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UT (Tax & Chancery) Case Number: UT/2023/000030

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: Remote video hearing

Heard on: 18 June 2023
Written submissions on 12 July 2023
Judgment date: 28 July 2023

Rule 8(3)(c), Tribunal Procedure (Upper Tribunal) Rules 2008 - application to strike out an application by HMRC for a tax-related penalty under paragraph 50, Schedule 36, Finance Act 2008 – whether statutory conditions in paragraph 50 clearly not met – yes - whether HMRC's application having no reasonable prospect of success – yes – application allowed.

Before

JUDGE MARK BALDWIN

Between

PAUL BAXENDALE-WALKER

Applicant in the strike out application
Respondent in the substantive application

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents in the strike out application
Applicants in the substantive application

Representation:

For Mr Baxendale-Walker: David Bedenham, of counsel, instructed by Morr & Co LLP

For HMRC: Howard Watkinson, of counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

DECISION

Introduction

1. By an application notice dated 24 March 2023, HMRC asked the Upper Tribunal to impose on Mr Paul Baxendale-Walker ("PBW") a tax-related penalty in the sum of £14,031,851.01 pursuant to paragraph 50 of Schedule 36 ("Schedule 36") to the Finance Act 2008 ("FA 2008").

2. By an application notice dated 29 March 2023, PBW applied to strike out HMRC's penalty application on the basis that the statutory pre-conditions for the imposition of such a penalty are not satisfied and so there is there is no reasonable prospect of HMRC's case, or part of it, succeeding. This is my decision on PBW's strike out application.

The approach to strike-out applications

3. Rule 8(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that the Upper Tribunal may strike out the whole or part of proceedings if it considers that there is no reasonable prospect of the applicant's case, or part of it, succeeding.

4. It is common ground that the approach I should adopt to deciding whether there is no reasonable prospect of all or part of HMRC's application succeeding is to follow the approach to summary judgment applications under Part 24 of the Civil Procedure Rules as set out by Lewison, J. (as he then was) in *Easyair Limited v Opal Telecom Limited*, [2009] EWHC 339 (Ch) at [15], and approved by the Upper Tribunal in *The First De Sales Limited Partnership v HMRC*, [2018] UKUT 396 (TCC). So far as relevant to the issues before me, the relevant principles are:

a) Without conducting a "mini trial", the court must consider whether the claimant has a "realistic" (more than merely arguable) as opposed to a "fanciful" prospect of success.

b) If the issue is a short point of law or construction and the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it.

5. There is no disagreement as to the facts, at least so far as relevant to PBW's strike-out application, and the nettles I need to grasp are solely points of law or statutory construction.

Schedule 36, Finance Act 2008

6. Schedule 36 gives HMRC powers to gather information for the purposes of checking a person's tax position. It enables them to require a person to provide information or documents by way of a written notice called an information notice. Schedule 36 allows penalties to be imposed where a person fails to comply with an information notice, and that is what this application is about.

7. I set out below a summary of how (so far as relevant to this application) Schedule 36 and its penalty regime operate:

Taxpayer notices

8. Paragraph 1 of Schedule 36 to the FA 2008 provides HMRC with a power, by notice in writing (an "information notice"), to require a taxpayer to provide information or documentation that is reasonably required for checking the tax position of the taxpayer.

9. Paragraph 3(2) of Schedule 36 permits HMRC to ask the FTT for approval to the giving of an information notice.

10. Paragraph 7 of Schedule 36 provides that, where a person is required by an information notice to provide information or documentation, the person must do so within such period (and by such means and in such form) as is reasonably specified in the notice.

11. Paragraph 29 of Schedule 36 provides, in relation to an information notice, a right of appeal to the FTT "against the notice or any requirement in the notice". However, there is no such right of appeal if the FTT approved the giving of the information notice.

Paragraphs 39 and 40 penalties

12. Paragraph 39 of Schedule 36, provides so far as relevant:

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

13. Paragraph 40 of Schedule 36 provides:

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

14. Paragraph 44 of Schedule 36 provides that a failure by a person to comply with an information notice by the specified time does not give rise to a liability to a penalty under paragraphs 39 or 40 if the person complies within such further time as HMRC have allowed.

15. Paragraph 45(1) of Schedule 36 provides that liability to a penalty under paragraphs 39 or 40 does not arise if the person satisfies HMRC or the tribunal that there is a reasonable excuse for the failure.

16. Paragraph 46 of Schedule 36 provides:

> "(1) Where a person becomes liable for a penalty under paragraph 39, 40 or 40A
>
> (a) HMRC may assess the penalty, and
>
> (b) if they do so, they must notify the person.
>
> (2) An assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the date on which the person became liable to the penalty, subject to sub-paragraph (3)
>
> (3) In a case involving an information notice against which a person may appeal, an assessment of a penalty under paragraph 39 or 40 must be made within the period of 12 months beginning with the latest of the following—
>
> (a) the date on which the person became liable to the penalty,
>
> (b) the end of the period in which notice of an appeal against the information notice could have been given, and

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

17. Paragraph 47 of Schedule 36 provides a right of appeal against a decision that a penalty is payable under paragraph 39. The procedure for such an appeal is set out in paragraph 48 which provides:

"(1) Notice of an appeal under paragraph 47 must be given–

(a) in writing,

(b) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, and

(c) to HMRC.

(2) Notice of an appeal under paragraph 47 must state the grounds of appeal.

(3) On an appeal under paragraph 47(1)(a) that is notified to the tribunal, the tribunal may confirm or cancel the decision.

(4) On an appeal under paragraph 47(1)(b) that is notified to the tribunal, the tribunal may–

(a) confirm the decision, or

(b) substitute for the decision another decision that the officer of Revenue and Customs had power to make.

(5) Subject to this paragraph and paragraph 49, the provisions of Part 5 of TMA 1970 relating to appeals have effect in relation to appeals under this Part of this Schedule as they have effect in relation to an appeal against an assessment to income tax."

18. Paragraph 49 of Schedule 36 provides:

"(1) A penalty under paragraph 39, 40 or 40A must be paid–

(a) before the end of the period of 30 days beginning with the date on which the notification under paragraph 46 was issued, or

(b) if a notice of an appeal against the penalty is given, before the end of the period of 30 days beginning with the date on which the appeal is determined or withdrawn.

(2) A penalty under paragraph 39, 40 or 40A may be enforced as if it were income tax charged in an assessment and due and payable."

Paragraph 50 penalties

19. Paragraph 50 of Schedule 36 provides:

"(1) This paragraph applies where–

(a) a person becomes liable to a penalty under paragraph 39,

(b) the failure or obstruction continues after a penalty is imposed under that paragraph,

(c) an officer of Revenue and Customs has reason to believe that, as a result of the failure or obstruction, the amount of tax that the person has paid, or is likely to pay, is significantly less than it would otherwise have been,

(d) before the end of the period of 12 months beginning with the relevant date [...], an officer of Revenue and Customs makes an application to the Upper Tribunal for an additional penalty to be imposed on the person, and

(e) the Upper Tribunal decides that it is appropriate for an additional penalty to be imposed.

(2) The person is liable to a penalty of an amount decided by the Upper Tribunal.

(3) In deciding the amount of the penalty, the Upper Tribunal must have regard to the amount of tax which has not been, or is not likely to be, paid by the person.

(4) Where a person becomes liable to a penalty under this paragraph, HMRC must notify the person.

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

(6) In the application of the following provisions, no account shall be taken of a penalty under this paragraph–

(a) section 97A of TMA 1970 (multiple penalties),

(b) paragraph 12(2) of Schedule 24 to FA 2007 (interaction with other penalties), and

(c) paragraph 15(1) of Schedule 41 (interaction with other penalties).

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

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

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

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

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

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

20. Paragraph 51 of Schedule 36 provides:

"(1) A penalty under paragraph 50 must be paid before the end of the period of 30 days beginning with the date on which the notification of the penalty is issued.

(2) A penalty under paragraph 50 may be enforced as if it were income tax charged in an assessment and due and payable."

21. Schedule 36 clearly provides for a series of escalating penalties, fixed (paragraph 39), daily (paragraph 40) and finally tax-related (paragraph 50), although there is no statutory requirement for a paragraph 40 (as opposed to a paragraph 39) penalty to have been imposed before an application can be made for a paragraph 50 penalty. Nevertheless, Henderson LJ observed in *HMRC v Tager* [2018] EWCA Civ 1727 at [86]:

"I find it hard to envisage circumstances where it would be appropriate for HMRC to make an application under paragraph 50 until fixed and daily penalties have been imposed for a significant period to no avail. Further, as I have already noted, the fact that a paragraph 50 penalty may only be imposed by the Upper Tribunal is a clear indication of the exceptional nature of the jurisdiction."

22. In *Derrin Brothers Properties Ltd & Ors, R (on the application of) v A Judge of the First Tier Tribunal (Tax Chamber) & Ors*, [2016] EWCA Civ 15, the Chancellor described the purpose of Schedule 36 as follows at [67] – [68]:

> "67…schedule 36, like its predecessor scheme in section 20 of the TMA, represents a balance between the interests of individuals and the interests of the wider community. So far as concerns the interests of the wider community, the statutory scheme is intended to assist HMRC in its investigation of tax avoidance and tax evasion. Complex and sophisticated corporate and international arrangements are often the hallmark of schemes to avoid or evade tax and are often intended to throw a veil of obscurity over the reality of underlying transactions. Such complex arrangements feature in the present case, which concerns an investigation into suspected cross-border corporate tax avoidance and evasion under which tax has been wrongly claimed on interest on "loans" made through a web of onshore and offshore companies.
>
> 68. The purpose of the statutory scheme is to assist HMRC at the investigatory stage to obtain documents and information without providing an opportunity for those involved in potentially fraudulent or otherwise unlawful arrangements to delay or frustrate the investigation by lengthy or complex adversarial proceedings or otherwise. It is inevitable in many cases, particularly where there are complex arrangements designed to evade tax, that at the investigatory stage it will be difficult, if not impossible, for HMRC to be definitive as to the precise way in which particular documents will establish tax liability. It is also clear that in many cases disclosure of HMRC's emerging analysis and strategy and of sources of information to the taxpayer or those associated with the taxpayer may endanger the investigation by forewarning them."

The facts

23. For present purposes, the relevant facts can be shortly stated:

a) On 10 January 2022, the FTT approved an information notice (the "information notice") under paragraph 1 of Schedule 36. The deadline for compliance in the form approved by the FTT was 11 March 2022, giving 60 days to comply.

b) On 14 January 2022, HMRC issued the information notice to PBW. HMRC notified the information notice to PBW at The Grove, Hadley Green Road, Monken Hadley, Barnet, EN5 5PY ("The Grove") by recorded delivery. The deadline in the served version of the information notice was amended to 15 March 2022 to account for the short delay in service after the FTT's approval of the information notice and preserve the 60- day compliance period approved by the FTT. The information notice was also served on PBW's agent, Thomson Elphick Ltd. I understand that there is no dispute about PBW receiving the information notice, but PBW reserves his right to argue in any substantive hearing that the purported issue of the information notice was ineffective on the basis that the notice issued was not in the same form as approved by the FTT, because HMRC altered the date for compliance without further reference to the FTT. I have tried to make it clear, wherever this point arises, that I am expressing no opinion on this point, but (for the avoidance of doubt) nothing I say should be taken as expressing a view, one way or the other, on this argument.

c) PBW's solicitor, Morr & Co LLP, requested an extension to the deadline on 15 March 2022.

d) HMRC agreed an extension for compliance to 29 March 2022. On 28 March 2022 PBW requested a further 14 days to comply.

e) On 29 March 2022, HMRC issued a paragraph 39 penalty notice to PBW.

f) After the paragraph 39 penalty had been issued to PBW, Morr & Co LLP (now acting as PBW's agent) provided a 64/8 authorisation form, which gave a different address for PBW, namely Suite 3, Atlantic House, Pretoria Rd., E4 7HA ("Atlantic House"). This is a serviced office. PBW appealed the paragraph 39 penalty to HMRC, who issued their view of the matter, concluding that the penalty remained due and payable on 13 April 2022.

g) On 5 May 2022 HMRC notified PBW, at The Grove, of daily penalties of £1,350 pursuant to paragraph 40 of Schedule 36. On 8 June 2022 HMRC notified PBW, at The Grove, of further daily penalties of £1,800 pursuant to paragraph 40. In both cases HMRC also informed PBW's agent of the penalties.

h) On 1 March 2023 HMRC wrote to PBW at Atlantic House, at The Grove, at the address provided by PBW with the last return he submitted, and care of Morr & Co LLP, stating that, in light of the two addresses provided by him in the last year, a further address being the last notified to HMRC and evidence that he resided at The Grove, further copies of the information notice (showing the date for compliance as 11 March 2022) were being issued to those four addresses and providing a further 14 days, until 15 March 2023 for full compliance with the information notice. The letter also stated that all the penalties previously notified would be withdrawn. The letter was copied to PBW's agent. Mr Bedenham suggested at one point that HMRC were "reissuing" the information notice when they re-circulated it on 1 March 2023. That is not how I read HMRC's letter; I regard them as doing no more than sending out copies of the information notice (albeit with 11 March 2002 as the compliance deadline) they had previously served and giving additional time for compliance. Mr Bedenham did not enlarge on this point and I will say no more about it.

i) On 15 March 2023, HMRC issued PBW with a new penalty pursuant to paragraph 39.

j) On 16 March 2023, PBW appealed the paragraph 39 penalty to HMRC.

k) On 28 March 2023, HMRC asked the Upper Tribunal to impose a tax-related penalty on PBW pursuant to paragraph 50 of Schedule 36. HMRC's application includes the following passages:

> "(a) [PBW] originally became liable to a penalty under paragraph 39 on 29 March 2022, which was the date of the extended deadline HMRC granted for him to comply with the Notice. However, this penalty was withdrawn on 1 March 2023 … , and a new penalty issued under paragraph 39 on 15 March 2023. HMRC submit that [PBW], therefore, became liable to a penalty under paragraph 39 on 15 March 2023.
>
> (b) HMRC has not received any of the documents or information (except for the few pieces detailed … above) required by the Notice and so the failure has continued beyond 15 March 2023."

l) On 20 April 2023, PBW filed with the FTT an appeal against the paragraph 39 penalty.

PBW's Strike-Out Application

24. PBW's application to strike out HMRC's application was made on two grounds. Firstly it was submitted that no valid paragraph 50 application could be made in reliance on the paragraph 39 penalty imposed on 29 March 2022. As HMRC accept that their paragraph 50 application is based on PBW's liability to the paragraph 39 penalty imposed on 15 March 2023 and the penalty imposed

on 29 March 2022 was withdrawn, it is not clear to me why PBW based his application on this ground. In any event, it was not pursued before me.

25. Secondly, PBW asserts that, as he has appealed against the paragraph 39 penalty notified on 15 March 2023 (on the basis that the information notice was invalid), no paragraph 50 penalty can be imposed as the requirement of paragraph 50(1)(a) will not be satisfied until the appeal against the paragraph 39 penalty has been concluded. His principal points here are as follows:

26. He says that the Upper Tribunal's decision in *HMRC v Sukhdev Mattu* [2021] UKUT 0245 (TCC) supports his interpretation that it is a pre-condition to a paragraph 50 penalty that there is no extant appeal against the underlying paragraph 39 penalty.

27. He submits that the interpretation proposed by HMRC (that paragraph 50(1)(a) is satisfied even where there is an extant appeal against the paragraph 39 penalty) has the potential to cause procedural chaos and palpable unfairness. One example Mr Bedenham gave is of a taxpayer on whom the Upper Tribunal imposes a paragraph 50 penalty and who has to sell treasured assets to meet that penalty. How could the taxpayer be restored to his previous position if subsequently his appeal against the paragraph 39 penalty succeeds, bringing the paragraph 50 penalty down with it?

28. To the extent the statutory wording in paragraph 50(1)(a) is open to more than one reasonable interpretation, Mr Bedenham submits that the principle against doubtful penalisation applies, such that the interpretation which avoids the paragraph 50 penalty should be preferred.

29. Mr Bedenham also submits that the interpretation proposed by HMRC would give rise to a breach of Article 6 of the European Convention on Human Rights ("ECHR") and, accordingly, a conforming interpretation should be adopted, as required by section 3 of the Human Rights Act 1998. What this means here is that we should read into paragraph 50 a requirement that HMRC cannot apply for a paragraph 50 penalty until any relevant extant appeal has been finally determined.

30. Mr Bedenham raised further arguments as to why the statutory pre-requisites for HMRC's application were not met. The first of these is that it is clear from their letter of 15 March 2023 that HMRC were considering making an application for a paragraph 50 penalty even though the paragraph 39 penalty had been raised only the day before and the statutory pre-requisite (that the failure to comply with the information notice continues after the penalty had been imposed) had not been met. Secondly, given that HMRC had extended time for compliance with the information notice until 28 March 2023, there was no "failure" that "continued after [the paragraph 39 penalty was imposed]" as required by paragraphs 50(1)(b) and (c).

HMRC's Response

31. HMRC submit that the reference to a person who "becomes liable" to a paragraph 39 penalty, in paragraph 50(1)(a), must mean simply that liability has arisen due to non-compliance with an information notice, not that any consequent appeal has been determined. Any other construction would render the statutory scheme of penalties unworkable. This, they say, is a matter of statutory interpretation which is clear when paragraph 50(1)(a) is viewed in context. PBW's interpretation involves, they say, reading into paragraph 50(1)(a) words (to the effect of "and any appeal against that penalty has either been withdrawn or dismissed") that are simply not there and the tribunal should be cautious before adding, omitting or substituting words into paragraph 50.

32. As to PBW's submission that "procedural chaos" and unfairness would result if HMRC's interpretation of the provisions is correct, HMRC reply that the obvious answer is that the Upper Tribunal could simply stay any paragraph 50 application where there was an extant appeal against a

paragraph 39 penalty. All the difficulties Mr Bedenham postulates will melt away if the Upper Tribunal defers dealing with the application for a paragraph 50 penalty until any appeal against a paragraph 39 penalty has been disposed of.

33. HMRC accept Mr Bedenham's argument that a person should not be penalised except to the extent that is clearly what the statute requires. However, they say that, for the principle against doubtful penalisation to apply, there must be genuine ambiguity such as to lead to uncertainty beyond just disagreement about what the words might mean. HMRC submit that there is no genuine ambiguity here and the principle is therefore not engaged. Even if it is engaged, the relevant provision is no more than a gateway to the potential imposition of what is a purely discretionary judicial penalty. In that context, the principle does not require me to hold that being "liable to" a paragraph 39 penalty means that any appeal process has been completed.

34. Similarly HMRC accept that a paragraph 50 penalty amounts to a "criminal charge" for the purposes of Article 6 of the ECHR. They accept that the presumption of innocence in Article 6(2) requires that a court should not start with the preconceived idea that the accused has committed the offence charged, the burden of proof is on the prosecution, and any doubt should benefit the accused, but argue that their interpretation of paragraph 50 does not involve any incursion into the presumption of innocence.

35. Turning to Mr Bedenham's additional grounds, HMRC say, as far as the objection that HMRC were considering applying for a paragraph 50 penalty when the paragraph 39 penalty was issued is concerned, this is neither here nor there, and is certainly no ground for striking out the application.

36. As to whether there was a continuing failure relevant to paragraph 50(1)(b) and (c), HMRC say that the paragraph 39 penalty was imposed on 15 March 2023. The officer's letter was not extending time for compliance with the information notice until 28 March 2023. PBW's failure to comply with the information notice continued after the paragraph 39 penalty was imposed on 15 March 2023. He had not complied with the information notice by 28 March 2023 when the paragraph 50 penalty application was made.

37. I pause here to note that these are the arguments explored in pleadings and initially discussed in the hearing. However, the focus on the various dates on which the information notice was given and later copied and the dates on which penalties were initially imposed and later withdrawn and finally re-imposed caused us to focus on when PBW became liable to a paragraph 39 penalty, whether that date could change and ultimately whether a paragraph 39 penalty had been lawfully imposed at all. Although not trailed by PBW in his application or Mr Bedenham in his skeleton argument, the implication of these questions became a central issue towards the end of the hearing. I should stress that these issues were fully discussed both by Mr Bedenham and Mr Watkinson in the hearing and subsequently by way of written submissions. Mr Watkinson did not object to the course the argument took and I am satisfied that both parties had sufficient opportunity to address the issues as they emerged. To the extent PBW needs the tribunal's permission to raise these grounds, which were not in his strike-out application, I am satisfied that this would be fair and just and allow him to do so.

Discussion

38. I will address the arguments raised in the papers and in the first part of the hearing to start with and then move on to the arguments which emerged towards the end of the hearing and which were then explored further in written submissions.

Sukhdev Mattu

39. I will deal first with Mr Bedenham's submission that the Upper Tribunal's decision in *HMRC v Sukhdev Mattu*, [2021] UKUT 0245 (TCC), supports his contention that it is a pre-condition to a paragraph 50 penalty that there is no extant appeal against the underlying paragraph 39 penalty, to the point of determining the question against HMRC. At paragraphs [21] and [22] the Upper Tribunal said this:

> "21. Despite the Respondent not including it as a ground for opposing the application in his formal correspondence with the Upper Tribunal, in his opening skeleton argument Mr Firth submitted for the first time that the Respondent has not become liable to a penalty under Paragraph 39 of Sch 36 ("the Paragraph 39 Penalty") within the meaning of paragraph 50(1)(a) such that a penalty under Paragraph 50 may not be imposed upon him. Mr Firth submitted that this was a consequence of the fact that there is a "live" appeal before the FTT against the penalty imposed upon the Respondent under paragraph 39.
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> 22. There is no dispute that if there remains an outstanding appeal to the FTT in respect of the Paragraph 39 Penalty then the Respondent has not "become liable to a penalty" – to be liable to the penalty, not only must HMRC have imposed the penalty but any challenge to that penalty needs to have been resolved."

40. There was no discussion of this issue in *Sukhdev Mattu;* the Upper Tribunal merely recorded that there was "no dispute" that, to have "become liable to a penalty" not only must HMRC have imposed the penalty but any challenge to that penalty needs to have been resolved. It was unnecessary for the Upper Tribunal to express a view on this point as it concluded (at [81]) that there was no live appeal against the paragraph 39 penalty anyway. I do not regard *Sukhdev Mattu* as determining this point against HMRC at all; the Upper Tribunal records the parties' agreement on the point (without indicating whether it agreed) and the point formed no part of the Upper Tribunal's decision.

41. Interestingly, when considering an argument whether or not the FTT was correct to have rejected Mr Mattu's appeal, the Upper Tribunal said this (at [84]):

> "That decision is a decision of the FTT that is presumed to be valid unless successfully challenged, and this is most certainly the case in circumstances in which there is a specific right of appeal by which the decision might be challenged: in circumstances in which the right has not been exercised, the decision must be treated as valid and binding."

And then more broadly (at [86]) it said this:

> "An administrative act (i.e. decision of a public body) is treated as valid unless and until it is successfully challenged before a court of competent jurisdiction (at which time it will generally be recognised as having had no legal effect): for example, *F. Hoffmann-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295 at [365]:
>
> > "Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another party or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed.""

That observation (that an administrative act is treated as valid unless and until successfully challenged) is one which it may be useful to bear in mind when looking at the construction of the relevant provisions of Schedule 36, to which I now turn.

The construction on ordinary principles of paragraph 50

42. Leaving to one side for the moment the principle against doubtful penalisation and ECHR points, Mr Watkinson's core submission on paragraph 50(1)(a) is that there is a difference in Schedule 36 between a person becoming liable to a penalty, that penalty being notified/imposed and the question of any appeal. All that is needed for a person to become liable to a penalty under paragraph 39 is that the person fails to comply with an information notice. Paragraph 39 simply provides that a person who fails to comply with an information notice "is liable to a penalty of £300" and, when paragraph 50(1)(a) refers to "a person [who] becomes liable to a penalty under paragraph 39", it is doing no more than reflecting the language of paragraph 39. In that light, all paragraph 50(1)(a) requires is a failure to comply with an information notice which automatically cause a liability to a penalty to arise.

43. Paragraph 46 also provides that "where a person becomes liable to a penalty under paragraph 39", HMRC "may assess the penalty". Becoming liable is an automatic consequence of non-compliance; assessment is a separate act, which may (or may not) follow. Paragraph 46(2) requires an assessment to be raised "within the period of 12 months beginning with the date on which the person became liable to the penalty". If becoming liable to a paragraph 39 penalty depended on the exhaustion of appeal rights in relation to an assessment to such a penalty, then the assessment time limit provisions could not work at all and HMRC could never assess a penalty because liability to it would never arise. That, submits Mr Watkinson, would produce a patently absurd result. I agree that such an over-literal reading of the provisions cannot possibly be right.

44. Paragraph 46(2) is subject to paragraph 46(3), which provides different time limits for assessments in cases involving an information notice against which a person may appeal. Here the time limit is 12 months after the latest of :

a) the date on which the person became liable to the penalty,

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

c) if notice of such an appeal is given, the date on which the appeal is determined or withdrawn.

Here the draftsman can clearly be seen taking the possibility of an appeal against an information notice into account when setting the period in which a paragraph 39 penalty must be assessed. The draftsman could similarly have made the time limits for applying for a paragraph 50 penalty contingent on the exhaustion of any appeal rights against the underlying paragraph 39 penalty, but seems to have made a quite deliberate choice not to do that. Instead, the draftsman makes special provision in the definition of "relevant date" (the start of the 12 month period for HMRC to apply for a paragraph 50 penalty) for cases involving an information notice against which a person may appeal, but remains silent on the question of appeals against paragraph 39 penalties.

45. Mr Bedenham points to paragraph 45, and the provision that liability "does not arise" where a person satisfies the requirement in paragraph 45, as indicating that liability is not a fixed concept. How, he asks, can liability "not arise" if it arose automatically as a result of non-compliance with the information notice? Mr Watkinson's answer to this point is that paragraph 45 (at least where appeals are concerned) must be operating as a form of retrospective deeming provision to the effect

that the failure (which automatically gives rise to a penalty liability) is ignored if subsequently the appellant can prove that it had a reasonable excuse; only then does liability not arise.

46. Beyond this point on paragraph 45, Mr Bedenham did not launch any serious challenge to Mr Watkinson's reading of these provisions as an ordinary matter of statutory construction. His arguments were more to the effect that the concepts of liability or becoming liable are not set in stone (as, he says, paragraph 45 indicates) and, even if the concepts were set in stone, those concepts when found in paragraph 50 can, and indeed must at least where Convention rights are in point, be read in a way which gives effect to a person's Convention rights and in a way which avoids doubtful penalisation. I will turn to those arguments in a moment.

47. As far as the ordinary construction of paragraph 50 is concerned, I am with Mr Watkinson. To my mind, there is a clear distinction in the relevant provisions in Schedule 36 between a person becoming liable to a penalty (which simply depends on failing to comply with an information notice), being assessed to that penalty and the outcome of any appeal. On occasion the draftsman clearly addressed the impact of rights of appeal, but chose to make no provision to accommodate rights of appeal against a paragraph 39 penalty assessment where paragraph 50 is concerned. Reading paragraph 50 as operating on the basis that a penalty assessment is valid unless and until it is successfully challenged is also consistent with the approach to the validity of administrative acts discussed in *Sukhdev Mattu* (see [41] above). It follows that a person who does not comply with an information notice is to be treated for the purposes of paragraph 50(1)(a) and (b) as liable to a penalty under paragraph 39 unless and until they successfully appeal any assessment of the penalty (and the penalty will need to be assessed if the requirement of paragraph 50(1)(b) is to be met) or satisfy the requirements of paragraph 45.

The impact of the principle against doubtful penalisation and the ECHR

48. I turn now to Mr Bedenham's arguments relating to the ECHR. As paragraph 50 penalties are not intended to be pecuniary compensation but are instead intended to encourage compliance with tax obligations and to penalise non-compliance, it is common ground that paragraph 50 penalties are criminal charges for the purpose of Article 6 of the ECHR albeit that tax penalties differ from "hard core" criminal law and the criminal safeguards in the Convention will not necessarily apply with their full stringency; *Jussila v Finland* [2006] ECHR 996, at [43].

49. Paragraph 2 of Article 6 embodies the principle of the presumption of innocence, that the Court should not start with the preconceived idea that the accused has committed the offence charged, the burden of proof is on the prosecution, and any doubt should benefit the accused (see *Barberà, Messegué and Jabardo v. Spain*, App. 10588/83 (1988), at [77]). In relation to both the ECHR arguments and the principle against doubtful penalisation, we might usefully start by reminding ourselves of the conditions which must be satisfied before a paragraph 50 penalty can be imposed. These are:

a) a person becomes liable to a penalty under paragraph 39,

b) the failure or obstruction continues after a penalty is imposed under that paragraph,

c) an HMRC officer has reason to believe that, as a result of the failure, the amount of tax that the person has paid, or is likely to pay, is significantly less than it would otherwise have been,

d) before the end of the period of 12 months beginning with the relevant date an HMRC officer makes an application to the Upper Tribunal for an additional penalty to be imposed on the person, and

e) the Upper Tribunal decides that it is appropriate for an additional penalty to be imposed.

50. At this point we are concerned only with the question whether HMRC can apply for an additional, tax related penalty to be imposed and are asking ourselves whether, in circumstances where a person has a live appeal against an assessment to a paragraph 39 penalty, adopting the position that they have become liable to that penalty for this limited purpose engages the principle against doubtful penalisation or infringes that person's Convention rights. The short answer to that question is "No". Further requirements need to be satisfied before a paragraph 50 penalty is imposed and the most important of these is that "the Upper Tribunal decides that it is appropriate for an additional penalty to be imposed". The conditions in paragraph 50(1)(a) and (b) are no more than a gateway to a judicial process, which does not operate with any statutorily imposed preconceptions.

51. Although I have held that a person who does not comply with an information notice is to be treated for the purposes of paragraph 50(1)(a) and (b) as liable to a penalty under paragraph 39 unless and until they successfully appeal any assessment of the penalty or satisfy the requirements of paragraph 45, nothing in paragraph 50 requires the Upper Tribunal to decide whether it is appropriate to impose a penalty on that basis in a case where the penalty has been challenged.

52. Mr Bedenham is absolutely right that, if, in the paragraph 50 application, the Upper Tribunal proceeded (or was required by paragraph 50 to proceed) on the basis that the statutory pre-requisite of liability under paragraph 39 was satisfied, despite that liability being the subject of an extant appeal, that would amount to the Upper Tribunal having a pre-conceived idea in relation to that element of the paragraph 50 "charge", ignoring the burden of proof being on HMRC and would give rise to a breach of Article 6. That, however, is not the basis on which the Upper Tribunal is required to proceed at all. If there is a live challenge to a paragraph 39 penalty, that is something the Upper Tribunal would need to take into account in deciding whether it is appropriate to impose a penalty under paragraph 50.

53. To the extent the Upper Tribunal has jurisdiction to entertain an appeal against a paragraph 39 penalty assessment, arrangements could be made for it to hear that appeal at the same time as dealing with the paragraph 50 application or, if it does not have such a jurisdiction or chooses not to exercise it, it could stay the paragraph 50 application until the paragraph 39 penalty appeal had been finally determined. Such an approach would deal with the dangers of procedural chaos and potential unfairness Mr Bedenham raises.

54. The same reasoning applies so far as the principle against doubtful penalisation is concerned. The principle against doubtful penalisation reflects the approach the courts have taken that it is:

> "generally reasonable to assume that Parliament intended to observe what Bennion on Statutory Interpretation (7th Edn, 2017) in section 27.1 calls the 'principle against doubtful penalisation". This is the principle that a person should not be subjected to a penalty – particularly a criminal penalty – except on the basis of clear law"

R(OAO the Good Law Project) v Electoral Commission & Ors [2018] EWHC 2414 (Admin) at [34]. The principle has also been summarised as follows:

> "If there is a reasonable interpretation which will avoid the penalty in any particular case, we must adopt that construction. If there are two reasonable constructions, we must give the more lenient one. That is the settled rule for the construction of penal sections" (*Tuck & Sons v Priester*) (1887) 19 QBD 629)

55. Without doubt, Parliament cannot have intended a person to be subjected to a paragraph 50 penalty whilst there was real doubt about whether one of the conditions to liability had been met, but again the safeguard against doubtful penalisation is the requirement that the Upper Tribunal considers the imposition of a paragraph 50 penalty to be "appropriate"; it is hard to see how imposing a paragraph 50 penalty could be appropriate before any live questions around the paragraph 39 liability had been finally determined.

56. I asked Mr Watkinson why HMRC would want to make an application for a paragraph 50 penalty when (as a result of an extant paragraph 39 penalty appeal) the Upper Tribunal would be unlikely to consider it before the paragraph 39 penalty appeal had been dealt with. His answer lies in the analysis of the purpose behind Schedule 36 in *Derrin*. If a taxpayer is trying to delay complying with an information notice by appealing against a paragraph 39 penalty, "marking his card" by applying for a paragraph 50 penalty would serve to remind the taxpayer of the importance of complying with the information notice and the consequences of not doing so. It would also enable HMRC to proceed to a hearing of their paragraph 50 application in short order after any paragraph 39 appeal were determined in their favour, or to have both matters dealt with at the same hearing. In addition, HMRC only have 12 months after a person becomes liable to a paragraph 39 penalty to apply to the Upper Tribunal for a paragraph 50 penalty to be imposed. If it is right (as HMRC say it is) that the taxpayer became liable to the penalty when they first failed to comply with the information notice, HMRC may well need to make an application under paragraph 50 before a paragraph 39 appeal is determined in order not to be out of time.

HMRC's letter of 15 March 2023

57. I turn now to the arguments (as they developed in the hearing) which revolve around the letter the HMRC officer wrote to PBW on 15 March 2023. Given the importance of that letter, it is worth setting out in some detail what the officer said. Firstly, he referred to his letter of 1 March 2023, which enclosed further copies of the information notice originally issued on 14 January 2022. Next, he went on to say that he was issuing PBW with a £300 penalty under paragraph 39 because the information notice's requirements had not been satisfied. He completed this section of the letter by observing that "I am therefore charging you a penalty because my letter of 1 March 2023 requested that you comply with the Notice by 15 March 2023."

58. The second main issue the officer addressed was the possibility of a paragraph 50 penalty. His letter made it very clear that "I am currently considering making an application to the Upper Tribunal for a further penalty to be imposed under paragraph 50 Schedule 36 Finance Act 2008. Any further penalty imposed under this legislation could considerably exceed what has already been charged to you. With that in mind, I would ask that you provide the outstanding information and documentation requested in the Notice by 28 March 2023." Mr Bedenham's criticisms of this letter are that it was wrong for HMRC to be considering applying for a paragraph 50 penalty at a time when the requirement in paragraph 50(1)(b) (that the failure or obstruction continues after a paragraph 39 penalty is imposed) had not been satisfied. In any event, he says, HMRC had extended the compliance deadline to 28 March 2023. As they had done so, there was no "compliance failure" for the purposes of paragraphs 50(1)(b) or (c).

59. Mr Watkinson's submits (and I agree) that the HMRC officer's letter of 15 March 2023 does not extend the time given to PBW to comply with the information notice at all. As Mr Watkinson observed, it would be very odd if HMRC extended the deadline for complying with an information notice to a time after the time when they imposed a paragraph 39 penalty. A paragraph 39 penalty can only be imposed when there is a failure to comply with a information notice and it would be bizarre for HMRC to write to someone and in the same letter extend the time for compliance (so they

are not in default) and impose a penalty for being in default. More importantly, the passage from the letter I quoted above does not in any way suggest that the date for complying with the information notice has been extended to 28 March 2023. What the officer is saying is that he is considering applying for a paragraph 50 penalty, but will delay doing so until after 28 March 2023 to give PBW one last chance to comply with the information notice. That is the natural (and to my mind only) reading of that passage.

60. So far as Mr Bedenham's criticism of the officer for considering a paragraph 50 penalty on 15 March 2023 is concerned, I agree with Mr Watkinson that there is nothing in this point either. No application can be made to the Upper Tribunal until the conditions in paragraph 50(1)(a) – (c) have been met and they cannot be met until the compliance failure has continued after the imposition of the paragraph 39 penalty. But there is nothing in paragraph 50 which prevents HMRC thinking about what they would do if that situation were to come about and sharing their thoughts with the taxpayer.

Were HMRC too quick to apply for a paragraph 50 penalty?

61. HMRC did not apply for the paragraph 50 penalty until 28 March 2023, by which time PBW's failure had continued after the paragraph 39 penalty was imposed (on 15 March 2023). Nevertheless, Mr Bedenham criticised HMRC for, in his view, rushing to apply for a paragraph 50 penalty so soon (less than a fortnight) after they imposed the paragraph 39 penalty. This runs counter to the approach to applying for a paragraph 50 penalty articulated by Henderson LJ in *Tager* (set out at [21]) above. There are two answers to this criticism.

62. Firstly, Henderson LJ's comments do not in any way change the provisions of Schedule 36. It is clear (and was accepted in *Tager*, for example at [57]) that there is no need for a paragraph 40 penalty to have been imposed before an application for a paragraph 50 penalty can be made; the requirement in paragraph 50 is simply that a person has become liable to a paragraph 39 penalty and that penalty has been imposed. Whilst, in the ordinary course, one might expect a steady progression through the penalties before an application is made for a paragraph 50 penalty, there is nothing in the legislation which requires this.

63. Secondly, whatever one might expect in a standard case, this is of course not a standard case. The information notice was served in January 2022 and the original compliance deadline (in the information notice as served by HMRC) was 15 March 2022, later extended to 29 March 2022. Paragraph 39 and paragraph 40 penalties had been imposed. They were withdrawn by HMRC in March 2023 and a new paragraph 39 penalty imposed. If HMRC need to justify their application for a paragraph 50 penalty so soon after imposing a paragraph 39 penalty, the explanation and justification lies in the history of PBW's non-compliance with the information notice which, by that time, had stretched to almost a year.

Were HMRC right to assess a paragraph 39 penalty on 15 March 2023?

64. This brings us neatly to the aspect of Mr Bedenham's argument which arose in the course of the hearing. He observed that, in his letter of 1 March 2023, the officer said that "I will provide a further 14 days until 15 March 2023 for you to comply in full with the Notice."

65. The paragraph 39 penalty notice was, of course, issued on 15 March 2023. On that basis, Mr Bedenham says, HMRC had assessed and notified a penalty for which PBW had not become liable. He would only become liable for the penalty under paragraph 39 at the end of 15 March, whereas HMRC notified the imposition of the penalty during the course of the working day on 15 March. Accordingly, the requirement of paragraph 50(1)(b) has not been met because PBW's admitted failure

did not continue after a penalty was validly imposed under paragraph 39. All the other penalties had been withdrawn and the penalty imposed on 15 March 2023 was imposed prematurely.

66. This forces us to confront the question when PBW became liable to a penalty under paragraph 39. The answer to this question, as we have seen, is when he failed to comply with the information notice. But when was that? At least initially, that would have been at the end of 15 March 2022 (assuming that HMRC have power to amend the information notice as approved by the tribunal before serving it). However, HMRC describe themselves as having granted an extension to 29 March 2022, and in due course they wrote to PBW and gave him until 15 March 2023 to comply, withdrawing all the earlier penalties. The discussion in the hearing assumed that HMRC have a general power (outside the statutory review mechanism in sections 49A et seq of the Taxes Management Act 1970) to change the date for compliance with an information notice once it has been served. If that is right, following HMRC's letter of 1 March 2023, PBW would not have become liable to a penalty unless he failed to comply with the information notice by the end of 15 March 2023.

67. I cannot find any power in Schedule 36 for HMRC to vary the terms of an information notice (including the date by which its requirements are to be complied with) once it has been given. The closest I have come is paragraph 44, but paragraph 44 does not allow HMRC to extend the time for compliance. In terms, paragraph 44 provides (in much the same way that paragraph 45 relieves a person who can show a reasonable excuse for a failure) that a person is relieved from the consequences of failing to comply with an information notice if that person complies with the information notice within such further time as HMRC may allow. Interestingly, paragraph 44 does not deem a person not to have failed to comply with an information notice if they do so; it simply provides that their failure is not to give rise to a penalty liability.

68. Because this question (whether HMRC can vary the terms of an information notice which has been given) only occurred to me after the hearing and because the linked question of when (if at all) PBW became liable to a paragraph 39 penalty only arose late in the hearing, I invited written submissions from PBW and HMRC on these issues generally.

69. Mr Bedenham submits that HMRC do not have power to extend time for compliance with an information notice, at least if it has been approved by the tribunal. HMRC are not obliged to apply to the FTT for approval prior to issuing a taxpayer an information notice (as opposed to a third-party notice). However, where HMRC do so apply, the taxpayer is deprived of the normal appeal rights. (As a notice of appeal is the trigger for a statutory review, that mechanism will not be available in respect of a tribunal-approved information notice either.) It simply cannot be right that HMRC can later amend the information notice (for example, by altering the compliance date) in the absence of, at the very least, seeking further approval/permission from the FTT. Were it otherwise, HMRC could achieve the benefit of a tribunal approved information notice (the taxpayer being deprived of ordinary appeal rights) in relation to a document that differs from that actually approved by the tribunal.

70. Mr Bedenham also submits that HMRC cannot "restart" or extend the time limit for making a paragraph 50 application by the device of "re-issuing" the information notice or unilaterally allowing further time for compliance. He relies on the decision of Judge Redston (sitting in the FTT) in *Sadiq Ahmed v HMRC* [2020] UKFTT 337 (TC) where she held (at [3]):

> "Sch 36, para 46 provides that a penalty can only be issued within the twelve months after a person becomes liable to a penalty. The penalty was issued more than twelve months after the First Notice. HMRC cannot refresh the twelve month time limit by the simple device of reissuing the notice and repeating the information requirements. To the extent that the penalty related to a failure to comply with requirements to those in the First Notice, it is invalid."

71. If HMRC have power to alter tribunal approved information notices, that would logically seem to permit HMRC to shorten time for compliance so as to allow a taxpayer less time than had been approved by the tribunal. That outcome, which cannot be right, would tend to suggest that HMRC have no power, at least absent returning the matter to the FTT, to amend a tribunal approved information notice or impose a compliance deadline beyond the one endorsed at the tribunal. This, of course, is the essence of PBW's objection to the validity of the information notice in the first place. His precise complaint is that HMRC amended the information notice before they served it, so that the information notice served on him was not the same as the one approved by the tribunal, but the logic of that approach applies just as much to things done subsequently by HMRC, which result in the information notice having a different effect to the effect that would have been produced by the information notice as approved by the tribunal.

72. HMRC say that section 9 of the Commissioners for Revenue and Customs Act 2005 ("CRCA 2005") gives them this power. It provides:

> "(1) The Commissioners may do anything which they think—
>
> (a) necessary or expedient in connection with the exercise of their functions, or
>
> (b) incidental or conducive to the exercise of their functions."

73. Section 51(2) CRCA 2005 defines "function" as "any power or duty (including a power or duty that is ancillary to another power or duty)".

74. HMRC submit that extending time for compliance with an information notice is (1) necessary or expedient in connection with the exercise of their power under Schedule 36 to issue an information notice, or (2) incidental or conducive to the exercise of that power. Since HMRC have the residual power in section 9 CRCA to extend time for compliance with an information notice, there is no need for such a power to be explicitly stated in Schedule 36.

75. They also say that it is implicit in paragraph 44 that HMRC can extend time for compliance with an information notice. If HMRC could not actually extend time for compliance with an information notice it would be remarkable that the Act envisages that being done. Further, as a matter of good administration, it would be remarkable if HMRC do not have that power. If they do not then HMRC could not, having received a perfectly reasonable request for an extension of time, accede to that request. It is (they say) in neither HMRC's nor the taxpayer's interest to find that HMRC have no such power.

76. HMRC say that, if they have the power to extend the time for compliance with an information notice, there would be no question of the date for liability to a paragraph 39 penalty defaulting back to the original date for compliance with the information notice simply because the taxpayer has failed to comply with the extended period for compliance. The date of failure would be the date of failing to comply with the information notice as extended by HMRC. Mr Watkinson's argument at this point is straightforward. He says that HMRC can vary the date for compliance with an information notice, they did so here and they did not impose a paragraph 39 penalty for that failure too soon.

77. If HMRC agree to allow extra time before the original time for compliance with the information notice expired, it is relatively easy to see how such an action might be described as extending the information notice compliance time period. Here, where HMRC did not allow extra time until 1 March 2023, when PBW had been in default since 29 March 2022, it is harder to describe HMRC's action as an extension of the original information notice compliance period rather than the giving of an opportunity to PBW to purge his failure. However, HMRC do not draw a distinction between agreeing (or imposing) a new compliance deadline before the original deadline had expired and doing

so afterwards. They simply submit that they have power (under section 9 CRCA 2005) to agree or impose a new compliance deadline at any time.

78. In *OWD Ltd and another v HMRC*, [2019] UKSC 30, the Supreme Court expressed the view (at [49]) that section 9 CRCA 2005 "should not be construed as conferring on HMRC a power …which Parliament could have conferred through [a particular relevant statute] but did not". The same point applies here. Parliament could very easily have given HMRC power to agree or impose a different time for compliance than the one in the information notice. Instead, paragraph 7 requires compliance "at such time, by such means and in such form (if any) as is reasonably specified or described in the notice". Paragraph 7(2) appears to contemplate an agreement outside the notice but only so far as concerns the place where a document is to be produced.

79. Paragraph 44 does not provide that HMRC may agree or impose a different time for compliance than the one in the notice, which might have been the easier and more obvious drafting approach to take. Instead it makes the (quite precise) provision that a person's failure to do what is required within a limited time is not to give rise to a liability to a penalty if it is done within such further time as HMRC allow. I do not consider that it is implicit in paragraph 44 that HMRC can extend time for compliance; quite the contrary, the time for compliance remains fixed in the notice, but HMRC can waive their right to impose a penalty. If section 9 CRCA 2005 gives HMRC the power they assert, paragraph 44 would be redundant; HMRC could simply agree or impose a new compliance deadline and this would mean that the taxpayer was no longer in default. Their section 9 power would be broader in scope than a relevant provision (paragraph 44) in Schedule 36.

80. I am also conscious of the point made in *Ahmed* that HMRC should not be able to refresh or extend the period set out in statute (12 months after a person becomes liable to a penalty) for imposing or applying for a penalty. Parliament has imposed a time limit for assessing paragraph 39 penalties and applying for paragraph 50 penalties and it should respected. If HMRC can unilaterally impose a different compliance date at any time, which is how they analyse their actions in this case, they can effectively circumvent that requirement.

81. On the other hand, I take HMRC's point that an interpretation that HMRC do not have the power they claim under section 9 will limit their ability to accommodate requests for extensions of time from a taxpayer. If they want to remain able to impose penalties on a taxpayer for failure to comply, they would need to limit any extensions of time they allow under paragraph 44 such that they still have time to impose a paragraph 39 penalty and apply for a paragraph 50 penalty within a year of the original compliance date on the notice and they will need to be astute to make sure that taxpayers do not "run down the clock" on them. On balance, I do not ascribe much weight to that point as against the factors discussed in [78]-[81] above, and my conclusion on this question would be that section 9 CRCA 2005 does not give HMRC the power they assert. to agree or impose a different time limit for compliance with an information notice once it has been served. However, for the reasons explained below, the outcome of this application will be the same whether HMRC have that power or not and there is no need for me to express a definitive view on that question.

What are the consequences of HMRC having power to change the compliance date on the information notice?

82. If we assume for a moment that HMRC are right and they can unilaterally impose a new compliance date, then for our purposes the only date by which the information notice needed to be complied with was 15 March 2023. What would be the implications of this? The obvious implication is that PBW would not have failed to comply with the information notice and thus become liable to a paragraph 39 penalty until the end of 15 March 2023, whereas the officer wrote to him (and emailed his advisers) on 15 March 2023. His letter began "This letter is a penalty notice. I am sending it to

you under paragraphs 39 and 46 of Schedule 36 to the Finance Act 2008." and went on to state "As I have not received what the notice asked for, I am now charging you a £300 penalty", giving PBW until 14 April to pay and notifying him of his right to appeal.

83. Much of the discussion before me, and HMRC's written submissions, focused on when the paragraph 39 penalty the officer wrote about was "imposed". This is because paragraph 50(1)(a)-(b) requires the failure to comply with the information notice to continue after a person has become liable to a penalty under paragraph 39 and after a penalty is "imposed" under that paragraph. Clearly, PBW had become liable to a penalty under paragraph 39 before HMRC applied for a paragraph 50 penalty; he became liable to that penalty at the end of 15 March 2023 and HMRC applied for a paragraph 50 penalty on 28 March 2023. So, the requirement in paragraph 50(1)(a) would have been met by then. However, that is not enough, as paragraph 50(1)(b) requires PBW's compliance failure to continue after a penalty is imposed under that paragraph (i.e. paragraph 39).

84. Mr Watkinson's submission is that no paragraph 39 penalty is imposed before the taxpayer has been notified of the penalty. He says that would have been on 16 March 2023 and by then PBW had failed to comply with the extended deadline for complying with the information notice. Mr Watkinson's reasoning is that only service on PBW himself (not his authorised agent) would be valid service for these purposes and that would not take place until the notification was received (or is deemed to have been received) by him in the ordinary course of post the following day; section 7, Interpretation Act 1978.

85. "Imposed" is a curious word to use in paragraph 50. The verbs used elsewhere in Schedule 36 in connection with a paragraph 39 penalty are to become liable, to assess and to notify. It is not at all obvious why the draftsman used a new and different verb. Clearly the draftsman did not intend that "imposed" should just mean "assessed"; in a tax statute, "assessed" would have been the obvious word to use if that is all they meant to say. The only additional step required (the only other matter the draftsman could be pointing to) is notification. Paragraph 50 is a route to imposing a potentially very substantial penalty for failing to comply with an information notice, and it seems to me to be wholly consistent with the approach to the seriousness of such penalties taken by Henderson LJ in *Tager* (see [21] above) that a taxpayer should have been aware that he had entered the Schedule 36 penalty regime and yet continued to default. I consider that the process of imposing a paragraph 39 penalty involves (but only involves) two steps, assessment and notification, as paragraph 46 makes clear. So, "imposed under that paragraph" in paragraph 50(1)(b) is a reference to a paragraph 39 penalty which has been properly assessed and notified, that being the process for "imposing" such a penalty.

86. It is also clear as a general matter that assessment and notification are distinct steps and that "the process of making the assessment itself is an internal matter for the Commissioners"; see *Courts plc v Customs and Excise Comrs* [2004] EWCA Civ 1527, at [106] per Jonathan Parker LJ.

87. The problem for HMRC here is that the officer wrote to PBW (a letter copied to his advisers and received by them electronically on 15 March 2023) before the end of the time for PBW to comply with the information notice and told them that he was charging a penalty. A letter written under paragraph 46 (which is what the officer's letter described itself as being) is a notification of an assessment which has been made; see paragraph 46(1)(b). However, the officer could only assess a paragraph 39 penalty on PBW if he had become liable to one and (on the assumption we have made about HMRC's powers to change the compliance date on an information notice) PBW did not become liable to a paragraph 39 penalty until the end of 15 March 2023. The officer purported to assess and notify a penalty to which PBW was not liable. Although PBW subsequently (within a matter of hours) became liable to a paragraph 39 penalty, no such penalty was properly assessed and notified

as the purported assessment was made before the liability arose. Mr Watkinson did not suggest that PBW becoming liable to a penalty so soon afterwards would have cured any defect in the way the penalty was imposed. As noted above, he raised a number of arguments to the effect that the assessment was not imposed on PBW until 16 March. Mr Bedenham took issue with them, but they do not alter the fact that the assessment was made before the liability arose and so I do not need to consider them further. It follows from the paragraph 39 penalty being prematurely imposed that it was not imposed under that paragraph and so the requirement in paragraph 50(1)(b) was not satisfied.

What if HMRC did not have power to change the compliance date on the information notice?

88. If HMRC do not have power to change the date by which the information notice was to be complied with once the notice had been given, PBW became liable to a paragraph 39 penalty at the end of 15 March 2022 (assuming that HMRC had power to amend the information notice as approved by the tribunal before serving it) and the officer's letter of 1 March 2023 can only be read as an offer of an "amnesty" under paragraph 44.

89. As we have seen, paragraph 44 operates to cancel a person's liability for failure to comply with an information notice if they comply within such further time as HMRC allow. If (as was the case with PBW) they do not do so, their original failure is not purged and so it remains the case that they became liable to a paragraph 50 penalty at the time of their original failure. As far as PBW is concerned, this means that HMRC were in time to assess a paragraph 39 penalty by reference to that failure, in fact 15 March 2023 was the last day on which they could do that; see paragraph 46(2). It would mean that they would have assessed the liability whilst their "amnesty" period was still running. There is nothing in paragraph 44 which would stop them doing this, although clearly the assessment would fall away if PBW complied before the end of 15 March.

90. That is not the end of the matter, however, as an application for a tax-related penalty must be made within the period of 12 months beginning with the date on which PBW became liable to a paragraph 39 penalty; see paragraph 50(1)(d) and (7). That would mean that the application for the paragraph 50 penalty would need to be made by 15 March 2023, whereas it was not made until 28 March 2023.

Conclusion

91. To conclude, I am against Mr Bedenham on the grounds of this application as originally articulated. A person becomes liable to a paragraph 39 penalty for the purposes of paragraph 50 as soon as that person has failed to comply with an information notice. *Sukhdev Mattu* notwithstanding, there is no need to give that phrase a different meaning for the purposes of paragraph 50(1)(a) and (b) where a person has an extant appeal against a consequential penalty assessment, in order to avoid infringing the principle against doubtful penalisation or that person's Convention rights. The necessary safeguard is in paragraph 50(1)(e).

92. However, on the facts of this case one of the requirements of paragraph 50 will always be lacking, and so the Upper Tribunal will not be able to decide that a penalty can be imposed under that paragraph. This is because

a) if HMRC are correct, and they have power to vary the date for compliance in an information notice which has been served, even where the date for compliance in the information notice has passed and the information notice was approved by the tribunal, then their purported assessment of a paragraph 39 penalty on PBW on 15 March 2023 was invalid, because, at the time the officer made the assessment and began the process of notification, PBW had not yet failed to comply with the

information notice. If this is the case, the requirement in paragraph 50(1)(b) is not met; and

b) if, on the other hand, HMRC's only power in these circumstances is one under paragraph 44, to allow a further period within which PBW could purge his existing failure to comply with the information notice, then the period in which they could apply for a paragraph 50 penalty expired on 15 March 2023 (assuming that HMRC have power to amend the information notice as approved by the tribunal before serving it) and they did not apply to this tribunal until 28 March 2023. If this is the case, the requirement in paragraph 50(1)(d) is not met.

93. It is because one (although not the same) requirement of paragraph 50 is not met, whether HMRC have power to vary the date for compliance in this information notice or not, that I do not need to come to a definitive conclusion on the question whether they have such power or not.

94. For completeness, I make the obvious point that, if PBW is right and HMRC do not have power to vary the terms of a tribunal-approved information notice in any respect at all (even where the variation benefits the taxpayer) and, to be valid, the information notice as served must be exactly the same as the information notice approved by the tribunal, that would be a further reason why HMRC's application would have to fail.

Disposition

95. Notwithstanding PBW's clear failure to comply with the information notice, the only conclusion open to me is that HMRC's application for a paragraph 50 penalty has no reasonable prospect of success.

96. This application is allowed and HMRC's application for a tax-related penalty must be struck out.

JUDGE MARK BALDWIN
RELEASE DATE: 28 JULY 2023

[NOTE: This decision was not originally published. After consultation with the parties, on 3 June 2024 Judge Baldwin directed that the decision be published subject to minor amendments to anonymise references to the HMRC officer involved.]