TC02099

Appeal number: SC/3122/2008

INCOME TAX – penalty – previous finding of negligence by Special Commissioners in relation to partnership accounts – personal returns reflecting profits shown in those accounts – held, findings of negligence applied to personal returns – consideration of level of penalty – relevant criteria – total penalty left unchanged – appeal dismissed

Procedure – whether open to Tribunal to consider human rights point in light of limited terms on which the High Court permitted appeal to be remitted – no, but point considered in case of possible further appeal

FIRST-TIER TRIBUNAL
TAX CHAMBER

WILLIAM STOCKLER **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE JOHN CLARK

Sitting in public at 45 Bedford Square, London WC1B 3DN on 30 April 2012

The Appellant, of Stockler Brunton, Solicitors, in person

Akash Nawbatt of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, Mr Stockler, appeals against the penalty determination made by the Respondents ("HMRC") in respect of the years referred to below. As this matter has a long history, I summarise the events leading to this decision.

History

2. The issue of the penalty determination was first raised in a hearing before me as a Special Commissioner in December 2008. That hearing was, by agreement between the parties, listed to consider a preliminary question of law. The details are set out in my decision released on 20 February 2009 (Spc 00739, [2009] STC (SCD) 333). In that decision ("my 2009 decision") I set out at paragraph 3 the Statement of Agreed Facts as provided for that hearing, and at paragraphs 4 to 14 I dealt with other relevant facts and background to the issue under consideration at that hearing.

3. For convenience, I repeat below that Statement of Agreed Facts:

> "(1) At all material times, the Appellant ("Mr Stockler") was a solicitor and partner in the firm of Stockler Charity ("the Partnership").
>
> (2) On 26th September 2005, HMRC notified the Partnership that it had amended the Partnership's statements in respect of various periods of account from 1st May 1994 to 30th April 1998.
>
> (3) Between 31st October 2006 and 9th November 2006, the Special Commissioners heard an appeal by the Partnership against those amendments.
>
> (4) On 7th December 2006, the Special Commissioners decided that:
>
> > (a) the sums which had been deducted in computing the profits of the Partnership were not monies wholly and exclusively expended for the purpose of the Partnership's profession within the meaning of section 74(1)(a) of the ICTA 1988, and
> >
> > (b) the insufficiency of the amount of the profits was attributable to the negligent conduct on the part of Mr Stockler within the meaning of section 30B(5) of the TMA 1970.
>
> (5) On 25th January 2007, the Partnership appealed against the decision dated 7th December 2006 to the Chancery Division of the High Court.
>
> (6) On 17th May 2007, the Partnership made an offer to HMRC pursuant to Part 36 of the Civil Procedure Rules. The offer provided that, in return for the Respondents withdrawing the amendments of the Partnership's Tax Return for the Tax Years 1996/1997, 1997/1998 and 1998/1999, the Partnership would make certain payments to HMRC. The offer was stated to relate to the whole of the appeal and, for the avoidance of doubt, to the matters raised in the Respondents' Notice.

(7) On 25th May 2007, the Solicitor to HMRC gave notice to the Partnership and the Court that HMRC accepted the Partnership's offer dated 17th May 2007. In a letter to the Partnership of that date, the said Solicitor wrote that he was instructed to make it clear that acceptance of Part 36 Offer "is of course entirely without prejudice to any penalty determination which may follow hereafter".

(8) On 31st May 2007, the Partnership informed the Court that the appeal had been settled and on the same day wrote to the Solicitor to HMRC stating that the legal effect of an unconditional acceptance could not be altered by the incorrect assertion that it was "without prejudice" to any penalty determination. The Partnership also required the withdrawal of the amendments and asked for agreement to the figures payable pursuant to the settlement.

(9) There followed correspondence between the Partnership and HMRC about those figures. Ultimately the parties agreed that the sum payable was £122,731.77. This sum was paid on 12th June 2007.

(10) On 27th June 2007, HMRC confirmed to the Partnership that the amendments that had been made against the 1996-97, 1997-8 and 1998-99 Self Assessment Returns had been withdrawn.

(11) On 16th October 2007, Mrs J L Becker, an investigator employed by HMRC, wrote to Mr Stockler personally at his home address informing him that she had on that day made a penalty determination in respect of incorrect returns of his liability to tax for the years 1996/1997, 1997/1998 and 1998/1999. Mrs Becker wrote that she had calculated the penalty as being 70% of the culpable tax and that that amounted to £53, 555.

(12) On 31st October 2007, Mr Stockler wrote to Mrs Becker informing her that steps would be taken in the Chancery Division of the High Court to enforce the terms and effect of the settlement that had been reached under CPR Part 36 and in the meantime, in order to protect his position, requesting her to accept that letter as his appeal against both liability for the penalty and the quantum of the penalty.

(13) On 7th November 2007, the Partnership applied to the Chancery Division of the High Court for a declaration pursuant to CPR Part 36.11(8) that HMRC had failed to honour the terms of the settlement and that in consequence of HMRC's agreement to withdraw and its subsequent withdrawal of the amendments to the partnership returns, HMRC was precluded from relying on the amendments for any purpose, including the levying of penalties in respect of the relevant tax years. The Partnership also asked for a declaration that the payments by the Partnership pursuant to the Part 36 Offer were in full and final settlement of all liabilities to tax and penalties in respect of the relevant tax years.

(14) The application came before Mr Justice Warren on 14th November 2007. The hearing was adjourned to permit HMRC to put in further written submissions. It did so on 27th November 2007 and on 4th December 2007 the Partnership replied.

> (15) On 13th December 2007 Mr Justice Warren declined to make the declaration sought by the Partnership and dismissed the application. He stated that he considered that this was a matter which was best determined in accordance with the appeal process which has been laid down by statute, namely by the Special Commissioners."

4. As explained at paragraph 4 of my 2009 decision, the penalty proceedings followed the decision of the Special Commissioners (Stephen Oliver QC and Dr Nuala Brice) in *AB (a firm) v Revenue and Customs Commissioners* [2007] STC (SCD) 99. The *AB* decision forms a significant part of the evidence in respect of the present proceedings.

5. Following the issue of my 2009 decision, Mr Stockler appealed against it. As a result, the hearing listed for March 2009, to consider the question of the amount and percentage rate of the penalty, was vacated. His appeal to the High Court was heard by Sir John Lindsay, whose judgment in *Stockler v Revenue and Customs Commissioners* was published at [2009] EWHC 2306 (Ch), [2009] STC 2602. At [43], Sir John Lindsay indicated that he could find no error of law in my decision, and acknowledged the possibility of a reference back to me.

6. Mr Stockler appealed to the Court of Appeal against Sir John Lindsay's judgment. That appeal, *Stockler v Revenue and Customs Commissioners* [2010] EWCA Civ 893, [2010] STC 2584, was not successful. The Court of Appeal (Lloyd LJ dissenting) held that the penalty HMRC had power to raise a penalty determination in respect of Mr Stockler under s 95 of the Taxes Management Act 1970 ("TMA 1970"), and dismissed his appeal.

7. The Court of Appeal did not expressly refer to the final paragraph of Sir John Lindsay's judgment, but as it has relevance to the matters raised at the 2012 hearing before me, I set it out here:

> "[43] I detect no error of law in Mr Clark's decision so I must dismiss Mr Stockler's appeal. There may, if necessary, be a reference back to the special commissioner but only as to the due percentage rate for the penalty and not as to the attribution, in the event, of the whole of the Stockler Charity liability to Mr Stockler."

8. As the proceedings in relation to Mr Stockler's penalty appeal were commenced before 1 April 2009, they fall within the definition of "current proceedings" in paragraph 1(1) of Schedule 3 to The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56). Under paragraphs 6 and 7 of that Schedule, the proceedings commenced before me as a Special Commissioner are to continue as proceedings before the Tribunal, and the Tribunal is required to be comprised for the continuation of that hearing of the person who began it. As no other Special Commissioner was involved, I was the sole member of the Tribunal panel for the 2012 hearing.

The 2012 hearing

9. In preparation for the hearing, I had given directions following an earlier directions hearing in November 2011. The first of these was:

> "1. The issue for determination at the hearing of the remaining part of the appeal shall be as set out in the final paragraph of the judgment of Sir John Lindsay in the High Court on the preliminary issue in the appeal, namely:
>
> [as set out above]."

10. The 2012 hearing was listed for one day. In the course of the hearing, it became apparent that there would be insufficient time to complete it in one day. I therefore agreed to sit longer in order to avoid the matter going part heard. In the event, the hearing was completed by extending the sitting time by nearly one and a half hours.

11. As Mr Stockler wished to be fully informed of the case being put by HMRC before putting his own case, I agreed that HMRC should open their case first and that his argument would follow. As this would have given him no opportunity to respond to HMRC's reply to his arguments, I also agreed that he was to have a further right of reply at the end of the hearing.

12. In the course of his main argument, approximately an hour before the hearing finished, Mr Stockler raised a human rights point which had not been referred to at any earlier stage, either that day or in the hearing before me in 2008. It had therefore not formed part of the appeals to Sir John Lindsay or to the Court of Appeal. I consider below to what extent I am permitted, in the light of the final paragraph of Sir John Lindsay's judgment, to consider Mr Stockler's new point, which raises an issue of law and therefore appears to go beyond the matters which Sir John Lindsay indicated could be referred back to me.

The human rights point

13. The point raised by Mr Stockler had not been raised in specific terms in his skeleton argument. In that argument, Mr Stockler referred the Tribunal to the decision of the European Court of Human Rights in *King v UK* [2004] ECHR 631, in which it had approved of the finding of Jacob J that tax-geared penalties were the equivalent of criminal charges. Mr Stockler stated that it was for that reason that proper warnings had to be given; this had been accepted by HMRC in their own Enquiry Manual, at EM1362.

14. He referred to EM1063, and submitted that none of the required procedures had been followed in his case. Had HMRC complied with their own policy once the appeal process against the decision in *AB* had been exhausted, he submitted that there was every reason to believe that a settlement in a smaller amount than that presently being sought [ie in respect of the penalty] could have been achieved. He indicated that this in itself was a ground for abating the amount of the penalty.

15. Mr Stockler's submission at the hearing was significantly different. He commented that Mr Nawbatt and Mrs Becker (HMRC's witness – see below) had made a valiant attempt to say that a warning in the terms referred to by EM1362 had been given by means of the warning under HMRC's Code of Practice ("COP") 8. In his submission, it was clear from EM1362 that the fact of the penalty had to be specifically drawn to the attention of the taxpayer. It had been stated in *King v UK* that specific warning had to be given.

16. He commented that by 22 November 2006, the *AB* case was being heard by the Special Commissioners. The issue was whether there was a breach of s 6 of the Human Rights Act 1998 by HMRC for not having given Mr Stockler that notice earlier. If his human rights were affected, there would be no penalty period. It had not already been determined by the higher court; the issue considered by that court was whether the penalty determination had been settled.

17. In the light of his human rights submission, Mr Stockler's remaining submissions (considered later in this decision) were made on the contested hypothesis that a penalty was appropriate. His human rights submission therefore called into question the imposition of any penalty, rather than merely "the due percentage rate for the penalty" as specified by Sir John Lindsay.

18. Mr Nawbatt's response to Mr Stockler's human rights submission was that Mr Stockler had introduced a new ground of appeal because of his reference to an alleged breach of human rights; this had not been included in Mr Stockler's original grounds of appeal. Sir John Lindsay had specified that the only matter to be considered on this further reference to me was the due percentage rate for the penalty.

19. Mr Nawbatt referred to Mr Stockler's witness statement, and in particular paragraph 7, which stated:

> "Whilst I do not before this tribunal assert that HMRC's failure to comply with the rulings of the ECHR or with its own policy exempts me from paying any penalty, I respectfully submit that this is a relevant factor in deciding on the level of abatement, as proper warnings might have resulted in negotiations leading to a lower figure of penalty than that currently sought to be imposed. I will expand on this point at the hearing."

Mr Nawbatt submitted that Mr Stockler could not resile from this at 4.45 pm on the day of the hearing. This was indicative of the way in which Mr Stockler had conducted the whole proceedings. In paragraph 4 of his skeleton argument, Mr Stockler had referred to reduction of the penalty by reason of what he contended to be HMRC's failure to give a proper warning; this had been consistent with his witness statement, and with the position taken in the final paragraph of his skeleton argument. Mr Nawbatt submitted that it was not open to Mr Stockler to raise a new ground of appeal.

20. My view at the hearing was that I should not make any ruling on the issue without having had an opportunity to consider fully the implications. I therefore heard

both parties' submissions on this question, and made no comment on these submissions.

21. In his final reply, Mr Stockler described as a remarkable assertion the submission for HMRC that because the human rights point had been made too late, it could not be considered. He submitted that it infected the penalty determination as a whole. He added that even if I concluded that HMRC had complied with their human rights obligations, the failure to give proper notification was nevertheless relevant in considering the issue of abatement.

Conclusions on the human rights point

22. At no time before the 2012 hearing was any indication given that Mr Stockler wished to question the imposition of the penalty on grounds of delay by HMRC in giving notice that a penalty might be imposed. Mr Stockler was represented by Conrad McDonnell of Counsel at the hearing before me in December 2008, which specifically considered as a question of principle whether it was open to HMRC to impose a penalty on Mr Stockler personally in relation to his tax returns submitted on the basis of the partnership returns considered in *AB*. I commented at paragraph 66 of the 2009 Decision:

> "66. Although there are three issues raised in the appeal, two of them are concerned with quantum. The preliminary issue is whether it was possible for HMRC to raise the penalty determination in circumstance where no amendments were made to the partnership statements."

I held that HMRC did have power to raise a penalty determination.

23. This was the issue in respect of which Mr Stockler appealed to the High Court, and then to the Court of Appeal. No issue concerning objection to the penalty on human rights grounds was raised either before me at the hearing in December 2008 or in those further appeal proceedings. The other matters raised by Mr Stockler's appeal related to quantum, rather than to the question whether HMRC were precluded for any reason other than the matters mentioned at paragraph 98 of my 2009 decision from imposing a penalty.

24. The purpose of the December 2008 hearing was to determine the issue of principle; was it open to HMRC to impose a penalty on Mr Stockler? If he had not appealed to the High Court, the issue of quantum would have been considered at a further hearing before me in March 2009. I therefore consider that if he wished to raise a further issue of principle concerning the imposition of the penalty, his time for doing so was at the 2008 hearing. He did not do so, and therefore that question of principle was not considered in my 2009 decision, or in consequence by Sir John Lindsay or the Court of Appeal.

25. In addition, I consider myself bound by the limitation set out in Sir John Lindsay's judgment at [43] (see paragraph 7 above). Those words do not permit me to

explore matters going beyond the quantum of the penalty, ie "the due percentage rate for the penalty".

26. My conclusion renders it unnecessary to consider whether it would be in the interests of justice to permit Mr Stockler to raise this human rights issue at this point in the proceedings. To allow for the possibility that my conclusion might be questioned on appeal, I think it appropriate to express the view which I would have taken had I not considered myself bound by the limitation in Sir John Lindsay's judgment.

27. The "overriding objective" in Rule 2 of the Tribunal Rules (SI 2009/273 (L.1)) is "to enable the Tribunal to deal with cases fairly and justly". I do not consider it to be fair and just for one party to be faced, late in the day of a hearing which has followed other extensive proceedings over a period of a number of years, with a newly introduced argument of principle that has not been mentioned (or even "signposted") at any previous stage. Nothing in Mr Stockler's skeleton argument or witness statement can be taken as amounting even to a hint that he sought to raise the issue of an objection on human rights grounds to the making of the penalty determination; what appeared to be in question was whether the alleged delay in informing him as to a possible penalty had some relevance to the quantum of the penalty.

28. Mr Stockler's skeleton argument, submitted in advance of the 2012 hearing, stated at paragraph 2:

> "This appeal does not challenge the right of HMRC to make a determination as such. It relates to the percentage of the tax due, which was assessed by HMRC at 70%."

His submission at the hearing was entirely inconsistent with the first sentence of this statement.

29. I therefore do not think that it would have been fair as between the parties for HMRC to be faced with the need to respond without notice to the argument based on human rights grounds against the imposition of the penalty. The issue of the possible effect on the quantum of the penalty is a different matter, and I consider this below in the context of the evidence.

30. Accordingly, I hold that it is not open to Mr Stockler to challenge, on human rights grounds, the imposition of the penalty. In case my decision on this point may be questioned on appeal, I consider at a later stage below whether on the available evidence there would be a basis for such a challenge.

The quantum issue

31. The evidence before me at the 2012 hearing consisted of a single bundle of documents. This included two witness statements made by Mr Stockler, together with exhibits, and a witness statement given by Mrs Jennifer Louise Becker, an Inspector

of Taxes in HMRC's Criminal Investigation Directorate. The bulk of the documentation in the bundle was made up by the exhibits to her statement.

32. Among the exhibits to that statement was the original decision in *AB*, before anonymisation for publication. For convenience, I refer to *AB* in its anonymised form, as the original decision cannot be viewed by other parties. It may assist to give the main relevant names: the firm concerned in *AB* was at the relevant time named Stockler Charity, and "Mr A" was Mr Stockler. (Other relevant names are set out as necessary at the appropriate points below.)

33. Oral evidence was given by Mrs Becker; for reasons mentioned below, Mr Nawbatt did not seek to cross-examine Mr Stockler on the matters raised in his witness statements.

34. As much of the background is stated in *AB* and in my 2009 decision, I do not repeat it here. Instead, I consider the evidence after taking into account the parties' arguments.

Arguments for HMRC

35. Mr Nawbatt argued that the sole issue was the correct quantum of the penalty; Mr Stockler was not denying that the penalty was properly due. [This comment by Mr Nawbatt was made when Mr Nawbatt was opening his argument; Mr Stockler did not raise the human rights issue until much later.] HMRC had indicated that the penalty should be 70 per cent of the tax insufficiency. Under s 100B(2)(b)(ii)-(iv) TMA 1970 it was for the Tribunal to determine whether the penalty was appropriate, excessive or insufficient and consequently confirm, reduce or increase the determination. This involved the Tribunal determining for itself what in all the circumstances the appropriate penalty was. The Tribunal was not therefore limited to or confined by the reasoning of HMRC.

36. It followed that the hearing was not concerned with whether Mrs Becker had been right or wrong in her approach. The focus was not on her conduct, but on that of Mr Stockler; what was an appropriate level of penalty for his conduct? Considering this question did not involve a rehearing of the matters considered by the Special Commissioners in *AB*. Mr Stockler could not go behind their findings of fact, their findings relating to understatement of income (both in relation to the "costs issue" and the "disbursements issue", as defined below) or their findings that Mr Stockler had been negligent.

37. The HMRC approach of considering penalty quantum under the headings disclosure, co-operation, size and gravity was not binding on the Tribunal, but Mr Nawbatt submitted that it was a good starting point for the Tribunal in deciding the appropriate penalty level in the present case on the basis of the Special Commissioners' findings in *AB*. He made submissions under each heading; I consider these below.

38. He referred to a number of paragraphs in *AB*, which he submitted was the key document, and commented on relevant findings made by the Special Commissioners. I deal with the relevant matters at a later stage in this decision. He submitted that Mr Stockler's skeleton argument sought to go behind the Special Commissioners' findings; this was not a course open to Mr Stockler. Mr Nawbatt submitted that the *AB* decision contained the essential findings of fact on which the Tribunal must base its decision. This was not a neat discrete legal issue; *AB* was a wholesale rejection of the evidence of Mr Stockler, which he had also given HMRC in the enquiry.

39. Mr Nawbatt submitted, in summary, that Mr Stockler's skeleton argument was incorrect in its focus; it was not appropriate to consider Mrs Becker's recollection of events. In particular, the issue to be decided did not concern the question whether Mrs Becker had been right or wrong; it was for the Tribunal to arrive at its view on the appropriate level for the penalty. The Special Commissioners in *AB* had provided an exhaustive decision containing the facts. What Mr Stockler had to grapple with was those findings of fact.

40. Mr Nawbatt explained HMRC's position on Mr Stockler's witness statement. Their view was it did not properly amount to a witness statement, as it was in the nature of a legal argument. The evidence had been considered in some detail. Accordingly, Mr Nawbatt had no desire to cross-examine Mr Stockler.

41. Mr Nawbatt's submissions on the evidence are considered below.

Mr Stockler's arguments

42. Mr Stockler accepted that the effect of s 100B was to place the discretion on the Tribunal. He submitted that the calculation of the penalty must be based on the time-honoured approach taken by HMRC in arriving at penalty determinations. If this approach were not to be followed, there was a risk of inconsistent calculations.

43. The three individual criteria (disclosure, size and gravity, and co-operation) had to be looked at separately. He submitted that it was incorrect to look at the overall position, as Mrs Becker had appeared to do in giving her evidence. In her witness statement she had explained how she had dealt with each of these criteria. He submitted that to take an overall approach was "disingenuous".

44. He referred to two entirely separate findings of fact having been made by the Special Commissioners in *AB*. He submitted that there were no findings of fact adverse to him in relation to the disbursements issue (involving approximately £164,000), and that what had been involved had been exclusively a question of law. He should not be penalised for having adopted a perfectly valid position.

45. He made separate submissions concerning the other of these findings of fact, concerning the payment of costs to another firm in the sum of £160,000.

46. I deal below with his respective submissions relating to these two findings of fact, as well as his other submissions on the facts.

47. In relation to the calculation of the penalty, he submitted that the three criteria should be applied separately to these respective parts of the Special Commissioners' decision in *AB*. He made submissions in respect of each part by reference to each of the three criteria, and the extent of abatement which would be appropriate; these are considered below.

48. In summary, if a penalty was appropriate, it should be split. In relation to the disbursements, he suggested that the maximum abatement was appropriate. In relation to the legal costs, he submitted that the appropriate abatement for disclosure was at least 10 per cent, the appropriate abatement for so-operation was at least 25 per cent, and suggested that the correct abatement for size and gravity was 30 per cent.

49. He accepted that some form of penalty was appropriate (subject to the human rights point) in respect of the legal costs, but not in relation to the disbursements.

Discussion and conclusions

50. Although, as Mr Nawbatt submitted, the decision in *AB* is a key document, I do not regard it as the sole evidence which I have to take into account in deciding on the applicable level of penalty. I also have to take into account the evidence given by Mrs Becker at the hearing, together with the documents referred to in support of that evidence, and to consider the evidence provided by Mr Stockler.

The Special Commissioners' findings

51. The first step is to carry out an analysis of the findings of the Special Commissioners in *AB*. This requires reference to a number of paragraphs of that decision; the following references are to paragraph numbers in *AB*.

52. At paragraph 10, the Special Commissioners referred to the four capacities in which Mr Stockler had acted. They stated:

> "In acting simultaneously in all four capacities he did not avoid the conflicts which arose between his own personal interests on the one hand and the interests of the firm and the Revenue on the other."

53. At paragraphs 101 to 114, the Special Commissioners considered whether the insufficiency of the amount of the profits in the partnership statements of Stockler Charity was attributable to the negligent conduct on the part of the representative partner within the meaning of s 30B(5) TMA 1970. At paragraphs 103 to 105 they considered the meaning of negligent conduct (the expression used in s 30B(5) at the relevant time), and commented at paragraph 105:

> "We are of the view that the question whether a taxpayer has engaged in negligent conduct is a question of fact in each case. We should take the words of the statute as we find them and not try to articulate principles which could restrict the application of the statutory words. However, we accept that negligent conduct amounts to more than just being wrong or taking a different view from the Revenue. We also accept that a taxpayer who takes proper and appropriate professional

> advice with a view to ensuring that his tax return is correct, and acts in accordance with that advice (if it is not obviously wrong), would not have engaged in negligent conduct."

54. In relation to the £160,000 payment for costs, the Special Commissioners set out their findings at paragraphs 106 and 107; the latter paragraph stated:

> "Mr A is a practising solicitor. In evidence before us he said that he knew a little bit about tax law. In our view he knew, or should have known, that the only sums which could be deducted from the profits of the firm were sums which were wholly and exclusively laid out for the purposes of the profession of the firm. He knew that at the time of the payment of £160,000 the firm had no liability and that the liability was his personally. He had gone out of his way to engineer a state of affairs designed to make the Appellant firm pay the costs while the actual liability had remained with him. He should have known that the discharge of a personal liability of his was not deductible from the profits of the firm from which it follows that, in claiming the deduction, he engaged in negligent conduct."

55. The Special Commissioners dealt separately with the disbursements (amounting, as mentioned above, to approximately £164,000) at paragraphs 108 to 114. They considered the legal principles, and referred to Mr Stockler's disagreement with the view of Tax Counsel (Rupert Baldry) that the disbursements would not be deductible, Mr Stockler's view being based on the case of *Mason v Innes* [1967] Ch 1079, 44 TC 326 (CA). They commented at paragraph 110:

> "We do not consider that Mr A was reasonable to conclude that *Mason v Innes* was authority for the view that any sum of money paid by the firm was deductible for tax purposes."

56. After referring to Mr Baldry's advice, they commented at paragraphs 113-114:

> "113. . . . What we have to decide is the position of the payment of disbursements. The disbursements paid by the firm were the personal liability of Mr A. The legal principles apply to the payment of the disbursements in the same way as they apply to the payment of costs.
>
> 114. We conclude that it was negligent conduct for Mr A, as representative partner, to claim as deductions from the profits of the firm the discharge of his personal liabilities."

Application of penalty to Mr Stockler's personal tax returns

57. As already mentioned, the Special Commissioners referred at paragraph 10 to the four capacities in which Mr Stockler had acted. The appeal before me concerns yet a further capacity, ie Mr Stockler as an individual taxpayer submitting his personal returns which included his share of his partnership profits from Stockler Charity for the relevant years.

58. The *AB* decision found Mr Stockler's conduct, in submitting partnership returns claiming deductions in respect of the costs and disbursements, to have been negligent. The penalty imposed on Mr Stockler was described in the penalty determination

enclosed with Mrs Becker's letter dated 16 October 2007; as mentioned at paragraph 14 of my 2009 decision, this stated:

> "The penalty arises under Section 95(1)(a) Taxes Management Act 1970 for negligently delivering an incorrect return under Section 8 of that Act for the years shown below. The amount of penalty is based on the difference specified under Section 95(2) of that Act."

59. I am satisfied that submission of personal returns including shares of partnership income in respect of which that taxpayer's conduct, in the capacity of the representative partner making partnership returns, has been held to have been negligent, amounts to negligently delivering incorrect returns within the terms of s 95(1) TMA 1970 as applicable for the relevant years.

60. It follows that the findings of the Special Commissioners in *AB* as to Mr Stockler's negligent conduct can be taken to extend to his submission of his personal returns. Further, it is clear from the Special Commissioners' findings in *AB* that they regarded the additional tax liability in respect of Stockler Charity's profits as wholly attributable to Mr Stockler; see paragraphs 60, 61 and 65 of *AB* relating to the costs, and paragraphs 67 to 83, as well as 97 to 99, concerning the treatment of the disbursements.

61. It was for that reason that HMRC decided to impose the penalty on Mr Stockler personally. There is no suggestion that HMRC ever considered imposing penalties on the other partners in his firm in respect of the matters considered in *AB*, nor any apparent reason for doing so.

Whether the two negligence issues should be dealt with separately

62. Before me, Mr Stockler argued that the Special Commissioners' findings in *AB* relating respectively to the £160,000 payment for costs and the £164,000 relating to disbursements should be considered separately when considering the three penalty criteria (disclosure, co-operation, and size and gravity). He submitted that the Special Commissioners had made no findings of fact adverse to him in relation to the "disbursements issue"; this was exclusively a question of law on which two eminent Tax Counsel (Kevin Prosser QC and Michael Flesch QC) had opined in, respectively, 2003 and 2004, some time before the hearing of *AB*. Mr Stockler's submission was that the maximum abatements should be applied in respect of the disbursements issue, while for the costs issue, the abatement for disclosure should be at least 10 per cent, that for co-operation at least 25 per cent, and for size and gravity 30 per cent.

63. Copies of the opinions of Mr Flesch and Mr Prosser were exhibited to Mr Stockler's second witness statement for the 2012 hearing. In addition, the further opinion of Mr Baldry dated 3 December 2003 was included with the other exhibits.

64. Contrary to Mr Stockler's submission, Mr Prosser's opinion makes no reference to the disbursements issue, being confined to the question whether the £160,000 costs payment was deductible in computing the profits of Stockler Charity. The opinion of Mr Flesch is mainly concerned with the costs issue, but deals in the final three

paragraphs with the question of fees paid to counsel in Mr Stockler's litigation against "Mr Z" (see paragraphs 18 to 20 of *AB*). As this opinion was given before *AB* was heard, it is not possible to establish whether it concerned the initial part of that litigation as referred to at paragraph 19 of *AB*, or the private and personal claim by Mr Stockler mentioned at paragraph 20 of *AB*, or both. Mr Stockler's witness statement contained no information as to the terms on which Mr Prosser and Mr Flesch were instructed, and in particular as to the description of the facts on which those opinions were subsequently based.

65. I therefore find myself in a similar position to that in which the Special Commissioners found themselves when they considered the advice obtained from Mr Baldry on the different topic referred to at paragraph 73 of *AB*; they had not seen the instructions. At paragraph 112 of *AB*, they referred to further advice from Mr Baldry, which they had not seen; they therefore relied solely on Mr Baldry's 1995 opinion, as referred to at paragraph 111 of *AB*.

66. The opinions of Mr Prosser and Mr Flesch exhibited to Mr Stockler's March 2012 witness statement do not appear to have formed part of the material before the Special Commissioners. I have no means of establishing whether, if Mr Prosser and Mr Flesch had been aware of the findings of fact made by the Special Commissioners in *AB*, they would have wished to make any amendments to their opinions as expressed in 2003 and 2004. The further opinion given by Mr Baldry on 3 December 2003 is based on his understanding that Stockler Charity had incurred disbursements while acting for Mr Stockler in a dispute with the auctioneers. This generalised description suggests that the information on which his opinion was based was not sufficiently specific to indicate which of the two disputes with the auctioneers subsequently mentioned in *AB* (at paragraphs 71 to 76, and at paragraphs 77 to 81) was under consideration in his further opinion. I find, on the balance of probabilities, that Mr Baldry's further opinion was not based on any detailed instructions as to the circumstances of either (or both) of the disputes.

67. The Special Commissioners commented at paragraph 112 of *AB* in relation to the question of Mr Baldry's opinion dated 2 June 1995 and his further advice:

> "From this Mr A knew that Tax counsel was of the view that if the firm did not bill him for costs and disbursements in personal matters the expenses and disbursements incurred in connection with his proceedings would be unlikely to be incurred wholly and exclusively for the purposes of the profession of the firm. In evidence before us Mr A said that he disagreed with Tax counsel. He said that after the Revenue had started their enquiries he had taken further advice from Tax counsel but we did not see the further advice. The fact is that, at the time the disbursements were claimed it was Tax counsel's earlier advice which was known to Mr A and not any later advice."

68. As the findings in *AB* as to Mr Stockler's negligent conduct were based on his decision not to accept the advice originally given by Mr Baldry in his 1995 opinion, and were not related to any subsequent advice, my conclusion is that the appropriate course in determining the level of penalty appropriate for that conduct is to ignore all

the subsequent advice. This view is reinforced by the difficulty in establishing whether the instructions given respectively to Mr Baldry in 2003, to Mr Prosser in 2003, and to Mr Flesch in 2004, set out the facts on a basis consistent with the Special Commissioners' subsequent findings of fact in *AB*.

69. I do not interpret the Special Commissioners' finding on the disbursements issue at paragraph 114 of *AB* as being a finding exclusively of law, as Mr Stockler argued. I accept that the Special Commissioners referred at paragraph 113 to the legal principles, but paragraph 114 is a factual finding that it was negligent for Mr Stockler to claim as deductions from profits of the firm the discharge of his personal liabilities. In submitting his personal returns reflecting his share of the firm's profits after deducting the disbursements, he was consequently, as a factual matter, negligent, having regard to the advice which Mr Baldry had given in his 1995 opinion, and which Mr Stockler had chosen not to follow.

70. My conclusion is that it is not appropriate to treat the costs issue and the disbursements issue as entirely separate matters in applying the three criteria for assessing the penalty, although for practical purposes it may be appropriate to examine the issues individually under each criterion.

The law relating to Mr Stockler's penalty appeal

71. Section 100B(1) and (2) TMA 1970 provide:

> "**100B Appeals against penalty determinations**
>
> (1) An appeal may be brought against the determination of a penalty under section 100 above and, subject to the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax except that references to the tribunal shall be taken to be references to the First-tier Tribunal.
>
> (2) On an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—
>
> (a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may—
>
> (i) if it appears that no penalty has been incurred, set the determination aside,
>
> (ii) if the amount determined appears to be correct, confirm the determination, or
>
> (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount,
>
> (b) in the case of any other penalty, the First-tier Tribunal may—
>
> (i) if it appears that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to be appropriate, confirm the determination,

(iii) if the amount determined appears to be excessive, reduce it to such other amount (including nil) as it considers appropriate, or

(iv) if the amount determined appears to be insufficient, increase it to such amount not exceeding the permitted maximum as it considers appropriate."

72. The penalty determined in respect of Mr Stockler falls within s 100B(2)(b) TMA 1970.

HMRC's determination of the penalty

73. Although, as Mr Stockler agreed, the effect of s 100B(2) TMA 1970 is that it falls to the Tribunal to decide the level of the penalty, it is necessary as a practical matter to consider how HMRC arrived at the determination.

74. Mrs Becker wrote to Mr Stockler on 16 October 2007 setting out the details of HMRC's penalty determination. This totalled 70 per cent of the "culpable tax". The "culpable tax" was:

1996-97	£17,220.79
1997-98	£43,904.40
1998-99	£15,383.56

The penalty was:

1996-97	£12,054
1997-98	£30,733
1998-99	£10,768
Total	£53,555

75. In her evidence, Mrs Becker set out the basis on which she had arrived at her conclusions in her report to Mr Savage, her supervising officer. Her view was the total abatement should be 30 per cent of the maximum penalty of 100 per cent of the "culpable tax", ie the difference between the tax chargeable on the "correct profits" and that chargeable on the profits which had originally been included in Mr Stockler's returns.

76. The maximum abatement under the first criterion, disclosure, was 20 per cent. Her conclusion was that there had been no voluntary disclosure; the information was only established after an exhaustive analysis of the records and a hearing before the Special Commissioners. She decided that no abatement should be recommended.

77. The maximum abatement under the second criterion, co-operation, was 40 per cent. Mrs Becker did not consider Mr Stockler's conduct in reaching a settlement of

the High Court proceedings to have been co-operative. She accepted that disagreement with the point of view put forward by HMRC and a subsequent decision to appeal the amendment made to the partnership's returns did not amount to a lack of co-operation. She did, however, consider that the basis on which Mr Stockler had pursued the appeal process in respect of the original *AB* appeal amounted to a "policy of obstruction" and "an attempt to mislead the Commissioners as considered in the guidance". In Mr Stockler's favour, however, he had dealt promptly with all correspondence and held meetings with Mr Pettit, the HMRC officer from whom she had taken over the investigation. She had decided to recommend an abatement of 20 per cent.

78. In respect of the third criterion, size and gravity, the maximum abatement was 40 per cent. Mrs Becker took into account the total amount underdeclared, which was £300,000. Apart from other factors mentioned in her evidence, she also took into account Mr Stockler's status as a litigation solicitor. She decided to recommend an abatement of 10 per cent, although she considered that if a negotiated position could be reached, the abatement might arguably be at 15 per cent.

79. Mr Savage agreed with Mrs Becker's conclusions. Mrs Becker then submitted her draft settlement report to Mr Ian Maitland-Round, Assistant Director (Technical) at HMRC's Special Civil Investigations ("SCI") office. Mr Maitland-Round sent Mrs Becker's report and associated files to Andrew Young of HMRC's SCI office, together with a covering note in which Mr Maitland-Round set out his own conclusions. He considered that there should be no abatement for disclosure, that the abatement for co-operation should be 10 per cent, and that the abatement for "seriousness" (ie size and gravity) should be 20 per cent.

80. Mr Young agreed and submitted the papers to Richard Alderman, Director of SCI. Mr Alderman set out his conclusions in his memorandum dated 1 October 2007 to Mr Maitland-Round and Mr Young; the abatement for disclosure should be nil, that for co-operation should be 10 per cent, and the abatement for seriousness should be 20 per cent. Thus the total abatement was as proposed by Mrs Becker, but her recommendations in respect of co-operation and size and gravity were adjusted.

Consideration of the quantum issue

81. I consider in the following paragraphs the issue of the level of the penalty under the three criteria as mentioned above. Mr Nawbatt laid emphasis on the findings of the Special Commissioners in *AB*. I accept his submission that it is not open to me to go behind the Special Commissioners' findings of negligence. He further submitted that the *AB* decision contained the essential findings of fact on which I should base my decision. To some extent, I accept this submission also. However, in *King v Walden* [2000] STC (SCD) 179, the Special Commissioners when considering penalties under s 95 TMA 1970 referred at paragraph 154 to the judgment of Scott J (as he then was) in *Willey v IRC* STC 56, and commented at paragraph 155:

> "From this authority we derive the principle that, for the purposes of mitigation, it is proper to take into account any fact relevant to the

> original assessments, or relevant to the circumstances in which the penalties were claimed, but that there cannot be a retrial of the matters which led to the original assessments."

82. These principles were not affected by the subsequent judgment of the European Court of Human Rights in *King v UK*, or by the judgment of Jacob J on the initial appeal against the Special Commissioners' decision. Although the decision of the Special Commissioners in *King v Walden* is not binding on me, I respectfully accept their views both that other circumstances relating to the penalties may be taken into account, and that there cannot be a retrial of the matters considered in *AB*.

83. In considering the three criteria relevant to the determination of the quantum issue, I refer to Mr Stockler's arguments before those of Mr Nawbatt, rather than following any chronological order. My reason for doing so is that Mr Stockler was making his case for the reduction of the penalty in accordance with the respective criteria, while Mr Nawbatt was putting arguments in support for the level of penalty which HMRC had determined, and some of these points were made before Mr Stockler put his case, while others came afterwards.

Disclosure

84. As mentioned at paragraph 65 of *AB*, in the firm's profit and loss account for the year ended on 30 April 1997 an expense of £160,000, referred to as "negligence claim", was recorded and deducted from the taxable profits of the firm for that year. In his letter dated 20 December 1994 notifying the enquiries to be made under COP 8, Mr Pettit of HMRC indicated his intention to examine whether liabilities arose due to the £160,000 "negligence claim", and the costs associated with Mr Stockler's private legal actions claimed in the partnership accounts (ie the disbursements issue). In his subsequent letter dated 8 February 2005 Mr Pettit set out at length the reasons for his view that Mr Stockler's argument as to the deductibility of this amount was not supported by the facts. Mr Pettit also set out in detail the reasons why HMRC did not consider the disbursements to be deductible.

85. In his reply dated 11 February 2005, Mr Stockler maintained his view that the payment of the £160,000 was wholly and exclusively for the purpose of settling the claim for a wasted costs order. He also repeated his view that the fees paid to counsel were deductible as being the liability of the partnership, referring to advice from counsel on the question whether the partnership was required to recover the fees from the partner concerned.

86. Before me, Mr Stockler contended that in respect of the costs issue, HMRC were relying on two separate findings of fact by the Special Commissioners in *AB*. The first was that he had had a discussion with Mr X in which the "instigation" of the wasted costs suggestion had come from Mr Stockler. The second was that Mr Stockler had not had the requisite discussion with his accountant.

87. He submitted that neither of these points mattered. In relation to the first finding, he accepted that there had been no imminent threat of a wasted costs order; however, it had never been suggested that there was to be no threat at all. In relation

to the second finding, he argued that it would have made no difference whether the originator of the argument as to deductibility had been him or the accountant. He contended that the Special Commissioners' findings had not been findings of wrongdoing by him, but had related to the timing of the wasted costs order and to the advice from his accountant.

88. Mr Stockler argued that in relation to the disbursements, the firm's accounts had not specifically referred to them; as soon as HMRC had raised the question, he had produced all the invoices to them, and there had been no dispute as to their subject matter.

89. Mr Nawbatt submitted that as Mr Stockler was a solicitor and had been represented by tax Counsel in relation to the preparation and conduct of the *AB* case, no abatement was warranted on the facts of the present case. Mr Stockler had simply failed to grapple with the wholesale rejection of his evidence in *AB*. This rejection had been much more general than merely in respect of the two points referred to by Mr Stockler.

90. In relation to the disbursements issue, Mr Nawbatt argued that Mr Stockler had simply failed to disclose the insufficiency. The Special Commissioners had made very clear findings. It was not possible to "divorce" their findings on the disbursements issue from their remaining findings; this was one tax appeal, and all these findings formed part of the same decision.

91. It appears to me that Mr Stockler did not volunteer any information to HMRC concerning either the £160,000 costs payment, or the disbursements issue, until HMRC asked for that information. His view, as emphasised to me, was that there had been nothing to disclose, as in his opinion the respective payments were deductible.

92. In relation to the costs payment, the Special Commissioners in *AB* set out in detail the history leading to the decision to show the deduction in the profit and loss account for the year ended 30 April 1997, and concluded at paragraph 96 that the payment was not deductible in computing the firm's profits for tax purposes, as it was not money wholly and exclusively expended for the purposes of the firm's profession within s 74(1)(a) of the Income and Corporation Taxes Act 1970 ("ICTA 1970").

93. In relation to the disbursements issue, the Special Commissioners in *AB* reviewed the circumstances leading to the decision to deduct from the firm's profits the amounts of the disbursements which had been incurred by the firm in respect of the litigation pursued on behalf of Mr Stockler but had not been recovered from him. They concluded at paragraph 100 that the amounts paid in respect of disbursements were not money wholly and exclusively expended for the purposes of the firm's profession within s 74(1)(a) ICTA 1970.

94. Having arrived at these conclusions, the Special Commissioners went on to consider whether Mr Stockler had engaged in negligent conduct in claiming the deduction in respect of the costs payment and in respect of the disbursements issue. Their conclusion as to the former was set out at paragraph 107 of their decision (see

paragraph 54 above), and as to the disbursements issue, at paragraph 114 (see paragraph 56 above).

95. In respect of the costs payment, this was reflected in the firm's accounts as "negligence payment". In my view, as supported by the findings of the Special Commissioners in *AB*, this was a wholly misleading description of the payment, and did not reveal its true nature. This accords with the comments recorded by Mrs Becker in a note of a telephone conversation with Mr Stockler on 1 March 2006. In response to Mr Stockler's comments on Mr Pettit's views concerning negligence, she stated:

> "Becker said that she disagreed. She said that she thought Stockler had been negligent in that the deduction claimed in the accounts was mis-described. She said that he had described as a negligence claim against the partnership, a payment which was actually in respect of a personal damages award against himself."

96. I conclude that, as Mr Stockler had decided to maintain his view that the payment was deductible, the basis on which it was claimed as deductible in the firm's accounts did not amount to disclosure. As the Special Commissioners put it at paragraph 107 of *AB* (see paragraph 54 above), he had gone out of his way to engineer a state of affairs designed to make the firm pay the costs while the actual liability had remained with him, and he should have known that the discharge of a personal liability of his was not deductible from the profits of the firm.

97. I am satisfied that no abatement is appropriate in respect of disclosure so far as the costs payment of £160,000 is concerned.

98. In relation to the disbursements issue, Mr Stockler argued before me that although he had turned out to be wrong in his view as to the application of *Mason v Innes*, this did not mean that he should be penalised for having adopted a perfectly valid position. It followed from HMRC's denial of any abatement for disclosure that it had to be assumed that Mr Stockler had hidden everything from HMRC. He contended that this was simply not the case. In relation to the disbursements, the accounts did not specifically refer to these, but as soon as the point had been raised by HMRC, all the invoices had been produced to them; there had been no dispute as to what these invoices related to.

99. At paragraph 105 of *AB* the Special Commissioners commented:

> "We are of the view that the question whether a taxpayer has engaged in negligent conduct is a question of fact in each case. We should take the words of the statute as we find them and not try to articulate principles which could restrict the application of the statutory words. However, we accept that negligent conduct amounts to more than just being wrong or taking a different view from the Revenue. We also accept that a taxpayer who takes proper and appropriate professional advice with a view to ensuring that his tax return is correct, and acts in accordance with that advice (if it is not obviously wrong), would not have engaged in negligent conduct."

100. Their conclusion in the subsequent paragraphs was that Mr Stockler knew that he was not following Mr Baldry's advice, as shown by their comments at paragraph 112:

> "From this Mr A knew that Tax counsel was of the view that if the firm did not bill him for costs and disbursements in personal matters the expenses and disbursements incurred in connection with his proceedings would be unlikely to be incurred wholly and exclusively for the purposes of the profession of the firm. In evidence before us Mr A said that he disagreed with Tax counsel. He said that after the Revenue had started their enquiries he had taken further advice from Tax counsel but we did not see the further advice. The fact is that, at the time the disbursements were claimed it was Tax counsel's earlier advice which was known to Mr A and not any later advice."

101. It is clear from the Special Commissioners' comments, and their findings in paragraphs 113 and 114 of *AB* (see paragraph 56 above) that Mr Stockler was taking his own view as to what deductions in respect of the disbursements were appropriate in computing the firm's profits. (The factual history leading up to the deduction of the disbursements in relation to the first action against the auctioneers, including taking advice from Mr Baldry, is set out at paragraphs 73 to 76 of *AB*.)

102. In relation to all the disbursements in the six cases referred to by the Special Commissioners, Mr Stockler took the view that they should be deducted in full from the firm's profits despite the decision not to claim recovery from him (subject to recovery of minor amounts from him by the firm in certain cases). His decision to treat the disbursements as deductible meant that there was no indication in the firm's partnership tax returns that this view, which Mr Stockler knew had not been accepted by Mr Baldry when advising on one of the cases, had been adopted. Mr Stockler's circumstances therefore clearly did not meet the test referred to in the final sentence of paragraph 105 of *AB* (see paragraph 99 above).

103. To have taken the view that the disbursements should be deducted in computing the firm's profits as shown in its tax returns, despite contrary advice from Counsel and without any indication in those returns as to the taking of that view, can hardly be described as making any initial form of disclosure. I accept that Mr Stockler did produce the invoices once HMRC asked for details, but I do not consider that this can be regarded as a relevant form of disclosure. The word disclosure in the context of penalties connotes a volunteering of information. If the taxpayer does not produce the information until HMRC ask for it, he can hardly be described as making a disclosure in any voluntary sense.

104. As Mr Stockler made no disclosure, there is no basis for any abatement for disclosure in the context of the disbursements.

105. In summary, I consider that no abatement in respect of the penalty should be made in respect of disclosure, either in relation to the costs issue or to the disbursements issue.

Co-operation

106. Mrs Becker's proposed abatement for co-operation, with which Mr Savage agreed, was 20 per cent. However, Mr Maitland-Round took the view that it should be 10 per cent. I am required to consider the matter afresh, and that difference of view emphasises the need to examine the detailed history of the matter.

107. It is clear, from Mr Pettit's letter dated 20 December 2004 to Mr Stockler notifying him of the enquiry under COP 8, that HMRC had been considering bringing a prosecution against Mr Stockler "for the alleged offence". That letter confirmed that Mr Stockler would not be prosecuted. (According to the Annex to Mr Maitland-Round's memorandum dated 2 August 2007, the prosecution had been withdrawn on 7 July 2004, but liability to pay the tax, interest and penalty "if appropriate" had explicitly been kept open. His note did not record the date on which the prosecution investigation had begun.) I am satisfied, from Mrs Becker's evidence, that the point at issue in the investigation under COP 8 was the same as that under consideration in relation to the former prosecution investigation.

108. I am also aware, both from the correspondence and from Mr Stockler's comments in making his submissions, that a "raid" had been made on his offices, and papers retained by HMRC. This raid had taken place on 22 January 2003; redacted copies of pages from the notebook of Robert Grant, the team leader of the search, were included in the evidence, as were those of another HMRC officer, Mike Preston. As indicated in Mr Pettit's letter dated 20 December 2004 to Mr Stockler, it had not been until 7 July 2004 that HMRC's Solicitor's Office had informed Mr Stockler's firm of the decision not to prosecute Mr Stockler for "the alleged offence". In a telephone conversation on 16 January 2006 during which Mrs Becker explained that she had taken over the investigation from Mr Pettit, Mr Stockler referred to his papers and to his previous request for their return.

109. I take these matters into account as indicating that the position as between Mr Stockler and HMRC in relation to the enquiry commenced by Mr Pettit could be regarded as contentious.

110. Mr Pettit had attempted to persuade Mr Stockler to make a disclosure of his liabilities and to proceed to a negotiated settlement. Mr Stockler had declined to do so; he insisted that the deductions claimed in the accounts were allowable and that he had acted properly throughout.

111. Mr Stockler argued before me that the points considered by Mrs Becker in arriving at her decision on the abatement for co-operation came down to annoyance on HMRC's part that he had not decided to "throw in the towel" much earlier. He characterised her arguments as "trite" and representing "pique" on her part because he had had the "effrontery" to fight the *AB* case.

112. Mr Nawbatt submitted that Mr Stockler's dealings with HMRC in relation to the enquiry had all been based on a factual account which in a number of respects had subsequently been disbelieved by the Special Commissioners in *AB*. Despite this, Mrs

Becker had proposed a 20 per cent abatement. He suggested that this might have been generous in the light of the circumstances.

113. In her witness statement, when commenting on her reasons for her decision on the proposed abatement, Mrs Becker criticised the basis on which the *AB* appeal had been pursued. My own view, taking into account my small part in that litigation in dealing with the pre-trial hearing on 29 March 2006, is that the litigation can be described as having been hard-fought, but that this does not really decide the issue of co-operation. The normal relevance of co-operation is in seeking to arrive at an agreed settlement without need to resort to litigation. Where a taxpayer has decided to follow the litigation process, opportunities for co-operation become limited. The Special Commissioners in *AB* made numerous adverse findings against Mr Stockler in relation to the costs issue; their decision not to accept various elements of his evidence in relation to that issue, and their views in relation to his approach to the disbursements issue, demonstrate a lack of readiness on his part to engage appropriately with the self-assessment system. To a considerable extent, this amounts to a lack of co-operation.

114. In this context, I take the view that there is no distinction between the costs issue and the disbursements issue. I consider that Mr Stockler's co-operation with HMRC was limited, in agreeing to attend meetings and in dealing promptly with correspondence. The appropriate abatement for that degree of co-operation is, in my view, 10 per cent. In arriving at this view, I am aware that I am being less generous than Mrs Becker proposed in her report, but also that my view corresponds with that of both Mr Maitland-Round and that of Mr Alderman, from which I see no reason to differ.

Size and gravity

115. The amount of the under-declaration was over £300,000, the tax being £76,508.75. Mrs Becker stated that in arriving at her proposed abatement of 10 per cent, she had considered a number of points:

(1) The amount of the under-declaration. This might not be a large figure by reference to some figures dealt with in HMRC's Criminal Investigations Directorate, but it was a large sum of money, which she compared with the amount of Mr Stockler's drawings from his firm.

(2) Her recollection of his answers under cross-examination in *AB* was that he had admitted himself to be "well-versed in tax avoidance and constantly aiming to reduce his liability".

(3) The disbursements claimed had covered several years and might well have continued had HMRC not intervened.

(4) The "negligence claim" in the accounts had been nothing of the sort, and Mr Stockler's apparent dishonesty had been clearly shown before the Special Commissioners by his representation of his means to the other party in his litigation.

(5) Mrs Becker had inferred from the decision in *AB*, particularly paragraphs 47 and 50-52, that the Special Commissioners believed not only that Mr Stockler and his accountant were not telling the truth, but that they had colluded in the preparation of their version of events.

(6) She considered that there had been attempts to allege misconduct by HMRC, and referred to allegations made by Mr Stockler about Mr Chipperfield of HMRC.

(7) The question of fraud had been expressly excluded when the case had been transferred from HMRC's Prosecution group, but the case did involve serious negligence, as the Special Commissioners had considered.

(8) She took into account Mr Stockler's status as a litigation solicitor; in her view his conduct merited a significant penalty.

116. Mr Stockler submitted before me that the appropriate amount to take into account was not the pre-tax figure but the actual tax. He disputed whether the comparison with his partnership drawings was appropriate. Mrs Becker had referred to him as "well-versed in tax avoidance", but in her oral evidence had only been able to refer to Enterprise Investment Scheme relief. In the vernacular, that could not be tax avoidance. She had also referred to the fact that the disbursements had continued for several years and to the possibility that they might have continued had HMRC not intervened. Mr Stockler submitted that it was not the job of a penalty determination to act as a deterrent. The issue was whether the determination was appropriate in comparison with what had happened. She had made references to his status as a solicitor and to the future position, implying that in some way the penalty ought to be greater as some form of warning to him. He submitted that this was not the basis for arriving at the amount of a penalty, and that attention should be confined to the three criteria.

117. Mr Nawbatt submitted that Mr Stockler's status as a solicitor was relevant; he was not someone who was ignorant of tax matters. He had not engaged with the Special Commissioners' findings at paragraph 107 of *AB* (paragraph 54 above). He had argued that he did not engage in tax avoidance schemes; what had he been doing in this case? [ie *AB*.] The Special Commissioners had found that he deliberately sought to engineer a state of affairs so as to absolve his own tax liability; this was an express finding. In support of this submission, Mr Nawbatt referred to *AB* at paragraphs 89, 90, and 92.

118. As considered in my 2009 decision, under s 95 TMA 1970 the amount of the penalty is not to exceed the amount of the difference between the tax payable and the tax which would have been payable if the returns had been correct. I therefore have some sympathy with Mr Stockler's point that the more relevant issue in considering size is the amount of the tax rather than the amount of the "gross" under-declaration.

119. In his memorandum dated 2 August 2007, Mr Maitland-Round commented, under the heading "Seriousness":

> "The amounts involved are large but not enormous."

In terms of size, I share this view; the total additional tax of £76,500 is a significant sum. Rather than making any comparison with Mr Stockler's drawings from his firm, I think it more appropriate to look at the sum in isolation.

120. In respect of gravity, the earlier investigations by HMRC must be totally ignored. The only issue is the conduct of Mr Stockler in relation to the matters considered as a result of the COP 8 investigation.

121. The Special Commissioners in *AB* made clear at paragraph 107 (see paragraph 54 above) their view of Mr Stockler's conduct in relation to the costs issue, in the light of his status as a practising solicitor with some knowledge of tax law. In arriving at their view, they had taken into account various findings in respect of Mr Stockler's evidence before them. In relation to the disbursements issue, they applied the same legal principles to the claims for deductions as they had already applied to the costs issue; in addition, they found that Mr Stockler had decided not to follow the advice of Mr Baldry, as referred to at paragraph 112 of *AB*.

122. In his memorandum dated 2 August 2007, Mr Maitland-Round of HMRC described Mr Stockler's conduct in relation to the costs issue as having been "at the most serious end of negligence", and commented that "the fact that this dishonesty has been committed by a solicitor ought also to weigh in the balance". His comment in respect of the disbursements issue, however, was less strong: "Although the Special Commissioners found negligence here, the aggravating features of deliberate planning and dishonesty are absent."

123. In his response dated 1 October 2007, Mr Alderman accepted Mr Maitland-Round's comments as to the costs issue, but did not expressly comment on the disbursements issue. He agreed the abatement at 20 per cent.

124. In reaching a decision as to the appropriate abatement for size and gravity, I am principally influenced by the views of the Special Commissioners in *AB*. Their comments demonstrate that their views as to the seriousness of Mr Stockler's negligence were influenced by his status as a solicitor. I also take into account the various respects in which they declined to accept his evidence.

125. My view, having regard to the size of the tax liability and to the seriousness of Mr Stockler's negligence as "averaged" between the costs issue and the disbursements issue, is that the appropriate amount of the abatement is 20 per cent.

Overall conclusion as to quantum

126. The tax in issue being £76,508.75, I hold that the appropriate abatements from the potential penalty of 100 per cent of the tax are:

(1) Disclosure: nil

(2) Co-operation: 10 per cent

(3) Size and gravity (seriousness): 20 per cent

The total abatement is therefore 30 per cent. The penalty at 70 per cent is therefore £53,555, equal to the amount set out in HMRC's penalty determination notification dated 16 October 2007.

127. Mr Stockler submitted that delay in making the determination should be taken into account in arriving at the level of the penalty. For the reasons set out below, I do not consider that there was any unreasonable delay on HMRC's part in making the determination, and I therefore find it inappropriate to make any adjustment to the amount of the penalty.

128. As there is no change to the amount determined, I dismiss Mr Stockler's appeal against the amount and percentage rate of the penalty.

Evidence relating to the human rights issue

129. Although I have held that I should not consider this, I think it appropriate to state what my conclusions would have been, taking account of the evidence, if I had been required to deal with this issue.

130. HMRC's earlier investigation with a view to possible prosecution ceased on 7 July 2004. On the basis of Mr Alderman's memorandum dated 1 October 2007, I find that HMRC did not communicate with Mr Stockler between 7 July 2004 and 20 December 2004.

131. In Mr Pettit's letter of the latter date, he indicated that his enquiries would be under COP 8. As HMRC do not keep copies of older versions of their leaflets, it was not possible for them to put in evidence a copy of the version of COP 8 which applied in 2004. Mrs Becker stated the following in her witness statement:

> "The enquiry was being conducted under HMRC's Code of Practice 8. A copy of this had been given to Mr Stockler by my predecessor with a letter dated 20/12/2004 . . . It included an explanation that the code was relevant to the investigation of tax liability where fraud was not alleged. It explained that any eventual negotiated settlement would include tax, interest and penalties and went on to explain the way in which penalties would be abated under the headings of Disclosure, Co-operation and Size and Gravity."

132. I am satisfied from Mrs Becker's evidence that Mr Pettit's letter, together with a copy of COP 8, informed Mr Stockler that he could be subject to a penalty if it were to be established that further tax was due as a result of the enquiry. I am also satisfied that Mr Pettit's letter related to Mr Stockler's position as an individual taxpayer, as it concerned liabilities to tax, and could not be regarded as limited to his capacity as representative partner of his firm.

133. Mr Stockler referred in his submission to s 6 of the Human Rights Act 1998. This provides:

> "**6 Acts of public authorities**

> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes—
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
>
> (4) . . .
>
> (5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.
>
> (6) "An act" includes a failure to act but does not include a failure to—
>
> (a) introduce in, or lay before, Parliament a proposal for legislation; or
>
> (b) make any primary legislation or remedial order."

134. The first sentence of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Right to a fair trial) is:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

135. Mr Stockler's submission was that Mr Pettit's letter dated 20 December 2004 was not a COP 8 warning. Enclosing the leaflet did not amount to a warning. The possibility of a penalty had to be specifically drawn to the taxpayer's attention. The question was whether HMRC were in breach by not giving notice.

136. The decision of the ECHR in *King v UK* was that tax-geared penalties under s 95 TMA 1970 were criminal charges for the purposes of Article 6 of the Convention. The ECHR found that the delays in the proceedings constituted a violation of Article 6 of the Convention.

137. Mr Stockler argued that if his human rights were affected, there would be no penalty period. The penalty had not already been determined by the High Court, which had merely decided whether the penalty determination had been settled.

138. His submissions raise two questions. The first is whether he was notified of the possibility of a penalty determination. The second is whether, if he had not been appropriately notified, HMRC's penalty determination was in some way invalidated.

139. On the first question, I accept that there was a delay between the notification of HMRC's decision not to prosecute him, and Mr Pettit's letter. It appears from Mr Alderman's memorandum that the delay was the result of internal discussions within HMRC "on the best way forward". The issues had been difficult, and he did not consider that there had been unreasonable delay. He commented that in retrospect there might have been more that HMRC could have done to keep Mr Stockler informed of what was happening during that period.

140. In his memorandum, Mr Maitland-Round had also raised the question of the delay between the release of the Special Commissioners' decision in *AB* and the penalty determination under consideration at the time. At that stage, there had been a gap of eight months. Mr Alderman's view was that the gap had not been as long, as the firm's appeal to the High Court had not been withdrawn until the end of May 2007, so that only three months had elapsed.

141. I am satisfied that the inclusion of COP 8 with Mr Pettit's letter did make clear to Mr Stockler that the possibility of a penalty would be under consideration as part of the enquiry. I also consider that in the context of the history of HMRC's earlier enquiries and given Mr Stockler's position as a solicitor, he would not have been unaware of the possibility that HMRC might pursue a civil investigation leading to additional tax, interest and penalties. Further, I do not consider that the delay from July to December 2004 was unreasonable, particularly given the previous history of a different form of investigation carried out by HMRC. I also find that the delay between withdrawal of the High Court proceedings and the penalty determination was not unreasonable.

142. My conclusion means that it is not necessary for me to consider the second question. However, I am concerned to avoid any possibility of this matter being remitted again to this Tribunal as a result of any further appeal, and I therefore address this second question.

143. The only relevant Convention right is that under Article 6. This is the right to a fair trial within a reasonable time. Section 6 of the Human Rights Act 1998, to which Mr Stockler referred, precludes HMRC from acting in a way which is incompatible with a Convention right. The penalty does constitute a "criminal charge" for the purposes of Article 6. If it could be established that Mr Stockler was not notified of the possibility of a penalty, the maximum period for which he could be said not to have been informed of it is from July 2004 to the making of the determination in October 2007. For the reasons already given, I consider that it would be unrealistic to conclude that he had not been made aware at a much earlier stage of the possibility of a penalty determination. Further, the period during which the *AB* proceedings were continuing should be subtracted from that maximum period. The question of an appeal to the Special Commissioners had been raised in correspondence in late 2005, and the appeal to the High Court was withdrawn at the end of May 2007. I do not

consider that Mr Stockler's right to a fair trial would have been prejudiced by the remaining period of delay. I do not accept that the determination actually made in October 2007 could be regarded as invalidated by any such alleged failure to notify him of the possibility of a penalty determination being made.

144. I emphasise that this section of this decision is obiter, in the light of my conclusion that the scope of the hearing, and thus of this decision, is limited by reference to the judgment of Sir John Lindsay.

Result

145. Mr Stockler's appeal against the penalty determination made on 16 October 2007 is dismissed.

Right to apply for permission to appeal

146. Under s 100B(3) TMA 1970 there is an additional right of appeal conferred in respect of appeals against penalty determinations, as set out below, and therefore the final paragraph of this decision should be read as extending to that additional right of appeal. The sub-section provides:

> "(3) In addition to any right of appeal on a point of law under section 11(2) of the TCEA 2007, the person liable to the penalty may appeal to the Upper Tribunal against the amount of the penalty which has been determined under subsection (2), but not against any decision which falls under section 11(5)(d) and (e) of the TCEA 2007 and was made in connection with the determination of the amount of the penalty."

147. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 25 June 2012