[2015] UKUT 663 (TCC)

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 but not agreed on correction to be made — whether decision should be amended under slip rule (r 42) or should be set aside and remade (r 43) — neither rule engaged but different course suggested

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ROMIE TAGER QC
THE PERSONAL REPRESENTATIVE OF OSIAS TAGER deceased
Applicants

- and -

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

Tribunal: Judge Colin Bishopp

Sitting in public in London on 5 February and 8 July 2015

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

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

DECISION

Introduction

1. This decision relates to an application by which the applicants seek to persuade me to set aside and remake a decision of my own, released on 6 March 2015 ([2015] UKUT 0040 (TCC), [2015] STC 1687). By that decision I imposed on the applicants penalties totalling £1,246,020 for their failure to comply with three information notices issued pursuant to Sch 36 of the Finance Act 2008. The penalties were imposed in accordance with para 50 of that Schedule. They have also applied for a direction that the effect of the decision should be suspended pending an appeal to the Court of Appeal. This decision should be read with the earlier decision, which I shall summarise only fairly briefly.

2. Although I have referred to the applicants in the plural, there is in reality only one applicant, Mr Romie Tager QC. The information notices were directed to him both in respect of his own tax affairs and also in his capacity of personal representative of his late father, Mr Osias Tager. I shall henceforth refer to him simply as Mr Tager, and to his father as Mr Tager senior.

3. 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 enquiry 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 described in more detail in my earlier decision. Ultimately, HMRC made an application pursuant to para 50 for the imposition on him of what is shortly referred to as a "tax-related penalty".

4. Mr Tager senior died on 26 March 2005. He died intestate, and no grant of letters of administration has yet been made, but Mr Tager has embarked on the administration of the estate and he accepts that he is for that reason to be treated as his father's personal representative. He 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.

5. 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.

6. 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 is some dispute now, to which I shall return, about whether the compliance

was complete. Mr Yates told me at the second hearing that HMRC's position was that it was not complete, a proposition from which Mr Tager did not then demur although he did maintain that it was substantially complete. 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.

7. Mr Tager accepted then, and accepts now, that he has no reasonable excuse for his failure to comply with the information notices. He argued at the October 2014 hearing 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 as he is a man of ample means he did not suggest that the penalties I might impose should be abated on grounds of hardship. As my earlier decision shows, I imposed penalties of £75,000 for his failure to comply with the two income tax notices, 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 instead invited further submissions.

8. I commented in my earlier decision on the fact that Mr Tager was not only unrepresented but 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. It was, I imagine, the scale of the penalties which I had imposed which prompted Mr Tager to seek professional help as soon as he received a draft of the decision; in accordance with this Chamber's usual practice a draft was sent to the parties about seven days in advance of its intended publication, in order that typing mistakes could be identified and corrected. Almost immediately, and before the decision was published, Mr Tager consulted solicitors who issued an application by which he sought to have the publication of the decision delayed while a number of matters were resolved.

9. 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. Mr Tager is a practising barrister and there were, as I accepted, professional considerations, essentially the protection of the interests of third parties, which warranted the slight delay in publication which was sought. I was also satisfied that some modest amendment to the wording of the decision was appropriate. I therefore agreed to defer publication of the decision for a short period. The decision was in fact published, with minor and now inconsequential changes from the drafted version, on 6 March. Shortly afterwards Mr Tager instructed accountants to deal with his and the estate's tax affairs, and to provide all the information which HMRC require.

10. The delay in publication of my original decision and the modest amendment did not, however, resolve all of Mr Tager's concerns and the application now before me was made a few days after the decision was formally released. It came before me on 8 July 2015 when Mr Tager was again represented by Miss McCarthy, and HMRC by Mr Yates. I was told that there had been—as HMRC accept—full compliance with the notices shortly before the hearing.

11. The essence of Miss McCarthy's argument is that there were procedural errors in the making of the decision sufficient to warrant its being set aside in accordance with rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008, to which I shall come in more detail shortly, and re-made. The first error on which she relied is, briefly stated, that the assessment of the underlying tax at risk (a concept with which I dealt in some detail in my earlier decision) proceeded on a false basis, in particular because the burden of proof was wrongly applied and the evidence of the value of Mr Tager senior's estate was misunderstood. The second lay in my being unaware at the October 2014 hearing, because he did not argue the point fully at that time, that Mr Tager had in fact complied with the income tax notices. Thus, irrespective of any other consideration, I proceeded to impose a penalty on him while ignorant of some material facts. If the rule is engaged, she added, the tribunal is not confined to a correction of the immediate error or errors, but can go on to deal with other errors which, although they are not attributable to procedural failings, are errors nonetheless. The errors, or supposed errors, she identified in this category lay in my approach to the determination of the level of the penalty to be imposed. She also argued that if I were to re-make the decision I should bear in mind, if no more, that Mr Tager has now complied in full with all of the notices.

12. While he disagrees with Miss McCarthy about the amendment which should be made, Mr Yates accepts (as do I) that the assessment of the tax at risk as it is recorded in my decision released following the October 2014 hearing is incorrect, and that the arithmetical assessment of the amount of the penalty is in consequence also incorrect. However, Mr Yates says, the necessary amendments should be made by exercise of the slip rule (that is, r 42), and he argues that the jurisdiction to set aside and re-make the decision is not engaged. Rather, much of what is advanced by Mr Tager amounts to an attempt to re-argue the case he has already advanced, and the merits of that re-argued case should be determined by way of appeal. He adds that the approach to the determination of the penalty was correct even if some arithmetical adjustment is warranted, and that although Mr Tager has now complied in full with the three outstanding notices, his compliance in advance of the imposition of the penalties was only partial.

13. The disagreement to which I have referred can be explained briefly. It stems primarily from the difference between the amount of a valuation of Mr Tager senior's home obtained by HMRC, from the District Valuer, without the benefit of internal inspection, and the formal valuation obtained by Mr Tager in 2006. Other factors, which I do not think it necessary to explore for the purposes of this decision, may affect the value of the property for inheritance tax purposes. A further relevant factor lies in HMRC's assumption, from a comment made earlier by Mr Tager and which he attributes to a slip of the tongue, about the credit balance in one of Mr Tager senior's bank accounts. Miss McCarthy's position is that the amount at which I arrived for the inheritance tax at risk, £1,171,020, is overstated because of those considerations by at least £270,837.11, while Mr Yates concedes an overstatement of no more than £170,810. The resulting corrected figure, rounded down, would be £900,000 (and possibly significantly less) if Miss McCarthy is right, or £1,000,000 if Mr Yates' approach is to be preferred.

14. I accept that, if it is possible for me to do so, I should correct the decision rather than leave the parties to appeal—or, at least, they should be left to appeal against findings which reflect the evidence as it is rather than as I thought it was. The first task, with which I regret I have struggled for rather too long, is to identify the jurisdiction which might enable me to make an appropriate correction.

Jurisdiction

15. As I have said, Miss McCarthy's argument is based upon r 43 which, so far as material for present purposes, is as follows:

> "**Setting aside a decision which disposes of proceedings**
>
> (1) The Upper Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
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> (a) the Upper Tribunal considers that it is in the interests of justice to do so; and
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> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
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> (b) a document relating to the proceedings was not sent to the Upper Tribunal at an appropriate time;
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> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings."

16. It does not seem to me that this rule is engaged. While I accept that it is in the interests of justice to correct a decision which does not accurately reflect the evidence, and that correspondingly sub-rule (1)(a) is met, I am not persuaded that in this case any of the conditions listed in sub-rule (2) is satisfied. Miss McCarthy accepted that this was so in respect of paras (a) to (c), and relied instead on para (d). Her argument was that my misunderstanding or misinterpreting the evidence amounted to "some other procedural irregularity", a phrase which should be given a wide interpretation.

17. While I agree that the phrase, by its own terms, invites a wide interpretation, and makes it clear that what appears in paras (a) to (c) does not represent an exhaustive list, it is apparent from the manner in which the conditions are set out that para (d) must be read in its context, and be interpreted consistently with what precedes it. The prior paragraphs provide examples of errors affecting the conduct of a hearing: thus paras (a) and (b) do not relate to a document which a party has omitted to produce because he did not then realise its evidential significance, but which he now, belatedly, wishes to introduce, but to one which was not available to the tribunal, or to one party, because of a transmission error. Paragraph (c), as worded, is a little odd because rr 37(4) and 35 provide for circumstances in which a hearing may properly proceed in the absence of a party (a factor reflected in the different order in which the conditions are listed in the corresponding rule, r 38, of

the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) and what is plainly meant is a case in which the tribunal erroneously believed that it was in order to proceed in the party's absence when it was not, for example in a case in which a party did not attend because the tribunal failed to notify him of the hearing or if he was prevented by an unforeseen circumstance from attending.

18. The error on which Miss McCarthy relies is not of the same character. It occurred, not because a document which should have been available to me was absent, because Mr Tager was not present, or for any similar reason, but because (if Miss McCarthy is right) I failed to understand the evidence available to me, or made a finding which was not supported by that evidence. That is, classically, a judicial rather than procedural error. In my view the manner in which the rule has been drafted makes it clear that it was intended to apply only in the case of failings which have led to a flawed hearing, and that it cannot be extended to encompass judicial errors.

19. I am also not persuaded that Mr Yates is right to argue that I should, instead, make the necessary changes to the decision in accordance with r 42, which is in these terms:

> "**Clerical mistakes and accidental slips or omissions**
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> The Upper Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision or record of a decision by—
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> (a) sending notification of the amended decision, or a copy of the amended record, to all parties; and
>
> (b) making any necessary amendment to any information published in relation to the decision or record."

20. As the title of the rule indicates, it is designed for the correction of minor errors, such as spelling mistakes, the transposition of digits, errors in dates or other slips which, although they warrant correction and may indeed be of some consequence if left uncorrected, are of the character of accidental mistakes made while committing the decision to writing. In practice, such corrections are commonly suggested by the parties during the seven-day period to which I have referred, between the sending of the draft decision to the parties and its public release, and they are usually, if not invariably, uncontroversial in the sense that the parties and the tribunal all agree that there is an error, and on how it should be corrected.

21. It does not seem to me that the rule lends itself to the correction of errors about which there is some element of dispute. It is designed, as I see it, to provide only for an amendment which corrects the record of what the judge decided, and not for the correction of the finding or decision itself. Thus I do not think it is permissible to deploy the rule in a case such as this where the finding may be erroneous but the record of it is not, and all the more so when, although the parties are agreed that there is an error which should be corrected, they do not agree on what the correction should be and still less on the consequences, if any, which should flow from the correction.

22. Those conclusions lead to a rather unsatisfactory result: there is an acknowledged error in the decision, which I am powerless to correct. I have, therefore, considered whether there is any other provision within the rules by

which I might address the problem. Unfortunately I do not think there is, though I should at least mention r 48, which is in these terms:

> "The Upper Tribunal may treat an application for a decision to be corrected, set aside or reviewed, or for permission to appeal against a decision, as an application for any other one of those things."

23. I take the reference to correction to be to the power conferred by r 42 even though the rule does not make any provision for an application. The only rule which provides for the setting aside of a decision is r 43, with which I have dealt. Reviews are dealt with by rr 45 and 46, but r 45(1) limits the possibility of a review to two circumstances, neither of which arises in this case. The rule does not, therefore, offer any help and I have identified no other which might do so.

The available remedy

24. However, and although neither party adverted to this possibility, it does seem to me that there is a means by which the error may be addressed without the necessity of an appeal. It lies in the fact that I have not finally determined the original (that is, HMRC's) application, because of the outstanding matter of Mr Tager's undertakings. I am, therefore, still seised of the application and it seems to me that the overriding objective of r 2 enables, indeed requires, me to revisit the assessment of the tax at risk and arrive, if I can, at the correct amount. That must be all the more the appropriate course when the question is the correct application of a penal provision.

25. At this stage I do not have available to me the material from which I might make the assessment. Although Miss McCarthy and Mr Yates addressed the point, they were able to advance only argument and not evidence. However, as I have indicated, the accountants recently instructed by Mr Tager have completed the process of complying with the information notices and, I understand, they and HMRC are in the process of attempting to agree the amount of inheritance tax which is payable. If they are able to do so in the reasonably near future it seems to me that the pragmatic course is for them to agree also on the amount of tax, to use the words of para 50 "which has not been, or is not likely to be, paid by" the estate (for which I have elsewhere used the shorthand "tax at risk"), which is of course not necessarily the same as the total amount payable. If it proves impossible to agree on a figure I am willing to hear further argument. Whatever the resulting figure I would also be willing to amend the amount of the penalty on an arithmetical basis.

26. I am not, however, willing to entertain Miss McCarthy's argument that my approach to the assessment of the penalty was flawed; that argument, in my view, must be advanced by way of appeal since it is of a different character altogether. It is not an argument designed to correct an error in a finding of fact, but amounts to an attempt to re-argue the case on a materially different basis from that previously advanced. I should, however, say that were I deciding the point I would not accede to Miss McCarthy's argument that Mr Tager's conduct is to be equated with carelessness. I do not see how a persistent failure to deal with information notices can be so characterised; even if, as Miss McCarthy argued, it was attributable in this case to Mr Tager's inability to face up to reality rather than to a deliberate and considered refusal to cooperate his conduct, as I indicated in my

earlier decision, is far removed from a simple failure to take proper care. I remain of the view that the better comparison is with deliberate concealment.

27. I recognise that there is room for argument about whether the time for determining the scale of the penalties was at 8 May 2014, at 10 October 2014 or at some other, earlier, time. I took the view, when preparing my earlier decision, that as I had granted Mr Tager's request for additional time I should take into account when assessing the penalties the use he had made of that time, and that it would be unfair, in the particular circumstances of this case, to give no credit at all for the fact, if it were the fact, that he had made good use of it. Since, as I explain below, I accept that Mr Tager had complied with the income tax notices by his self-imposed deadline it may be that I allowed insufficient mitigation of the penalties I imposed for his earlier non-compliance, but in my view (particularly bearing in mind that there is any event a challenge, or potential challenge, to my approach generally) that too is a matter which must be determined by way of appeal. I am unpersuaded by Miss McCarthy's argument that the fact that there has now been full compliance with all of the notices is a relevant factor; the position must be considered, at the latest, at the date on which the penalties were imposed.

28. Miss McCarthy asked for a direction that the collection of the penalties be suspended pending an appeal to the Court of Appeal, on the basis, irrespective of the correct determination of the amount of tax at risk, that if her arguments about the correct approach to the determination of the penalty are right the amounts imposed are substantially too high: on her case the maximum amount should be a little under £300,000, and she would argue for even less. I was told, however, that although HMRC's position is that the penalty should not be suspended pending appeal, the uncertainty about the correct amount of the penalty, and the outcome of the present application, have led them to take a more relaxed approach to enforcement than might otherwise have been the case.

29. It seems to me that the most appropriate course now is for the parties to agree, as I have already suggested, what is the correct amount of inheritance tax at risk, so that I may determine the penalty due for the failure to comply with the relevant notice accordingly (that is to say, at 100%), or return for further argument if agreement is not possible. If they cannot also agree on suspension I will address that issue at the same time, though I should add that my initial view is that Mr Yates is right, and that suspension is inappropriate.

30. I add, for completeness, that there was also an application before me by HMRC that Mr Tager pay their costs of their applications, for the period to 13 February 2015. Mr Tager has accepted that he should do so, and indeed the amount has been agreed and paid.

31. I come, finally, to Mr Tager's undertakings. As I have said, Mr Yates told me in October 2014 that there had been only partial compliance with the income tax notices when the deadline agreed in May expired, and Mr Tager did not challenge that assertion. Although I can accept that Mr Tager had not then provided all that HMRC were hoping, and probably reasonably expecting, to receive, and in that sense Mr Yates was correct to say that compliance was not complete, Miss McCarthy has been able to demonstrate to my satisfaction that Mr Tager had complied with the letter of the notices, a proposition Mr Yates does not

now dispute. There was, therefore, no breach of the undertaking relating to the income tax notices.

32. Mr Tager does, however, accept that his compliance with the inheritance tax notice was both late and incomplete and that he was in breach of his undertaking relating to that notice. I do not think it necessary to impose a further financial penalty, or that it would achieve anything of value if I did. Instead I suggested at the July hearing, and Mr Tager agreed, that he should adopt a certain course of action. He asked, for reasons which I accept to be sound, that the nature of that course of action should not be publicly disclosed (although, by virtue of their attendance at the hearing, HMRC are aware of what it is). It is, I think, sufficient to record that I am satisfied that what he is to do will be burdensome and that it represents sufficient recognition of the gravity of his behaviour for which, it should be remembered, he is also to suffer a substantial financial penalty.

Colin Bishopp
Upper Tribunal Judge
Release date 7 December 2015