



[2017] UKUT 161 (TCC)

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

PROCEDURE— decision to impose penalties pursuant to FA 2008, Sch 36, para 50 — whether effect of decision should be suspended pending appeal to Court of Appeal — UT rules, r 5(3)(l) — suspension refused

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

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

Applicants

- and -

**ROMIE TAGER QC
THE PERSONAL REPRESENTATIVE OF OSIAS TAGER deceased**
Respondents

Tribunal: Judge Colin Bishopp

Application determined on written submissions only

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

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

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DECISION

1. I have released three substantive decisions in this case, in which HMRC applied to the tribunal for the imposition on the respondents of penalties for their failure to comply with information notices. As before, I should mention for clarity that in reality there is only one respondent, Mr Romie Tager, who failed to comply with two information notices relating to his own income tax affairs and with another relating to his late father's estate, he having assumed the responsibilities of personal representative. The penalties ultimately imposed by me were substantial: £75,000 in respect of the income tax notice, and £1,000,210 in respect of the notice relating to the estate.

2. Mr Tager has sought permission to appeal to the Court of Appeal, which I have already granted. He also asks that the penalties be suspended until his appeal has been determined, a request which HMRC oppose. I have decided the application by reference to the parties' written submissions, and without a hearing.

3. The penalties were imposed in accordance with para 50 of Sch 36 to the Finance Act 2008, which provides by sub-para (2) that a person in Mr Tager's position "is liable to a penalty of an amount decided by the Upper Tribunal". The decision of the tribunal does not, however, by itself trigger an obligation on the person concerned to pay the penalty on which the tribunal has decided. HMRC must first comply with sub-para (4): "Where a person becomes liable to a penalty under this paragraph, HMRC must notify the person". The notification then engages para 51(1) of the Schedule:

"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."

4. If one pauses there, it seems clear that I have no jurisdiction to suspend the penalties: by the third of my decisions I determined the penalties at the amounts I have mentioned, HMRC have an obligation to notify Mr Tager of them, albeit sub-para (4) does not impose any time limit within which they must do so, and once notification has been issued, the 30-day period for payment begins. There is nothing in the statutory provisions which allows for further intervention by the tribunal once it has determined the amount of the penalty.

5. Mr Tager's case, however, is that I need have resort only to rule 5(3)(I) of the Tribunal Procedure (Upper Tribunal) Rules 2008, which permits the tribunal to "suspend the effect of its own decision pending an appeal or review of that decision". That sub-rule does appear to cover a case of this kind, notwithstanding the mechanical statutory process, and HMRC have not argued otherwise.

6. I should, the application says, exercise the rule 5(3)(I) power because of the real doubt about the correctness of my approach, and because, as I recognised myself in the third of my decisions, the penalties, or at least the income tax penalties, were based on a significant over-estimation of the tax due. HMRC's response is that suspension of any decision pending appeal is the exception rather than the rule, a proposition supported by various authorities, that if the penalty is suspended Mr Tager will gain an advantage since interest will not run, and that there is no need for suspension since HMRC are willing to agree not to enforce the notifications they propose to issue "pending any decision of the Upper Tribunal in response to the suspension application". They point out, too, that Mr Tager has put forward nothing to suggest that he is unable to pay the penalties, or that he would suffer hardship if required to do so, and that I indicated in the

second of my decisions, albeit without the benefit of full argument on the matter, that I was of the view at that time that suspension would not be appropriate.

7. I do not think it necessary to conduct an analysis of the authorities to which I was referred. They describe well-known, and well-established, principles and show that HMRC are broadly right that suspension of the effect of a decision pending appeal is the exception rather than the rule, and that the person seeking suspension must ordinarily demonstrate some kind of material prejudice which would be occasioned to him if he is compelled to pay, sufficient to outweigh the prejudice caused to his opponent if the effect of the judgment or decision is suspended. Reluctance rather than inability to pay cannot be enough since otherwise any monetary judgment would automatically be suspended. Here, there is nothing before me to indicate what, if any, prejudice Mr Tager might suffer if compelled to pay; it is true that the penalties are large but it has been part of Mr Tager's own case that he has ample means and I have been given no reason to think that he will not be able to find the money with reasonable ease. There is no risk that, if the Court of Appeal does reduce the penalties, HMRC will be unable to repay the excess. The prejudice to HMRC of a further deferment of the date from which interest will run may not amount to serious prejudice, but it is prejudice none the less. It does not seem to me to make any difference that this is a penalty case; the rule in the United Kingdom, unlike in some other jurisdictions, is that even in a case of imprisonment the person convicted must begin to serve his sentence immediately, regardless of any possible appeal, and must remain in prison until any appeal he does bring is determined. It is true that rule 5(3)(I) is written in wide terms, allowing me an unfettered discretion, but it seems to me that I should respect the policy adopted in the courts, even if the proper view is that I am not bound by it.

8. I am not unmindful of the point made in the application that, as I said myself in the third of my decisions, the income tax due has now been agreed at a sum considerably less than the amount I assumed when determining the relevant penalty, though I do not accept the argument that the potential inheritance tax liability has been substantially over-estimated; its proper scale has yet to be determined. However, although para 50 describes a penalty within its scope as a "tax-related penalty", and in the particular circumstances of this case a considerable amount of attention has been devoted to the scale of the tax, the amount of tax at risk (to repeat my own shorthand) is not the only consideration—it is no more than a matter to which the tribunal must have regard—and I do not accept, as the application implies, that it is certain the Court of Appeal will reduce the penalties. On Mr Tager's own case, whatever the correct approach, they must be substantial. It would, in my view, be contrary to the general rule, and contrary to the interests of justice, for Mr Tager to be able to defer the payment of any sum; and I am not persuaded that any significant prejudice or injustice will be caused to him if he is required to pay the whole of the amounts on which I determined.

9. For those reasons I decline to suspend the effect of my decision.

Colin Bishopp
Upper Tribunal Judge
Release date: 21 April 2017