[2015] UKUT 0040 (TCC)

Case numbers: FTC/140/2013
FTC/141/2013

INFORMATION NOTICES — FA 2008 Sch 36 para 1 — failure of respondents to comply with many of requirements of notices — continued failure despite imposition of daily penalties pursuant to Sch 36 para 39 — whether tax-related penalties should be imposed pursuant to para 50 — yes — scale of penalties to be imposed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Applicants**

- and –

ROMIE TAGER
THE PERSONAL REPRESENATIVES OF THE ESTATE OF OSIAS TAGER deceased **Respondents**

Tribunal: Judge Colin Bishopp

Sitting in public in London on 8 May and 10 October 2014

Mr David Yates, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Applicants

Mr Romie Tager QC appeared in person, and for the Personal Representatives

DECISION

1. This decision notice follows the hearing of two applications by HM Revenue and Customs ("HMRC") for the imposition of penalties on a taxpayer in accordance with para 50 of Sch 36 to the Finance Act 2008. That Schedule, as its title ("Information and Inspection Powers") indicates, confers various powers on HMRC by which they may gather information and documents, and it contains provisions by which penalties may be imposed on taxpayers and some others who fail to cooperate. Broadly speaking, Sch 36 replaced corresponding provisions of earlier legislation, particularly the Taxes Management Act 1970 ("TMA"). Paragraph 50, however, introduced a wholly new penalty, described in the heading to the paragraph as a "tax-related penalty", which may be imposed only by this tribunal upon an application by HMRC. This is, it seems, the first occasion on which such an application has been made. There is, therefore, no precedent dealing with the manner in which para 50 is to be applied, and in particular the determination of the penalty to be imposed in an individual case.

2. The first of the respondents, Mr Romie Tager QC, filed his income tax returns for the tax years 2008-09, 2009-10 and 2010-11 on various dates in April 2012; the returns were all late but, although it is (as will be seen) symptomatic of Mr Tager's approach to his tax affairs, nothing turns on the lateness for present purposes. Despite the fact that he had not submitted his returns Mr Tager made payments on account of his assumed liability and it is common ground that, if his returns are correct, he has made a substantial over-payment in respect of those three tax years. HMRC were not, however, satisfied that his returns were correct and on 28 August 2012 they opened enquiries into each of the returns, in accordance with s 9A of TMA. In their letter notifying the enquiries to Mr Tager HMRC identified the information and documents they required him to produce.

3. Mr Tager or his advisers provided some of the information and documents, but did not supply everything HMRC had requested; the difference between what had been requested and what had been supplied was significant (as Mr Tager concedes). On 22 November 2012 HMRC served the first of the information notices which have led to the applications now before me. In doing so they were exercising the powers conferred on them by para 1(1) of Sch 36:

> "An officer of Revenue and Customs may by notice in writing require a person ('the taxpayer')—
>
> (a) to provide information, or
>
> (b) to produce a document,
>
> if the information or document is reasonably required by the officer for the purpose of checking the taxpayer's tax position."

4. A notice served in accordance with that provision is known as an "information notice": see para 6(1). The letter which accompanied the notice added some further questions. The information notice was not one issued with the approval of the First-tier Tribunal (see Sch 36 para 3(2)) and there was accordingly a right of appeal, pursuant to para 29 of the same Schedule, which Mr Tager did not exercise. The stipulated date for compliance with the notice was 22 December 2012. Mr Tager did comply, but again only in part, on 19 December

2012. On 15 January 2013, and because his compliance had been only partial, HMRC imposed upon him a penalty of £300 in accordance with para 39 of Sch 36:

> "(1) This paragraph applies to a person who—
>
> (a) fails to comply with an information notice …
>
> (2) The person is liable to a penalty of £300 …."

5. At the same time HMRC issued a second information notice, requiring the production of the information which was referred to in the covering letter sent with the first information notice, but not in the notice itself, and which was outstanding. Mr Tager again did not appeal against that notice, with which he was required to comply by 14 February 2013. Some information was provided, by Mr Tager's accountants, on 12 February, but no further information had been provided in response to either notice by 8 April 2013, when HMRC imposed another £300 penalty on Mr Tager in accordance with para 39, because of his failure to comply with the second notice, and in addition imposed on him "daily default penalties" amounting to £3,120 for his continuing failure to respond fully to the first notice. The daily penalties were imposed in accordance with para 40 of Sch 36:

> "(1) This paragraph applies if the failure … mentioned in paragraph 39(1) continues after the date on which a penalty is imposed under that paragraph in respect of the failure …
>
> (2) The person is liable to a further penalty or penalties not exceeding £60 for each subsequent day on which the failure … continues."

6. The daily rate on which HMRC determined was £40 in respect of the first notice, and £20 in respect of the second. Further daily penalties, in respect of the first and the second notice, have since been imposed and the aggregate amount of the various penalties suffered by Mr Tager for his failure to comply with the two notices is, in all, £27,020.

7. On 26 March 2005, Mr Tager's father, Osias Tager, died. Mr Tager told me he died intestate, and that, so far, neither he nor anyone else has taken out letters of administration. However, he had dealt with some parts of his late father's estate, and he accepted that the consequence of his so doing was that the responsibility for accounting for any inheritance tax which was due rested on him. Mr Tager is, therefore, also the second respondent, albeit in a different capacity.

8. An inheritance tax account should have been delivered by not later than 1 April 2006: see the Inheritance Tax Act 1984, s 216(2). It was not delivered until 26 January 2009, and only then after the imposition by a Special Commissioner on Mr Tager of a penalty of £100, following an application by HMRC for that purpose (see the 1984 Act, s 245). The direction imposing that penalty records an undertaking by Mr Tager to deliver the account by 31 July 2008; it follows from what I have recorded that Mr Tager failed to comply with that undertaking.

9. HMRC were not satisfied with the inheritance tax return which was delivered, and raised various enquiries, initially in correspondence. Their letters went unanswered, however, and on 16 September 2011 HMRC issued an information notice, again pursuant to para 1 of Sch 36, directed to Mr Tager. It too was not a notice approved by the First-tier Tribunal (which had by then assumed

the jurisdiction formerly exercised by the Special Commissioners) and there was accordingly a right of appeal. Mr Tager did not, however, appeal against the notice; and he did not comply with it. Various penalties were imposed on him in accordance with paras 39 and 40 of Sch 36 (which applies equally to inheritance tax and to income tax), but on 8 November 2012 HMRC wrote to Mr Tager to say that they were withdrawing the notice, together with all the penalties. The reason given was that further information had come into HMRC's possession which suggested that there were more omissions from the inheritance tax return than had at first been thought, and HMRC wished to combine all of their enquiries into a single information request. A fairly long list of questions followed, together with an indication that if the information was not provided by 10 December 2012, a new information notice would be issued. Mr Tager did not respond to the letter and an information notice was duly issued, on 17 December 2012. Mr Tager was required to respond by 21 January 2013, later extended to 15 February 2013. As before, Mr Tager did not appeal against the notice, and he also did not provide any of the required information by the due date. By the time the present application came before me for the first time, in May 2014, he had still not done so. Penalties totalling £12,900 have been imposed on him pursuant to paras 39 and 40 of Sch 36.

10. On 16 December 2013, in the absence of a further meaningful response of any kind from Mr Tager or his accountants, HMRC made two applications to the Upper Tribunal, one in respect of the information notices relating to his personal returns and the other in respect of the notice relating to the inheritance tax return. The applications were made, as I have said, in accordance with para 50 of Sch 36 which, so far as material to this case, is as follows:

> "(1) This paragraph applies where—
>
> (a) a person becomes liable to a penalty under paragraph 39,
>
> (b) the failure … continues after a penalty is imposed under that paragraph,
>
> (c) an officer of Revenue and Customs has reason to believe that, as a result of the failure …, the amount of tax that the person has paid, or is likely to pay, is significantly less than it would otherwise have been,
>
> (d) before the end of the period of 12 months beginning with the relevant date, an officer of Revenue and Customs makes an application to the Upper Tribunal for an additional penalty to be imposed on the person, and
>
> (e) the Upper Tribunal decides that it is appropriate for an additional penalty to be imposed.
>
> (2) The person is liable to a penalty of an amount decided by the Upper Tribunal.
>
> (3) In deciding the amount of the penalty, the Upper Tribunal must have regard to the amount of tax which has not been, or is not likely to be, paid by the person.
>
> (4) Where a person becomes liable to a penalty under this paragraph, HMRC must notify the person.

(5) Any penalty under this paragraph is in addition to the penalty or penalties under paragraph 39 or 40.

(6) [immaterial]

(7) In sub-paragraph (1)(d) 'the relevant date' means—

(a) in a case involving an information notice against which a person may appeal, the latest of—

(i) the date on which the person became liable to the penalty under paragraph 39,

(ii) the end of the period in which notice of an appeal against the information notice could have been given, and

(iii) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn, and

(b) in any other case, the date on which the person became liable to the penalty under paragraph 39."

11. The applications came before me, together, for the first time on 8 May 2014.

12. Mr Tager, who represented himself at that hearing, agreed that the narrative set out above fairly recorded the relevant events. He accepted that he had failed to comply with the notices and that, although there were reasons for that failure, on which he did not elaborate, they did not amount to a reasonable excuse. He therefore accepted too that he was liable, in principle, to the imposition on him of penalties in accordance with para 50. I should add that he has not appealed against any of the para 39 and 40 penalties, and he has not argued before me that the penalties were not correctly imposed, or that he has any reasonable excuse for his non-compliance.

13. Although he did not elaborate on the reasons for his delay, it seemed to me at that stage that Mr Tager was essentially blaming a lack of organisation on his part, coupled with other commitments, since he assured me that he was not attempting to conceal anything, and recognised that he could not continue to fail to comply with the notices any longer. He said that he had arranged his affairs in order to enable him to comply, and offered undertakings to the tribunal that he would answer the information notices relating to his income tax affairs by 30 May 2014, and the notice relating to the inheritance tax return delivered in respect of his late father's estate by 13 June 2014. He suggested that the determination of the penalties to be imposed should be deferred until he had complied (or failed to comply) with the proffered undertakings.

14. Mr David Yates, counsel for HMRC, resisted that suggestion; I should, he said, determine the matter immediately. He pointed out that not only had Mr Tager failed to honour the undertaking he had given to the Special Commissioner, he had in addition failed to honour several promises to HMRC made in correspondence by him or his accountants, and he had failed to provide the required information despite the imposition on him, already, of penalties exceeding £30,000 in all. There was no reason why he should be allowed a further period of grace when the history of the matter showed that one could not be confident of compliance. Mr Tager had previously been assisted by accountants, who had provided the limited amount of material which had been supplied to HMRC, but they were now without effective instructions. These applications were

made in December 2013, but their service on him did not prompt any reaction from Mr Tager. I had made directions on 14 February 2014, and he had failed to comply with those directions as well. In fact, he had done nothing until the last minute, and even than had merely served a very brief skeleton argument two days before the hearing.

15. I took the view on that occasion that Mr Tager commanded little sympathy. His prolonged failure to comply with the notices was substantially unexplained, and his failure to honour an undertaking to the Special Commissioner and various promises to HMRC is unexplainable. Compliance, even partial compliance, with the notices between service on him of HMRC's applications and the hearing would have been a significant factor in his favour but, as he agreed, he had done nothing and instead, as Mr Yates said, had left any response, and an inadequate response at that, to the last minute. Nevertheless, I decided that his undertakings should be accepted, and that he should be given a last chance.

16. I did so for two, quite distinct, reasons. The first is what I perceive to be the objective of Sch 36, taken as a whole, namely to ensure that the information which will ensure that the correct amount of tax can be determined is provided. It seemed to me that if I simply imposed a penalty that objective might be frustrated, since Mr Tager would have little remaining incentive thereafter to comply with the notices. HMRC might continue to impose daily penalties, but if the imposition on him of penalties already amounting to more than £30,000 had not resulted in compliance one could have little optimism that relatively modest daily penalties would have much effect. In addition, Mr Tager recognised when offering his undertakings that the Upper Tribunal is a superior court of record. A breach of the undertakings, since he is a practising barrister, would have serious professional consequences for him. I was persuaded that those consequences represented a real incentive to compliance and that the public interest in ensuring that the correct amount of tax is collected made it appropriate to allow the last chance Mr Tager requested.

17. The second reason was derived from the fact that this was untested legislation, and from my view that it posed some difficulties of interpretation on which I would welcome further submissions. I shall expand on my concerns later, but briefly stated they are twofold: that the draftsman may have contemplated that, in some circumstances, the penalty should stand as a proxy for the tax; and that the heading to para 50, "Tax-related penalty", taken with the phrase requiring the Upper Tribunal to "have regard to the amount of tax …" does not make it clear whether a tax-geared penalty is contemplated (with the obvious difficulty of assessment when the amount of underlying tax is unknown) or that the tribunal is merely enjoined to take some account of the scale of the tax in issue in its determination.

18. The preamble to the direction I made in May 2014 was as follows:

> "On the undertaking by the respondent, Romie Tager, that he will, by 30 May 2014, comply with information notices served on him in connection with the open enquiries into his income tax returns for the years 2008-09, 2009-10 and 2010-11 and that he will, by 13 June 2014, comply with the information notice served on him in connection with the inheritance tax return delivered by him in respect of the estate of Osias Tager deceased, which undertakings are accepted by the tribunal …."

19. It was clear, therefore, that Mr Tager had given, and I had accepted, his undertakings that he would comply with the income tax notices within about three weeks, and with the inheritance tax notices within about five weeks, of the May 2014 hearing. The dates specified were those he had suggested himself, assuring me that he could meet them. I went on to make directions by which HMRC were to notify the tribunal and Mr Tager whether they were satisfied with his compliance, a process which would enable Mr Tager to make good any errors or omissions. The applications were then to come back to me; I had made it clear to Mr Tager that compliance with his undertakings and my directions would not absolve him from a para 50 penalty, but that the extent and promptitude of his compliance would be a material factor in the determination of its amount. In addition, had there been full compliance, it should have been possible to make an, at least reasonably close, estimate of the income tax and inheritance tax for which he is liable.

20. The application came before me again on 10 October 2014. As before, Mr Tager represented himself, and Mr Yates appeared for HMRC. He explained that the sequence of events since the earlier hearing was as follows:

- On 30 May (the last day for compliance with the income tax notices) Mr Tager's accountants, who had by then received further instructions, sent an email to HMRC (enclosing a letter dated the previous day) explaining that Mr Tager, who was said to be overseas, was providing documents, that one or two were still awaited, but that a complete set should be available by early the following week;
- Various documents were provided on 5 June (and therefore six days late) but they did not represent all that had been requested;
- On 16 June (three days after the agreed deadline for him to respond to the inheritance tax notice) Mr Tager sent an email to HMRC to the effect that he had not after all been able to locate all the necessary documents in respect of his late father's estate, but that he thought they might be at his son's house and, if so, he should be able to respond adequately to the notice within a further week;
- On the following day HMRC, who took the view that Mr Tager's email did not offer a satisfactory explanation, notified the tribunal that he had not complied with the inheritance tax notice in any respect;
- On 24 June they wrote again to the tribunal to say that despite what Mr Tager had said in his 16 June email nothing had been received;
- On 1 July they wrote again to the tribunal to the effect that there had been only partial compliance with the income tax notices, and still no compliance with the inheritance tax notice;
- Mr Tager's accountants supplied some further documents relevant to the income tax notices on 9 September though what was supplied still did not amount to complete compliance;
- On 7 October Mr Tager submitted a witness statement relating to his father's estate, to which various documents were exhibited.

21. Mr Tager accepted that chronology, and he accepted too that he had complied only partially with the income tax notices and, until 7 October, had not complied at all with the inheritance tax notice. He was unwilling to be drawn on the extent to which his witness statement and the exhibits remedied his earlier failings. He also accepted that, before the 10 October hearing, he had offered no explanation of his failure to comply, beyond the limited reasons set out in the chronology above. Mr Yates acknowledged at the October hearing that the extent of Mr Tager's non-compliance with the income tax notices was by then relatively modest, though still more than trivial and technical (an assessment with which I agree), as well as very late. His position in respect of the inheritance tax notice was that Mr Tager's failure until 7 October was, obviously, complete and that what he produced then was wholly inadequate. I agree; and I have no doubt that Mr Tager must have been aware that it was inadequate.

22. Mr Yates pointed out that this was not a case in which the person required to produce information had had only limited time in which he could do so. The need to produce material to support his income tax self-assessments must have been apparent to Mr Tager since no later than August 2012, when the enquiries were opened; and the enquiries into his late father's estate went back even further. The extant information notices were all issued in late 2012 or early 2013, yet after almost two years Mr Tager had complied with two of them only partially, and with one of them not at all until only three days before the second hearing. There was no explanation of the only partial compliance with the two income tax notices, and no explanation of why, even if Mr Tager was hindered by the absence of some of the documents relating to his father's estate, he had not complied with the inheritance tax notice so far as it was possible for him to do so from what was available to him. Some of what was requested must be information within his own knowledge which could have been disclosed irrespective of the absence of documentation.

23. I had the statements of two officers of HMRC who had conduct of the enquiries: Mr Jonathan Hawkins who had dealt with the income tax returns, and Mr Robert Brown who had dealt with the inheritance tax enquiry. Mr Tager did not challenge what they said in those statements, and neither officer gave oral evidence. I can therefore deal with their statements fairly shortly.

24. Mr Hawkins described the chronology as I have set it out above, with some additional detail, particularly of communications between himself and a colleague on the one side and Mr Tager and his accountants on the other, and he also gave an account of Mr Tager's general compliance history—in brief, most of his income tax returns have been filed late, and at the time of the October 2014 hearing those for 2011-12 and 2012-13 were outstanding. On the other hand Mr Tager has generally made the payments on account required of him reasonably promptly. In the first of his witness statements Mr Hawkins explained that he had estimated the income tax at risk to amount to at least £235,112 but in the second (made in September 2014) he said that the information and evidence Mr Tager had since produced had caused him to reduce that estimate to not less than £89,361.73, with the caveat that there were still outstanding enquiries about some possible sources of income or gains, and that the true total might be higher.

25. Mr Brown, too, gave details of the chronology of the enquiry, and of his communications with Mr Tager. In his first statement he put the tax at risk at not less than £1,103,210 but by the time he made his second statement, also in September 2014, he had revised that figure upwards to £1,171,020, again with caveats. His calculation was, he said, conservative and based upon the limited information contained in the return which Mr Tager had submitted, together with his (Mr Brown's) assessment of the value of the known assets of the estate, a large proportion of which consisted of shares in unquoted companies. Even then, the numbers of shares said to have been owned by the deceased differed from one record to another, and the companies themselves were often difficult to value. Mr Brown added that he had no grounds for certainty that he had identified all of the assets of the estate. The figure he advanced was his best estimate of the minimum amount of tax due, but it was unlikely to be correct.

26. Shortly before the October hearing Mr Tager produced a skeleton argument, together with the witness statement and exhibit to which I have referred. He also gave oral evidence at the hearing and made a number of submissions.

27. I shall begin with what Mr Tager told me of his income tax affairs. He accepted that he had had a successful career at the bar, and for some years had been earning very substantial fees, as he continues to do. Although Mr Tager mentioned figures, I do not think it necessary, in this decision, to be any more precise. He recognised that his punctuality with his income tax returns left a good deal to be desired, but emphasised that he paid the requisite sums on account reasonably promptly. The sums paid on account were determined by reference to his estimate of his liability, and as it happened he had paid substantially more than he truly owed—indeed, as Mr Yates agreed, all of the penalties imposed so far had been met from the surplus on his tax account, and (subject to the determination of his true income tax liability) there remained money to spare. Thus, he said, there was no risk that the tax would go unpaid. He thought that he had complied with his undertaking in respect of the income tax notices, even if a little late, but accepted at the hearing that he had not fully complied. Now he understood what further information was outstanding, he would provide it within a few days. I have since been informed that he has failed to do so.

28. I am bound to say that I find it difficult, if not impossible, to understand why a man of Mr Tager's means who is, as he claims, anxious to pay the correct amount of tax on his income does not engage an accountant or tax adviser to deal with his tax affairs for him if he is unwilling or insufficiently skilled to do so himself. As the narrative above shows Mr Tager has instructed accountants to assist him in some respects but, it seems, he has not handed over all the relevant records and entrusted the preparation of complete and accurate returns to them. Of course, no-one is obliged to incur the cost of professional help; but the fact that, despite knowing that he had long-outstanding enquiries into his affairs and that he was suffering penalties, Mr Tager chose not to seek sufficient assistance necessarily undermines his claim that he wished to be transparent about his affairs. It is an obvious conclusion that the money he has forfeited by reason of the penalties imposed on him so far could have been more usefully employed in engaging a professional to put his affairs in order and keep him out of danger of incurring penalties in the first place. I regret to say that I am not satisfied that Mr Tager is as keen to be open and candid about his affairs as he would have me

believe. I will return to the significance of this conclusion in the determination of the penalty I should impose later.

29. In his witness statement Mr Tager provided some information about his late father's business activities and family history, on which he expanded as he gave oral evidence. Despite that evidence I was not left, at the conclusion of the hearing, with a clear understanding of what the deceased's assets might be. Mr Tager provided some information in his witness statement and the exhibits to it, but I do not share his view that the information (much of which was, in reality, not information but assumption, supposition or an explanation of why the information was not available) comes even close to compliance with the terms of the notice.

30. He also provided details of the searches he had undertaken for the information and documents sought by the inheritance tax notice, and gave an account of the difficulties he had encountered. In particular, he said, his father had been unforthcoming, if not secretive, about his financial affairs, and had not kept documents in a manner which enabled Mr Tager to extract information easily. It was only in his final months that Mr Tager senior had recognised that he needed to put his affairs in order, and he had not completed that process by the time of his death. Mr Tager expanded at some length at the October hearing on his father's history, the somewhat labyrinthine nature of his business interests and the difficulty he had experienced in trying to unravel his affairs following his death.

31. I accept, from Mr Tager's description of what he knew already and had discovered since his father's death, that Mr Tager senior had interests in a significant number of private companies, some of which were active and some of which were not, that he had various other investments or interests which were not always easy to identify or value, and that he did not keep well-organised financial records. What I find difficult to understand, in the context of the inheritance tax notice as much as in relation to his income tax affairs, is why Mr Tager has not dealt with the matter in a more methodical manner.

32. On 8 March 2006 accountants then acting for him sent a letter to HMRC enclosing a cheque said to be on account of the inheritance tax due. No explanation of the calculation of that amount was offered. Mr Tager obtained a valuation of his father's house in September 2006, and a copy of that valuation was exhibited to his witness statement; it appears that it had not previously been disclosed to HMRC. What was, and remains, unexplained is why Mr Tager did not deliver an inheritance tax return until January 2009. He described in his witness statement the compounding of his difficulty in finding his father's records by his having inadvertently disposed of, or having lost, various files when he moved home in 2009—though I observe that this event took place after the inheritance tax return had been filed. He said he kept the relevant files on a particular shelf in his former home, and assumed that the files had been moved to his new home and that he would be able to find them easily. It was on the strength of that assumption that he gave his undertaking in May 2014. It was only after that hearing that he discovered that he was mistaken, and he had spent many hours since in a largely fruitless search for documents, and in making enquiries of others who, he thought, might be able to assist. The valuation to which I have referred was one of the documents he had discovered by this process.

33. I find that explanation extraordinary, and in parts incredible. As I have said, I can accept that Mr Tager may have had some difficulty in identifying all of his late father's assets, and in putting an accurate value on those he could identify, but it is impossible to believe that he did not realise that he could explain to HMRC what his difficulties were, and attempt to reach agreement on the best available information. Instead, he delayed delivery of the inheritance tax return despite the numerous reminders which led to the application to the Special Commissioners to which I have referred, even then breaching the undertaking he gave. The return was incomplete when he submitted it, and he did nothing to remedy its deficiencies until three days before the October 2014 hearing when he served his witness statement. Even then the information was manifestly insufficient; it is quite obvious from what Mr Tager has supplied that more information is necessary if even an approximate estimation of the value of his late father's estate is to be made. I can accept that complete documentation, sufficient to support an accurate appraisal, is out of Mr Tager's reach; but I cannot accept that, within a period of more than nine years from his father's death, Mr Tager could assemble so little if he truly was attempting to be cooperative.

34. I also find it impossible to believe that a leading member of the bar would consider it appropriate to offer an undertaking to a court or tribunal that he would take certain action without having first checked that it was within his power to do so. Mr Tager had ample forewarning of the May 2014 hearing and could easily have checked, in advance of that hearing, what material was at his disposal, and could have made enquiries about what he found to be missing, in an attempt to obtain it from elsewhere. In giving his undertaking in respect of his compliance with the inheritance tax notice he was, at the least, reckless; and it seems to me that I must take everything he told me with a measure of caution. I am, again, unconvinced that Mr Tager has been as candid as he should be about his late father's affairs, and what he knows of them.

35. In summary, I am satisfied that Mr Tager has made little attempt to comply with his tax obligations in a general sense and, more particularly, has failed to act with proper diligence in responding to the information notices. He has, rather, dealt with them with no sense of urgency, in that he has paid little heed to the deadlines for compliance; he has behaved as if partial compliance is acceptable, with little evident recognition that it is for a taxpayer to be open and honest about his relevant affairs; and although, at the May hearing, he indicated that he recognised that nothing less than full compliance would suffice he had, by the time of the October hearing, still failed to comply in full with any of the notices. As I have indicated, I have no explanation of, still less excuse for, the dilatory, if not casual, character of Mr Tager's approach. The manner of his limited compliance gives no grounds for confidence that it approaches completeness, or that reliance can be placed on what he has said. A matter of additional concern is his repeated failure to honour promises made to HMRC and undertakings made to the Special Commissioner and to me, again with little evident recognition of the seriousness of those failures.

36. Before I come to the action I should take it is, I think, necessary to examine para 50 in some detail. The first matter for enquiry is whether it is primarily a means of encouraging compliance with an information notice, or is to be utilised as an after-the-event remedy, whose dominant purpose is to penalise non-

compliance. It may, of course, have both of those purposes. The second matter for enquiry relates to the criteria by reference to which the penalty for which it provides is to be determined.

37. In order to address the first of those questions one must, in my view, consider the context in which para 50 appears, and the other provisions which lead to its becoming engaged. It seems to me clear that para 39 is designed, like other provisions imposing automatic penalties for non-compliance, or late compliance, to discourage non-compliance and to punish it where it occurs, but that the relatively modest amount of the penalty shows that it is intended to operate as a reminder or incentive rather than as a more draconian measure. The offender becomes liable to the daily penalties for which para 40 provides if the para 39 reminder does not have the desired effect, but as he can limit the extent to which he incurs such penalties by bringing his non-compliance to an end these penalties too can be seen to have the primary purpose of encouraging compliance; punishment, or the threat of it, is the means by which that aim is achieved.

38. Paragraph 49A, not invoked here, allows for enhanced daily penalties to be imposed by the tribunal—meaning either the First-tier Tribunal or this tribunal—on the application of HMRC. The tribunal may determine that the penalty should be of any amount not exceeding £1000 per day, after considering (among other things) the benefit to the person concerned of continued non-compliance. Before the person concerned may be subjected to increased penalties pursuant to this provision he must be given a warning. This provision, as it seems to me, is also designed primarily to encourage compliance by removing any incentive to delay, although the rapid accumulation of penalties at an enhanced level could well have a serious punitive result.

39. The imposition of a penalty in accordance with para 50 is not dependent on the prior imposition of daily penalties, whether in accordance with para 40 or para 49A (and the wording of para 50(5) indicates that a person may not be subject to penalties under both para 49A and para 50), but only on the prior imposition of a penalty in accordance with para 39—that is, the initial £300 penalty which is incurred for even a minor failure of compliance. However, whereas paras 39, 40 and 49A are engaged by nothing more than non-compliance or continuing non-compliance, there must in addition be reason to believe that tax has been, or is likely to be, lost by reason of that non-compliance before para 50 may be invoked.

40. It does not seem to me that the addition of a further requirement negates the presence of an incentive purpose behind a para 50 penalty. As para 50(1) makes clear, it is the Upper Tribunal which determines the amount of the penalty to be imposed, on an application by HMRC. A person the subject of such an application will have notice of it, and the opportunity to remedy his failure before the application is heard. His doing so, even if belated, is likely to have a material bearing on the scale of the penalty, at least if the tribunal is satisfied that his compliance is now complete.

41. Where, however, the person's compliance is only partial or there has been no compliance by the time the Upper Tribunal comes to decide whether or not a para 50 penalty should be imposed the potential for the penalty to operate as an incentive is at an end: although para 50 does not expressly exclude the imposition of more than one penalty, there is no provision for a second application and in

practice it is unlikely that HMRC would be in a position to make successive applications for para 50 penalties because of the manner in which the time limit is drawn, restricting an application to the 12 months after the taxpayer incurs liability to a para 39 penalty. HMRC might continue to apply daily penalties in accordance with para 40, since the imposition of a para 50 penalty does not remove the taxpayer from the scope of para 40, although, as I have said, the enhanced penalties for which para 49A provides may not be imposed. However, if the threat of a para 50 penalty has not prompted compliance it seems unlikely that the continuing imposition of the relatively modest daily penalties for which para 40 provides will do so. It follows that, in most circumstances at least, para 50 represents a last resort.

42. It is that conclusion, coupled with the requirement that, when deciding on the amount of the penalty, the tribunal "must have regard to the amount of tax which has not been, or is not likely to be, paid by the person", which suggests that the draftsman contemplated the certainty or likelihood that tax due would escape assessment, and therefore not become payable in the ordinary way, and intended that the penalty should represent an alternative means of recovering that tax. Mr Yates preferred to put it differently, offering instead the suggestion that the underlying purpose of this requirement was to ensure that the person concerned did not benefit from his non-compliance. I am not altogether persuaded that there is much real difference between those descriptions and, having reflected on the matter, do not think that either of them is entirely apt.

43. It is to be noted that nothing in para 50 precludes the assessment by HMRC of the tax due once they have been able to determine what it is, at least to the standard necessary for the raising of an assessment. It is also apparent from the wording of para 50 that although it provides for a penalty whose scale must be determined with regard to the tax lost or potentially lost, so that it is in that sense a tax-related penalty, it does not impose a tax-geared penalty. Indeed, it is difficult to see how, in a practical sense, it could be geared to an unknown amount of tax, yet in the case of egregious non-compliance with an information notice it is unlikely that the true extent of the tax due could ever become ascertainable.

44. It is for that reason that I am not persuaded that a para 50 penalty is intended to operate as a proxy for an assessment, or to be a mainly or wholly restitutionary penalty. Rather, in my view, a para 50 penalty is essentially punitive. Like any punitive provision it may have a deterrent effect, not only on the person penalised but on others who might be tempted to disregard information notices, and the levying of a financial penalty may have the effect of making up for tax which, by reason of the continuing non-compliance, it is not possible to assess, but I do not perceive either of those effects as the purpose underlying the provision.

45. Paragraph 50 specifically identifies only "the amount of tax which has not been, or is not likely to be, paid" as a factor to which the tribunal must have regard when determining the amount of the penalty. It may well be the most important factor, but I do not think it can be the only consideration. If I am right in my view that para 50 is an essentially punitive provision it seems to me that the draftsman must have assumed that other factors which ordinarily play a role in the determination of a penalty would be taken into account as a matter of course. Those factors include, in the context of this case, the gravity of the offence, the

duration of the non-compliance, whether there has, ultimately, been full compliance and if not the extent to which information and documents remain outstanding. Contrition and other mitigating features plainly have a role to play.

46. That conclusion seems to me to be consistent with the structure of para 50. It is open to HMRC to make an application for the imposition of a para 50 penalty only when, as sub-para (1)(c) puts it, "an officer of Revenue and Customs has reason to believe that, as a result of the failure or obstruction, the amount of tax that the person has paid, or is likely to pay, is significantly less than it would otherwise have been". The "reason to believe" is therefore the gateway for the making of the application, and it is plainly possible that by the time the application is heard the person concerned has put right his default and there is no longer any reason to think that tax may be unpaid. In such a case the tribunal cannot have regard to the amount of tax which might go unpaid because, at the time it comes to fix the penalty, there is none; but it would be an odd result if a hitherto non-compliant taxpayer could avoid any penalty at all by last-minute compliance. It is also a pre-condition for the use of para 50 that the person concerned has failed to respond to the imposition of para 39 penalties (and possibly, though not necessarily, para 40 penalties), and para 50 can therefore be seen as a weapon to be used against the seriously non-compliant and to represent, as I have said, a form of last resort. For conventional reasons even last-minute compliance would merit a reduction in the penalty which might otherwise have been imposed, but I see nothing in para 50 which suggests that it should lead to absolution.

47. I should mention for completeness that para 45 of Sch 36 provides that a person does not become liable to a penalty under para 39 or 40 if he has a reasonable excuse for his non-compliance. That provision does not apply to penalties determined by the tribunal pursuant to para 49A or 50, but it is difficult to see how the tribunal could properly impose either kind of penalty if the non-compliance was reasonably excusable.

48. I come therefore to consider how para 50 should be applied in this case.

49. Mr Tager recognised that he had failed to comply with the notices on time, or completely, and he did not contend that he had any reasonable excuse, although he did say that, even if late, his compliance with the income tax notices was now complete and that he had done his best in difficult circumstances to comply with the inheritance tax notice. He was at pains to stress that he was not attempting to conceal his or the estate's liability, and that all the tax which was due would be paid; he added that even though his income tax compliance had always been tardy he had never been the subject of enforcement action.

50. In the skeleton argument he served in advance of the May 2014 hearing Mr Tager recognised that some penalty must be imposed but by the October hearing he had changed his position, which was now that a tax-related penalty would be inappropriate. What he had now disclosed showed that his income tax liability—assuming HMRC were right to say it amounted to £89,361—was more than covered by what he had already paid, and there was no more than (he said) an additional £75,000 of inheritance tax to pay. The relatively minor residual dispute could now be resolved between HMRC and himself by agreement or, failing that,

assessment and appeal, and the imposition on him of a further penalty would amount to double recovery.

51. Mr Tager did not address the underlying purpose of para 50, but he did argue that "have regard to" meant no more than that some cognisance of the amount of tax in issue should be taken, and that it should not be a factor carrying great weight. In any event, he said, the amounts estimated by HMRC, particularly for inheritance tax, were excessive. He added that, for the reasons I have set out above, any further penalties to be imposed should be confined to those exigible for the late payment of tax; the threat of a para 50 penalty had had the desired effect.

52. Mr Tager offered his apologies to HMRC and to the tribunal for his conduct, which he recognised was unacceptable. But, he said, there was no irremediable prejudice to HMRC and this was not a case for imposing substantial penalties, if there should be any at all. He did not suggest that any penalty I might impose should be tempered by reference to his means.

53. Mr Yates did not argue that the penalty should be assessed by reference only to the tax which would or might be unpaid, but accepted that other factors came into play. He accepted too that there was a qualitative difference between Mr Tager's approach to the income tax notices, to which he had, even if very belatedly, largely responded (although, contrary to his assertion and as I have agreed above, his compliance was still materially incomplete) and his approach to the inheritance tax notice, in respect of which there had been no compliance at all until only two or three days before the October hearing, and such information as was provided then was plainly inadequate, as I have said. In Mr Hawkins' first statement he suggested a "substantial" penalty, but was no more specific, and he did not address the point further in his second statement, save for emphasising that the estimate of the tax in issue at £89,361 took no account of the possibility that there was yet more information still to be disclosed which might show that the true amount was higher. Mr Brown asked in his first statement that I impose a penalty of £1,103,210, representing 100% of what he described as HMRC's "conservative estimate" of the tax unlikely to be collected. He suggested 100% because that was the measure of the penalty imposed for deliberate concealment, and Mr Tager's conduct was, he thought, of a similar character. In his second statement, as I have said, he revised the amount of tax at risk to £1,171,020 and invited the imposition of a penalty of that amount, for the same reasons.

54. I have already mentioned the practical difficulty inherent in a requirement that the penalty be geared to an unknown quantity of tax. The difficulty does not seem to me to be much diminished when the requirement is instead to "have regard to the amount of tax which has not been, or is not likely to be, paid"; indeed, it is complicated by the fact that there are two unknowns, namely the amount of the tax and the likelihood of its remaining unpaid.

55. The fact that Mr Tager has substantially, though not completely, complied with the income tax notices suggests that the risk that there remains a large amount of unidentified income tax is relatively modest, though it cannot be discounted altogether. I do not think there is much risk that the £89,361 which has been identified will remain unpaid; even disregarding the payments on account Mr Tager clearly has the means of paying an amount of that magnitude. The

seriousness of Mr Tager's conduct in relation to his income tax affairs lies in his unexplained failure over a prolonged period to provide the information which, once provided, showed that his self-assessments under-stated his liability to that extent, by reason of over-claimed relief. It is not the purpose of para 50 to penalise errors or misstatements in a return (there are other provisions which do so) and I disregard the fact that the returns were incorrect. But HMRC, and the body of taxpayers whom they represent, are entitled to expect that those who claim relief from tax, as Mr Tager has, will justify their claims when asked to do so and will not put HMRC to considerable trouble and expense in, as has happened here, dragging out of them information which should have been readily available and equally readily produced.

56. The unnecessary diversion of HMRC's resources by an uncooperative taxpayer over a prolonged period such as has occurred in this case is wholly unacceptable. If all taxpayers behaved as Mr Tager has done the administration of tax would become impossible. It is not a case in which the taxpayer has been overwhelmed by demands he was ill-equipped to meet, or has suffered illness or some other misfortune; nor is it a case of a minor failing of little lasting consequence. I cannot disregard the fact that Mr Tager has failed to honour several promises including his undertaking to this tribunal (a matter to which I shall return later). The amount of income tax in issue is not enormous, but it is substantial; yet, as I have said, the amount identified in Mr Hawkins' second witness statement is a sum which Mr Tager can readily pay, a fact which makes it all the more inexplicable that he did not attend to his tax affairs more promptly. The unacceptable aspects of Mr Tager's conduct are mitigated to a limited extent by his belated compliance but I reject his argument that that compliance should lead to the imposition of no penalty at all. Even now what he has disclosed is incomplete; and it was disclosed, I infer, only because Mr Tager recognised the serious threat that para 50 represents. It is true, as I pointed out during the course of the hearing, that HMRC could simply disallow the relief he has claimed and leave Mr Tager to challenge their doing so, by appeal to the First-tier Tribunal if necessary, but in my view that is beside the point. Mr Tager was required to supply the information identified in the notices. He did not appeal against them; on the contrary he promised to comply with them. The fact that HMRC might have taken different action does not seem to me to excuse his conduct.

57. I agree with Mr Brown that there is a proper comparison to be drawn between para 50 penalties and those imposed for deliberate concealment since the mischief targeted by them is materially the same, that is the intentional or, at least, prolonged withholding from HMRC of the information they need in order to assess the correct amount of tax. Parliament has provided that in some cases penalties may be imposed at a rate of 200% of the relevant tax (see the Finance Act 2009, Sch 55, para 6(3A)). I do not think an enhanced penalty is warranted here; but I am of the view that the starting point must be 100%.

58. However, the determination of the "amount of tax which has not been, or is not likely to be, paid" poses more of a problem. The figure mentioned in Mr Hawkins' second witness statement consists of £8,812 tax due on an accounting adjustment (and not a matter to which either of the information notices relates), while the balance is made up of relief which Mr Tager has claimed but has not justified, or at least had not justified by the time of the October hearing. HMRC

could have disallowed the claims for relief and left Mr Tager to challenge their doing so. Mr Yates agreed that that would have been a possible course but, he said, the tax was still at risk because, after closing the enquiry by disallowance of the claimed relief, HMRC would be left with the prospect of defending an appeal, with the uncertainty that would entail. I am not persuaded that such uncertainty is what is contemplated by the use in para 50 of the phrase "not likely to be paid"; Mr Tager would win an appeal only if he satisfied the tribunal that he was entitled to the relief. If he did so, there would be no tax (or, perhaps, less tax) to pay and none would have been at risk of non-payment since Mr Tager's ability to pay is not in doubt.

59. Mr Hawkins has identified other matters of concern: Mr Tager's investment income, the character of his shareholdings (principally whether he holds the shares beneficially or as trustee) and his directorships. It does not, of course, follow from the fact that there are concerns that any tax is at risk, but it is my view nevertheless a factor to be borne in mind that, despite having ample opportunity to do so, Mr Tager has not allayed Mr Hawkins' doubts about the completeness of his returns. However, although it is plain that there may be some tax due but which Mr Tager's lack of cooperation is concealing, I cannot be sure that there is any such tax, still less can I even hazard a guess at its amount.

60. The application of para 50 in such circumstances therefore imports a considerable practical difficulty: how can the tribunal have regard to an amount which it cannot ascertain? I discard the course of proceeding on the assumption that (this being a penal provision in respect of which doubts must be resolved in the taxpayer's favour) the tax at risk is nil, and the starting point must also be nil. The plain purpose of the provision, if I am right in what I have already said, is to impose a penalty when all else has failed, from which it follows that the penalty must be one of some substance, and certainly greater than the aggregate of the penalties which have already been imposed. It is worth reminding oneself that the penalty is imposed, not as a percentage of the tax even though I have concluded that, as a starting point, 100% is appropriate, but merely having regard to the amount of tax at risk, and that other factors are to be taken into account as appropriate.

61. Nevertheless, although the scale of the tax at risk is not the only factor, para 50(3) makes it clear that it is something to which the tribunal must have regard. The conclusion I have reached is that I should have regard to the amount of tax attributable to the claims for relief which Mr Tager has made but not justified. They were (among other items he has justified) the target of the information notices. It seems to me that, if I am to respect the purpose of the legislation, and to impose a penalty when one is so plainly merited, it is necessary to find a proxy for the tax at risk. I might go further, since it was only after HMRC issued their application—and, indeed, after the May hearing—that Mr Tager produced the material which reduced the identifiable monetary extent of Mr Hawkins' concerns to the amounts mentioned in his second statement, but I have concluded that my starting point should be 100% of that proxy amount. Elimination of the £8,812 I have mentioned leaves a sum of £80,549.

62. It will be obvious from what has gone before, but for reasons of form I should record that I have decided that it is appropriate that an additional penalty

be imposed on Mr Tager for his non-compliance with the income tax notices. For the reasons I have given I take as the starting point the sum of £80,549. I am not persuaded that the limited mitigation which I have identified in relation to the income tax notices should lead to a substantial reduction from that figure. What Mr Tager eventually did was, to borrow a common phrase, too little too late. His earlier conduct as I have described it was, not to mince words, disgraceful. In my view he merits no more than a modest rounding down of the penalty, which I determine at £75,000. If it is necessary to impose separate penalties for the two notices (a matter on which I was not addressed), I determine them at £37,500 each.

63. There is no comparable difficulty in ascertaining the amount of tax at risk in respect of the inheritance tax notice, though again there is no certainty about it and it is necessary to rely in part at least on supposition. The estimate which Mr Brown has made of the liability is, as I have said above, £1,171,020, a figure based on such information as he has been able to obtain and which takes no account of any assets of the estate which HMRC have yet to discover. The figure is explained in detail in Mr Brown's statements, and is supported by the evidence he describes in them, limited though that evidence might be. I am also satisfied that Mr Brown is right to say that the calculations are based on conservative valuations. Although Mr Tager represented himself before me it would be unrealistic to treat him as an ordinary self-represented litigant who could be excused for not knowing the consequences of failing to require a witness whose statement has been tendered in evidence to attend for cross-examination, yet all Mr Tager has done has put in what he must have known was a wholly inadequate statement exhibiting a few documents and making an unsubstantiated assertion that the estate was worth materially less than Mr Brown had estimated. As I have said, I am not persuaded that what Mr Tager has told me is credible; on the contrary, I am satisfied that the tax which is at risk is more likely than not to be at least the £1,171,020 which Mr Brown has calculated.

64. There is, in my judgment, nothing to be said by way of mitigation of Mr Tager's failure to comply with this notice. He did put in a witness statement and some exhibits, but he did so only three days before the October hearing, and what he provided then was manifestly inadequate. His father had died some nine and a half years before, but all Mr Tager had produced in that time was an incomplete return and an inadequate statement. He had ignored many of HMRC's requests for information, and when pressed made promises he did not honour. He did not approach HMRC to explain the difficulties he faced (if indeed there were any) and seek to reach an agreement; instead, in the vernacular, he repeatedly and persistently fobbed HMRC off. His conduct towards the Special Commissioner can only be regarded as contemptuous; and his reckless offer of undertakings to this tribunal, followed by his, as I perceive it, insouciant attitude to his non-compliance, are of a similar character.

65. For all those reasons I am satisfied that a penalty of 100% of the tax at risk, namely £1,171,020, must be imposed for Mr Tager's failure to comply with the inheritance tax notice. The aggregate of the penalties Mr Tager must pay is therefore £1,246,020. That sum is, as para 50(5) indicates, additional to the other penalties already imposed on Mr Tager and, as explained above, the payment of the penalties does not discharge the liability to pay such tax as is found to be due.

66. I come, finally, to Mr Tager's undertakings to this tribunal, offered and accepted at the May 2014 hearing. In what I have said above I have taken Mr Tager's standing, as a practising barrister, into account only in the sense that any court or tribunal would treat a person's background as a relevant factor when considering the quality of his conduct. His standing takes on a different character in the context of Mr Tager's offer of his undertakings, since he expressly referred to the more serious consequences which would follow for him, by virtue of his being a practising barrister, should he breach them. It was, in part, because of that argument that I agreed, despite Mr Yates' opposition, to give him the additional time for compliance which he had requested. It is also a matter for regret that he did not later seek any extension of the time limits he had himself set.

67. I am conscious of the fact that I have already imposed substantial penalties on Mr Tager. In doing so I have taken account of the breach of his undertakings as part of the overall background, but have not augmented the penalties I would otherwise have imposed because of them; it would in my view be inappropriate to increase statutory penalties for this reason. Connected though they are, Mr Tager's failure to comply with the information notices and his failure to honour his undertakings to the tribunal are discrete matters.

68. Mr Tager's breaches cannot, however, be simply ignored. I invite the parties to provide written submissions about the action, if any, which I should take: HMRC within 14 days of the release of this decision, and Mr Tager to respond within 7 days thereafter.

Colin Bishopp
Upper Tribunal Judge

Release Date: 06 March 2015