Tribunal refs: UT/2013/0031
UT/2013/0032

PROCEDURE— penalty imposed in accordance with FA 2008, Sch 36, para 50 — parties agreed that decision records incorrect amount — correction made — whether jurisdiction to admit further evidence to support reduction in penalty following publication of decision — no — whether, if jurisdiction assumed, evidence should be admitted — no

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Applicants

- and -

ROMIE TAGER QC
THE PERSONAL REPRESENTATIVE OF OSIAS TAGER deceased

Respondents

Tribunal: Judge Colin Bishopp

Sitting in public in London on 26 October 2016

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

Miss Hui Ling McCarthy, counsel, instructed by Withers LLP, for the respondents

DECISION

Introduction

1. This decision represents the latest, but I suspect not the last, stage in a lengthy dispute between the applicants, Her Majesty's Revenue and Customs, or HMRC, and Mr Romie Tager QC about the amount of the penalties to be imposed on Mr Tager for his failure to comply with three information notices. Two of the notices related to Mr Tager's own income tax affairs, and the third to the estate of his late father, Mr Osias Tager. This is the third decision in the case which I have released; the others are [2015] UKUT 0040 (TCC) (reported at [2015] STC 1687) and [2015] UKUT 0663 (TCC). In order to make this decision comprehensible without resort to other material I summarise the relevant events fairly briefly, and in largely the same form as in my second decision, below; a more detailed description can be found, if it is required, in my first decision.

2. Mr Tager submitted his income and capital gains tax self-assessment returns for the years 2008-09, 2009-10 and 2010-11 in April 2012 and HMRC opened enquiries into them in August 2012. In the course of the enquiries they asked for various items of information which Mr Tager did not provide, despite reminders. In consequence HMRC served two information notices on him. Mr Tager did not comply with the notices despite further reminders and despite the imposition on him of various penalties. Ultimately, HMRC made an application to this tribunal, pursuant to para 50 of Sch 36 to the Finance Act 2008, for the imposition on him of what is shortly referred to as a "tax-related penalty". The material parts of para 50 are set out at [11] below.

3. Mr Tager senior died on 26 March 2005. He died intestate, and Mr Tager embarked on the administration of the estate. He accepts that he is for that reason to be treated as his father's personal representative even though, at least when the matter first came before me, no grant of letters of administration had been made. Mr Tager delivered an inheritance tax account nearly 3 years late. It too led to the opening of an enquiry and the later service of an information notice with which Mr Tager did not comply. Again, HMRC imposed various penalties upon him, but he still not did not comply and a second application for the imposition of a tax-related penalty was made.

4. The penalty applications first came before me on 8 May 2014. At that time, Mr Tager represented himself; Mr David Yates appeared for HMRC. Rather than impose penalties immediately I agreed, at Mr Tager's request, to allow him a little further time to comply with the notices. He suggested dates for compliance himself, and those were the dates I adopted. I adjourned the hearing of the applications in order that it could be resumed after (as I assumed from his assurances would be the case) Mr Tager had complied with the notices. He offered, and I accepted, undertakings that he would comply with the notices by the dates he had suggested.

5. The applications came back before me on 10 October 2014. As before, Mr Tager represented himself and Mr Yates appeared for HMRC. There had been some compliance with the income tax notices, but only just before the deadline. There was at that time some confusion about whether the compliance was complete, but in my second decision I resolved that confusion in Mr Tager's favour. There had been very partial compliance with the information notices relating to the estate, and that compliance, such as it was, occurred only three days before the adjourned hearing, and several weeks after the date Mr Tager had himself suggested.

6. Mr Tager accepted then, and he continues to accept, that he had no reasonable excuse for his failure to comply with the information notices, and that in principle he had exposed himself to the imposition of para 50 penalties. He argued at the October 2014 hearing (though with only very limited supporting evidence) that the amounts of tax estimated by HMRC were excessive, and that his failure to comply with the notices was not so much wilful as attributable to his difficulty in securing the necessary information, but he did not suggest that the penalties I might impose should be abated on grounds of hardship. I imposed penalties of £75,000 for his failure to comply with the two income tax notices (or, if necessary, £37,500 for each notice), and £1,171,020 for his failure to comply with the inheritance tax information notice. I did not immediately deal with Mr Tager's breach of his undertakings, but did so in my second decision, and that aspect of the matter is now of no more than peripheral relevance.

7. As I have mentioned, at that stage Mr Tager was unrepresented before me; he had also sought rather limited professional assistance in dealing with his own tax affairs, and no professional assistance in relation to the liability for inheritance tax on the estate, save that he had obtained a valuation of his late father's home in 2006. A confidential draft of my decision following the October 2014 hearing was sent to the parties, in accordance with this Chamber's usual practice, and it prompted Mr Tager to seek professional help. Almost immediately, and before the decision was published, Mr Tager instructed solicitors who issued an application by which he sought to have the publication of the decision delayed while a number of matters were resolved.

8. That application came before me on 5 February 2015, when Miss Hui Ling McCarthy appeared for Mr Tager and Mr Yates again appeared for HMRC. I agreed, for reasons set out in my second decision, to delay publication of the first decision for a short period, and to make some now inconsequential changes from the drafted version. Although my doing so dealt with Mr Tager's immediate concerns there were other more enduring matters which required resolution, and they came before me on 8 July 2015. In the meantime Mr Tager had instructed accountants to provide all of the outstanding information (which had been done before the hearing), and to begin the task of reaching agreement with HMRC on the amounts of income tax and inheritance tax properly due.

9. By the time of July 2015 hearing the amounts had not been agreed, but when the matter returned to me in October 2016 the income tax liability had been agreed at £1,250 (compared to the £80,000 or thereabouts estimated by HMRC at the time of the October 2014 hearing). There remained (and still remains) a disagreement about the amount of the inheritance tax. In October 2014 HMRC's estimate was about £1,171,000, but by July 2015 they accepted that that amount might need some adjustment, though not to the extent for which Miss McCarthy argued. In October 2016 Miss McCarthy maintained that the outstanding inheritance tax amounted to no more than £61,507, while Mr Yates still put it at more than £1 million.

10. The primary question at the July 2015 hearing was whether, by one provision or another of the Tribunal Procedure (Upper Tribunal) Rules 2008, I could adjust the penalties I had imposed on Mr Tager. The parties agreed that some adjustment was arithmetically appropriate, since the initial assessment of the "tax at risk" (a phrase I explain shortly) was incorrect, even though they did not agree about the extent of any adjustment I might make, or the means by which I might make it. For the reasons I explained in my second decision I concluded that the Rules did not confer on me the jurisdiction to make such an adjustment, but I went on to express the view that it was

nevertheless possible for me to alter the amounts of the penalties because, having not fully resolved the question of Mr Tager's breach of one of his undertakings, I was still seised of the matter.

11. The need, or possible need, for an adjustment derives from para 50 itself. So far as material to this decision it is as follows:

> "(1) This paragraph applies where—
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> (a) a person becomes liable to a penalty under paragraph 39,
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> (b) the failure … continues after a penalty is imposed under that paragraph,
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> (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,
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> (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
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> (e) the Upper Tribunal decides that it is appropriate for an additional penalty to be imposed.
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> (2) The person is liable to a penalty of an amount decided by the Upper Tribunal.
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> (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.…."

12. It is not in dispute that Mr Tager (both personally and as his late father's personal representative) had become liable, in respect of each information notice, to a para 39 penalty, that the relevant failure had continued after the imposition of a penalty pursuant to that paragraph, and that an application was properly made in accordance with sub-para (1)(d). I had already decided that it was appropriate that an additional penalty (additional, that is, to the penalty already imposed pursuant to para 39) should be imposed. The difficulty which led to the hearing on 26 October 2016, and which has pervaded the applications, lies in sub-para (3), which may be coloured by the slightly different terms of sub-para (1)(c), and the impact it has on the application of sub-para (2).

13. I took the view in my first decision that the measure of the appropriate penalty in this case was 100% of the "tax at risk", meaning (in summary) the tax which, by reason of a failure by the person sought to be penalised to respond, or respond fully, to an information notice might escape payment; as before, I use "tax at risk" only as convenient shorthand. I arrived at 100% on the basis that Mr Tager's failure, in respect of all the notices, was comparable in gravity to deliberate concealment which, by virtue of other paragraphs of Sch 55 and similar penal provisions, is set at 100% of the tax liability concealed, and that conduct of the kind in which Mr Tager engaged should attract a similar level of penalty. I indicated in my second decision that I would not re-visit that part of my reasoning, to which any challenge cannot be the subject of re-argument but must be made by way of appeal, and that remains the position. For the same reason I shall not reconsider in this decision the interpretation of sub-para (3) which, as I explained in my first decision, introduces a number of conceptual

difficulties, and in particular shall not examine again the scope of "have regard to" and the meaning to be put on "tax which has not been, or is not likely to be, paid by the person" either generally or in the context of a person such as Mr Tager who is well able to pay any amount of tax which might realistically be considered to be due. Nor shall I reconsider mitigation; for the reasons I gave in my second decision my conclusions on that topic too must be challenged, if at all, by way of appeal.

14. Instead I shall focus on the question whether it is open to me to re-visit penalties I have already determined on what, in one case, was and, in the other, might have been a materially false understanding of the amount of tax at risk. The answer to that question may lead to others: on what date should the tax at risk be determined; and, when there is (as here) a significant dispute about the measure of that tax, by reference to what evidence or assessment should the determination be made? For the reasons which follow I do not, in the event, need to address those questions.

15. I said in my second decision, though without hearing argument from the parties on the point, that it seemed to me that the combination of the fact that I had not finally determined the applications and the overriding objective of rule 2 led to the conclusion that I was able to, and indeed should, reconsider the penalties. I consequently invited the parties to agree, if they could, on the amounts of the tax at risk; at that stage there was no agreement in respect either of income tax or of inheritance tax. As I have indicated, they have since reached an agreement in respect of income tax, but not in respect of inheritance tax. Mr Yates, however, disputes the assumption that I have the jurisdiction to do as I proposed. He argued at the July 2015 hearing that I could make an adjustment, if it was arithmetically appropriate, by means of the slip rule (rule 42). His position, now that I have rejected the possibility of an adjustment by that means (and also by means of rule 43, for which Miss McCarthy argued in July 2015), is that I have already finally determined the penalties and have no remaining jurisdiction, beyond an adjustment to reflect the evidence available in October 2014 as it was rather than as I understood it to be. Miss McCarthy does not agree.

16. Both in making observations on the question of jurisdiction (which he accepted it was not open to him to raise) and also on the question of discretion as to whether to admit fresh argument or evidence (if there were jurisdiction) Mr Yates relied on the analysis of the authorities by Nugee J in *R (Veolia ES Landfill Ltd & another) v Revenue and Customs Commissioners* [2016] EWHC 1880 (Admin):

> "[223] … I have no difficulty in principle with the Court being invited to reconsider a part of the draft judgment. The purpose of circulating a draft judgment is primarily to enable counsel to draw to the attention of the Court minor corrections or amendments before the judgment is formally handed down; to prepare, and if possible agree, drafts of orders giving effect to the judgment; and to prepare submissions on consequential matters such as costs and permission to appeal: see Civil Procedure (the White Book) 2016 §40.2.5. But the draft is a draft and not a final judgment, and for precisely that reason the Court retains the ability to reconsider and revise the judgment, whether invited to do so by the parties, or on the judge's own initiative if, on re-reading the draft, he or she thinks it appropriate to do so: *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2010] EWCA Civ 158 ('*Mohamed*') at [3]. The jurisdiction to alter a draft judgment is therefore not in doubt: *Robinson v Bird* [2003] EWCA Civ 1820 at [91].

> [224] The Court indeed retains a jurisdiction to re-open its judgment even after it has been handed down, provided that it has not been perfected by the order being sealed. This was confirmed by the Court of Appeal in *re Barrell Enterprises* [1973] 1 WLR 19, and the leading case is now *re L (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8, in which the Supreme Court disapproved statements to the effect that the jurisdiction is limited to exceptional circumstances, and held that it should be exercised in accordance with the overriding objective. Whatever the limits on this jurisdiction, the ability of a judge to alter a draft judgment that has not been handed down cannot be any narrower, and is probably in theory at least entirely unfettered.
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> [225] Third, it follows that if a draft judgment contains a demonstrable error of fact, it is open to a judge to correct it. Not only is this so, but I would have thought he or she should normally do so. Otherwise the judgment will be handed down despite containing a factual error. If the error makes no difference to the result, there is no reason not to correct it; if however it does make a difference to the result, to decline to correct it would mean the judgment was flawed, and no doubt lead to an appeal where one might otherwise have been unnecessary.
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> [226] Fourth, the circulation of a draft judgment is not however intended to provide an opportunity for the unsuccessful party to re-open or re-argue the case, or to repeat submissions made at the hearing, or to deploy fresh ones: *Mohamed* at [4]. A fortiori, the circulation of a draft judgment is not intended to provide an opportunity for the unsuccessful party to change his case, or adduce new evidence. It is not in the interests of efficient case management for a litigant, having seen from a draft judgment in detail why he has lost (or is about to lose), to be permitted to try and make good any gaps that the judge has found in his case by new evidence or argument. The trial is the opportunity for a litigant to put forward his case and the evidence he relies on; trial is not, and should not be allowed to become, an iterative process. That is not to say that there may not be circumstances where fresh evidence can be admitted after trial (and even after judgment has been handed down), but such applications are rare and not to be encouraged: see *Charlesworth v Relay Roads* [2000] 1 WLR 230.
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> [227] Fifth, although the Court can in an appropriate case be invited to look again at a draft judgment, the Court is not obliged to hold a hearing. If having looked at what it is invited to do and why, the Court sees no reason to alter the draft, it must be open to the Court to decline the invitation without more. One of the facets of the overriding objective is that a case should be allotted, so far as is practicable, an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases. In practical terms that means that it must be open to a judge to draw a line under the debate and finalise the judgment. In the present case I have extensive written submissions from [counsel for the applicant]. I do not think it necessary in order to address the point he makes either to have further submissions or a further hearing."

17. The position in this case, Mr Yates said, was that although my second decision was not sealed, since there is no provision for sealing a decision of the Upper Tribunal, it had been released in its final form following the process of sending a draft to the parties and allowing them to suggest corrections—the process referred to by Nugee J at [223]. What Mr Tager was seeking to do appeared to be the very thing of which Nugee J disapproved at [226], that is, to introduce new evidence. In the case to which he referred at the conclusion of the paragraph, *Charlesworth v Relay Roads*, Neuberger J, as he then was, described the principles to be applied when "a party is seeking to call fresh evidence on a new point after judgment has been given but before the order has been

drawn up". He said, at p 238, that the court has the jurisdiction to allow a party to raise new arguments or put in new evidence, that the court must exercise its jurisdiction "in a way best designed to achieve justice", that the fact that the opposing party can be compensated in costs is not enough, by itself, to justify the granting of permission, and that the "anxieties and legitimate expectations of the other party, the efficient conduct of litigation, and the inconvenience caused to other litigants" must be considered. He then added the following:

> "… because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in *Ladd v Marshall*."

18. In *Ladd v Marshall* [1954] 1 WLR 1489 the Court of Appeal decided that new evidence might be introduced after a final judgment had been given only if (among other things) it could not have been obtained with reasonable diligence for use at the trial. This, said Mr Yates, was not such a case: Mr Tager could have produced the evidence on which he now wishes to rely long before October 2014 had he chosen to do so. Instead, he had decided to instruct lawyers and accountants, and had made an attempt to put in the evidence, only after he had lost (or, at least, had learnt how great were the penalties to be imposed on him). In such circumstances it was permissible, said Mr Yates, to amend a sealed judgment or, in the Upper Tribunal, a decision of similar standing, only to reflect the evidence available to the judge at the time of the hearing—in the context of this case, to correct a misunderstanding about that evidence; it was not permissible to go further and, as Mr Tager was seeking, to embark on a wholesale reconsideration of the case.

19. Miss McCarthy responded with two principal submissions. The first was that Mr Yates' argument failed by its own terms: if it was not possible for Mr Tager to re-open the determination of the amounts of the penalties, it was by the same token not possible for HMRC to re-open the question of jurisdiction, which was itself the subject of a released decision (my second decision) in its final form. The second was based on what was said in *Robinson v Fernsby* (the case referred to by Nugee J at [223] as *Robinson v Bird*). At [120] Peter Gibson LJ said:

> "With one possible qualification it is in my judgment incontrovertible that until the order of a judge has been sealed he retains the ability to recall the order he has made even if he has given reasons for that order by a judgment handed down or orally delivered. That was established in two decisions of this court: *Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 KB 717 and *Pittalis v Sherefettin* [1986] QB 869. Such judicial tergiversation is in general not to be encouraged, but circumstances may arise in which it is necessary for a judge to have the courage to recall his order. If, as in *Millensted* and *Pittalis*, the judge realises that he has made an error, how can he be true to his judicial oath other than by correcting that error so long as it lies within his power to do so? No doubt that will happen only in exceptional circumstances, but I have serious misgivings about elevating that correct description of the circumstances when that occurs as exceptional into some sort of criterion for what is required for the recalling of an order before it is sealed. The possible qualification to which I have referred is where the judgment handed down or delivered has reasonably been relied on by a party who has altered his position irretrievably in consequence. In such a case the interests of justice may

require the judge not to resile from that judgment even if the order has not been sealed."

20. Although the decision in issue here (my first decision) was final, in the sense that it had been through the process of correction for typing and similar errors and was in the public domain, it was not final, Miss McCarthy said, in the sense that it resolved all matters; moreover, in the second decision I had made it clear that I wished to receive further evidence. She referred me to *Tibbles v SIG plc* [2012] 1 WLR 2591, a decision of the Court of Appeal in which it had indicated that in a case in which there has been a material change of circumstances, or the judge has made a manifest mistake, it might be appropriate, even though it was not in that case, to amend an order; and to *Re L* [2013] 1 WLR 634 in which the Supreme Court had made it clear that the power in a judge to change his decision is not limited to exceptional circumstances, but may be exercised whenever the justice of the case demands it.

21. I have not found this an easy question to answer, and it may be that by virtue of an over-enthusiastic desire, in my second decision, to give weight to the overriding objective I have purported to confer on myself a jurisdiction which is not available to me. Mr Yates nevertheless recognised, as I have mentioned, that consistently with his argument that I had no jurisdiction to allow the introduction of new evidence and re-visit the penalties I imposed in my first decision, save for correction of an error, he could not challenge the conclusion I reached in my second decision that I did indeed have that jurisdiction in this tribunal, but must do so, if at all, by way of appeal. I am not persuaded that Miss McCarthy is right to argue, as she did, that there is inconsistency in HMRC's position; rather, I think Mr Yates is correct in saying that it is Mr Tager who wishes to preserve what I said in my second decision while challenging the conclusions of the first. But that is not intended as a criticism; simply setting out the opposing positions identifies the difficulty.

22. It is, I think, necessary to start with the chronology. Although it was before me by way of background, I did not consider the evidence at the first hearing, in May 2014, in any detail; it was unnecessary to do so once I had decided to accede to Mr Tager's request for further time. At the second hearing in October 2014 I had the witness statements of two HMRC officers, who spoke of Mr Tager's income tax affairs and of his father's estate respectively. Mr Tager did not challenge the contents of their statements, and neither officer was required to give oral evidence. They could each give only an estimate of the tax which might be at risk, an estimate based on the information Mr Tager had provided and some further information drawn from other sources. The estimates they advanced were of £89,361.73 in respect of income tax and £1,171,020 in respect of inheritance tax. Mr Tager submitted a witness statement of his own, on which he too was not cross-examined, directed in part to the efforts he had made to comply with the notices and in part to the value of his father's estate but, as I observed in my first decision, such information as he submitted left me with no clear idea of what the true value of the estate might be. Mr Tager offered an explanation, or made observations, about a number of assets but they were almost all unsupported by documentary evidence and some were vague in the extreme. The one exception was the valuation of his father's house, to which I shall return. With that exception there was no evidentially reliable material before me from which I might properly conclude that the figures advanced by HMRC, even though estimates, significantly overstated the true liability.

23. The application issued by Mr Tager's solicitors a few days after the draft of my first decision was sent to the parties focussed on professional considerations, essentially the protection of the interests of third parties, which warranted the slight delay in publication which was sought. Nothing was said in it about the possible introduction of additional evidence, and although the penalties were described as "very severe", the application did not suggest that they were to be challenged. I recognise that the application was made only days after the draft decision had been sent out, and when Mr Tager had legitimate concerns about the matters to which the application was directed, and that those matters needed to be dealt with urgently. As I have mentioned, the application came before me on 5 February 2015, following which I made directions, and effected changes to the draft, designed to address Mr Tager's concerns.

24. The next relevant development came on 27 March 2015, when Mr Tager's solicitors issued a further application seeking a direction that the first decision be set aside and remade, and for suspension of its effect pending appeal. The application advanced a number of discrete arguments, but recognised (correctly) that some of them cannot be grounds for setting aside the decision and must instead be advanced as grounds of appeal, and I shall not deal with those points. The first argument which is not of that character was that I had misunderstood the evidence about the value of the late Mr Tager's home; this is the argument which Mr Yates accepted had some merit. The second is that HMRC had been incorrect in contending that the balance standing to his credit at his bank was at least £200,000, and that a penalty based in part on that figure could not stand. Mr Yates also accepted this point.

25. The estimate of the inheritance tax liability attributable to Mr Tager senior's house set out in the officer's witness statement was based on an informal, "drive past" inspection of the exterior of the house by the District Valuer, in 2012, and on some information obtained from the local authority. The value arrived at by that means was £997,500, but the very brief District Valuer's report made it clear that the figure would need to be reconsidered if the assumptions on which it was based were incorrect. Exhibited to Mr Tager's witness statement produced for the October 2014 hearing was the valuation report to which I have already referred. It had been prepared, for inheritance tax purposes, in September 2006 (and therefore about 18 months after Mr Tager senior's death), but had not previously been disclosed to HMRC. It put a value on the property of only £489,950 as it stood, but of £740,000 if it were put into a good state of repair. It also showed that some of the assumptions which had been made by the District Valuer were indeed incorrect (as HMRC accept to be the case). The point of immediate significance is that Mr Yates conceded at the October 2014 hearing that a value greater than £740,000 could not be supported, but I overlooked the concession and failed to adjust the amount of tax at risk as it was identified in the officer's witness statement accordingly. Had I done so, as the parties agreed, I would have arrived at an amount of tax at risk £103,000 lower than that I assumed. Mr Yates accepted that some other evidence available in October 2014, now it has been reconsidered, also supports some further minor adjustments, leading to an estimate of inheritance tax at risk of £1,000,210, rather than the £1,171,020 derived from the officer's statement, and that the relevant penalty should be adjusted to reflect that lower figure.

26. The figure of £200,000 placed on the late Mr Tager's bank balance was derived from a remark made by Mr Tager at the May 2014 hearing that he had been surprised to discover his father had "hundreds of thousands" in the bank; the officer took, for the purpose of his estimate, the lowest figure consistent with that observation. Mr Tager's

position at the October 2014 hearing was that the remark was a slip of the tongue attributable to his having misread £30,000 as £300,000. I need merely to record for the purposes of this decision that Mr Yates accepted, at the most recent hearing, that the credit balance of Mr Osias Tager's Bank of Scotland account was only £12,190.

27. In fact, Miss McCarthy urged me to go much further. I should, she said, take into account not merely the lower value of the house, but also the cost, estimated at £100,000, of putting it into the state of repair which would attract a price of £740,000 at the date of death; and in addition I should take into account all of the evidence available now, when the accountants instructed by Mr Tager have had the opportunity of investigating the true value of the deceased's assets and producing more accurate figures, and reduce the inheritance tax penalty accordingly. If I did, she said, I would arrive at a penalty in respect of the inheritance tax notice of £61,507, being 100% of the tax calculated by Mr Tager's accountants, tax which Mr Tager has paid. I repeat, for clarity, that HMRC do not accept that £61,507 is the correct amount; the parties remain, in fact, a long way apart. Similarly, said Miss McCarthy, I should base the income tax penalty or penalties on the amount of income tax now agreed to be owed rather than the much higher estimate on which I had relied.

28. Leaving aside for the moment what I said in my second decision, I have come to the conclusion, with a degree of reluctance, that Mr Yates is right and that it is not possible for me to do as Miss McCarthy asks. My reluctance stems from the overriding objective (set out in rule 2) of dealing with cases "fairly and justly"; it does not seem to me to be either fair or just to maintain a penalty determined by reference to assumptions which turn out to be substantially incorrect. There is some, though rather oblique, support for the proposition that I should use the figures as they are now known to be in one of the cases to which Miss McCarthy referred me, *The Bwllfa and Merthyr Dare Steam Collieries (1891) Ltd v The Pontypridd Waterworks Company* [1903] AC 426 but the circumstances of that case were very different and I do not derive much help from it. It seems to me, too, that one should not lose sight of the fact, first, that it was necessary to make and rely on assumptions at the October 2014 hearing because Mr Tager had failed to provide the relevant evidence (a feature which was absent from, and distinguishes, the *Bwllfa* case) and, second, that the purpose of the information notices was to secure the very evidence on which he now wishes to rely.

29. I have mentioned above the absence in the tribunal rules of an equivalent to sealing a judgment. It seems to me, however, that public release of a decision, and its publication on the Chamber's website, amounts, in practical terms, to the same thing. If one has to draw a line, and identify a "point of no return", public release seems to me to be the obvious moment. That occurred in this case on 6 March 2015. I agree with Mr Yates, having reflected on the point, that I was mistaken in my second decision to take the view that I was still seised of the penalties; my first decision was, so far as the penalties were concerned, intended to be the last word from me on the matter, and my decision had been made final without, it should be added, prior objection from Mr Tager.

30. It is apparent from the authorities to which I have referred above that while amendments to a judgment or decision are permissible, indeed in some circumstances wholly desirable, between the sending out of a draft and handing down, and a change based on new evidence is permissible in limited circumstances, if the party seeking the change is able to satisfy the *Ladd v Marshall* conditions, or there is some exceptional

circumstance, as Peter Gibson LJ suggested, between handing down and sealing, change after sealing is not permitted and the aggrieved party must resort to an appeal. There is nothing in *re L* which suggests otherwise; although the Supreme Court made it clear that exceptional circumstances were not required, thus disapproving Peter Gibson LJ on that point, it did so in the context of an order which had not been perfected. I agree with Mr Yates that Mr Tager does not satisfy the *Ladd v Marshall* conditions, because it is impossible for him to show that the evidence could not have been made available in October 2014 despite the exercise of due diligence. I observed in my first decision that it was a matter for surprise that Mr Tager had not sought professional help; he has since done so, and the result is that all of the evidence has now been supplied. It could very easily, perhaps even more easily, have been supplied before October 2014. I do not see anything exceptional about this case; for that, in my judgment, an absence of culpability on the part of the person seeking to re-open the decision is necessary.

31. For those reasons I have concluded, despite what I have said before, that I do not have the jurisdiction to admit the new evidence on which Mr Tager seeks to rely. I am accordingly persuaded that I was mistaken in inviting the parties to agree upon the correct amount of tax at risk, or to return for further argument should that prove impossible. However, I recognise, as did Mr Yates, that the invitation was made in a decision (my second decision) which, like the first, has been released publicly, and published on the Chamber's website, and that as a result it can be challenged only by way of appeal. The question nevertheless remains, assuming (contrary to what I have said) that I do have the jurisdiction to admit new evidence, should I exercise my discretion to do so?

32. Again, on the assumption that I retain a discretion and have not divested myself of it by my second decision, and despite what I said in that decision to the effect that I was willing to receive further evidence, I am persuaded by Mr Yates' arguments that I should not exercise my discretion in Mr Tager's favour. I am not unmindful of the importance of the overriding objective, and I am conscious too that I have created difficulties for myself, but having heard further argument from both parties on this point I have reached the conclusion that the overriding objective cannot be prayed in aid by a litigant who has brought an adverse result on himself by his own failings, including, as regards the inheritance tax notice, a failure to comply with an undertaking and correspondingly his own breach of rule 2(4).

33. I am willing to adjust the inheritance tax penalty in order to correct the error in relation to the value of the deceased's house, as I have mentioned above, as well as the other minor adjustments which lead to a revised figure of £1,000,210. I direct, therefore, that the penalty be reduced from the figure of £1,171,020 to £1,000,210. I make that adjustment in accordance with rule 42; I declined in my second decision to exercise that power because of a disagreement between the parties about the adjustment to be made but as they are now agreed that at least this adjustment is appropriate, and it is manifestly unfair to maintain a level of penalty based on a misunderstanding by the judge, I see no impediment to the use of rule 42, whose application is not limited to decisions which have not become final, however one defines that term. The income tax penalties will not be adjusted and will remain at £75,000. The application for a direction suspending the effect of this decision has, I was told, fallen away, though it may be revived if an application for permission to appeal is made.

34. I have considered whether, despite my conclusions, I should go on to indicate what I would have done had I reached a different conclusion about my jurisdiction. I have decided that it is not appropriate to do so, for two reasons. The first is that, even now, the parties are in significant disagreement about the scale of the inheritance tax which is due. The second, and perhaps the more important, is that Miss McCarthy has made it clear that it is Mr Tager's intention to challenge my whole approach to the setting of para 50 penalties, by way of appeal. It seems to me that it would serve little purpose to make a determination based on what might be found elsewhere to be a false premise.

35. The result is that the penalty of £1,171,020 imposed on Mr Tager for his failure to respond to the inheritance tax notice is reduced to £1,000,210. Accordingly, HMRC's applications for tax-related penalties succeed as follows: (a) in relation to the two income tax information notices, the penalty of £75,000 (or £37,500 per notice) imposed by my first decision dated 6 March 2015 remains and will not be adjusted; (b) in relation to the inheritance tax information notice, the penalty of £1,171,020 is reduced to £1,000,210. The total amount of penalties imposed is therefore £1,075,210. The respondents' application dated 27 March 2015, for a direction my first decision be set aside and remade, is dismissed, save to the extent that it encapsulates a request under rule 42 to which I have acceded.

Colin Bishopp
Upper Tribunal Judge

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