer or released to the nation. And if the tax ends up at the Exchequer later than it should have done, an interest charge at a rate dictated by the government acts as reasonable compensation.

Similarly if we make a claim in a return that is likely to lead to a tax repayment and this is disputed by HMRC, we cannot insist that the tax at stake is repaid to us before the dispute is agreed. So despite the assertion that the accelerated payment is just another form of payment on account, goalposts (bad football pun intended) have been moved.

And I mention Orwell because there is some part of me which thinks that strong-arming a taxpayer to make a payment of tax before the liability has been agreed will by itself lead to taxpayers giving in and letting down their drawbridge rather than standing firm and defending their castle.

There is a whiff of threat about all of this which seems at odds with HMRC’s insistence that “the legislation does not in any way deny the person’s access to their full appeal rights”. Whilst not removing any rights to continue the fight, this legislation has clearly given HMRC the heavier gloves.

Writing a cheque or making a bank transfer is psychologically defeatist. I understand that HMRC has so far collected north of £4 billion from accelerated payments. I am also told that having obtained the money using APNs, HMRC seem to be more ambivalent about bringing enquiries to a close that cannot be helpful.

The introduction of APNs must make tax avoidance schemes less attractive as promoters now have a responsibility to warn potential investors that an APN will mean that tax has to be paid up front and thereafter tied up for several years while the battle with HMRC continues. This is not something a potential investor wants to hear. One could argue that anything that deters tax avoidance is for the greater good and on this basis, the end justifies the means. Politically there is no doubt that APNs look like a strong move in the fight against tax avoidance and for this reason alone it’s hard to see things changing.

*Contributed by Steve Sanders*