[2022] UKUT 81 (TCC)

Appeal number: UT/2019/0045

CORPORATION TAX – continuing failure to comply with information notice – HMRC application for tax-related penalty under paragraph 50 Schedule 36 Finance Act 2008 – statutory conditions – application granted – penalty imposed

UPPER TRIBUNAL
(TAX AND CHANCERY

CHAMBER)

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

-and-

AML TAX (UK) LIMITED **Respondent**

TRIBUNAL: JUDGE THOMAS SCOTT
JUDGE JONATHAN CANNAN

Sitting in public by way of video hearing treated as taking place at the Royal Courts of Justice, Strand, London WC2A 2LL on 13 and 14 September 2021 with further written submissions from the Applicants on 21 October 2021 and the Respondent on 25 October 2021.

Howard Watkinson, instructed by HM Revenue & Customs Solicitor's Office and Legal Services, for the Applicants

Conrad McDonnell, instructed by RPC Solicitors, for the Respondent

DECISION

INTRODUCTION

1. This is an application by HM Revenue & Customs ("HMRC") pursuant to paragraph 50 Schedule 36 Finance Act 2008 ("Schedule 36") for an additional penalty to be imposed on AML Tax (UK) Limited ("AML"). HMRC allege that AML has failed to comply with an information notice under Schedule 36 issued to AML and that the conditions for the imposition of an additional penalty are satisfied.

2. AML is a UK limited company which was incorporated on 9 December 2009. The director is Mr Arthur Lancaster, a chartered accountant and chartered tax adviser specialising in trusts and private client matters. An issue arises as to the activities of AML. At this stage we shall simply say that it has acted in relation to certain tax avoidance schemes utilised by UK contractors and sub-contractors. It is part of an informal group of companies based in the Isle of Man known as the Knox Group.

3. HMRC have opened enquiries into the company tax returns of AML for accounting periods ending 31 December 2014 and 31 December 2015 pursuant to paragraph 24(1) Schedule 18 Finance Act 1998 ("FA 1998"). Mr James Preston was the HMRC officer with conduct of the enquiries until his retirement in September 2020. The enquiry into the 2015 return commenced on 5 December 2017 and included a request for AML to provide certain company records. AML did not produce those records and on 28 February 2018 HMRC issued an information notice under Schedule 36 requiring production of the records ("the Information Notice"). Again, AML failed to produce the records.

4. In April 2018, Mr Preston became aware that a notice for the compulsory striking off of AML had been published in the London Gazette. We understand that this was because of the late submission of accounts by AML. In the circumstances, HMRC notified what are known as "jeopardy amendments" to AML. Jeopardy amendments are notified to a taxpayer prior to the conclusion of an enquiry when HMRC consider that otherwise there is likely to be a loss of tax to the Crown.

5. The jeopardy amendments notified by HMRC to AML were in the sums of £1,661,772.39 for 2014 and £1,620,425.55 for 2015. AML has appealed the jeopardy amendments. It also applied for the tax due to be postponed and eventually HMRC agreed that the tax should be postponed in full.

6. On 30 April 2018 HMRC notified a £300 penalty to AML pursuant to paragraph 39 Schedule 36 for failing to comply with the Information Notice. Paragraph 39 Schedule 36 provides as follows:

> 39(1) This paragraph applies to a person who –
>
> (a) fails to comply with an information notice, or
>
> (b) deliberately obstructs an officer of Revenue and Customs in the course of an inspection under Part 2 of this Schedule that has been approved by the tribunal.
>
> (2) The person is liable to a penalty of £300.
>
> (3) The reference in this paragraph to a person who fails to comply with an information notice includes a person who conceals, destroys or otherwise disposes of, or arranges for the concealment, destruction or disposal of, a document in breach of paragraph 42 or 43.

7. Paragraph 40 Schedule 36 makes provisions for daily penalties of up to £60 per day for continuing non-compliance with an information notice. Daily penalties for non-compliance were subsequently notified to AML.

8. The fixed penalty of £300 was appealed by AML to HMRC but that appeal was refused. None of the daily penalties were appealed.

9. Paragraph 50 Schedule 36 makes provision for HMRC to apply to the Upper Tribunal for an additional penalty to be imposed on persons who fail to comply with an information notice. It provides as follows:

> 50(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.

10. Mr Preston provided a witness statement in support of the application, stating his belief that the potential "tax at risk" as a result of AML's non-compliance with the Information Notice was £1.34m. HMRC invite us to impose an additional penalty by reference to that amount of tax, with some discount to reflect uncertainty in the amount of tax said to be at risk, and taking into account various other factors which we consider in detail below.

11. The application has a long procedural history during which AML failed to engage with the proceedings. The result is that AML is barred from making any case to the effect that the requirements of paragraph 50(1)(a), (b) and (d) have not been met. The issues before us are therefore confined to paragraph 50(1)(c) and (e) and paragraph 50(2) and (3). In broad terms, AML contends as follows:

(1) Mr Preston did not have reason to believe that, as a result of the failure of AML to comply with the Information Notice, the amount of tax that AML has paid, or is likely to pay, is significantly less than it would otherwise have been. As a result, no penalty can be imposed under paragraph 50 because paragraph 50(1)(c) is not satisfied.

(2) Alternatively, no penalty is appropriate under paragraph 50(1)(e).

(3) There is no tax at risk.

(4) In any event, the amount of penalty being sought by HMRC is excessive and disproportionate to any tax properly considered to be at risk.

12. It is common ground that the burden of proof is on HMRC to establish that paragraph 50(1)(c) is satisfied, that it is appropriate for an additional penalty to be imposed and (in relation to paragraph 50(3)) the amount of tax that has not been paid or is not likely to be paid by AML.

13. We heard evidence from Mr Preston and another officer, Mr Luke Curtis on behalf of HMRC. On behalf of AML we heard evidence from Mr Arthur Lancaster. All witnesses had provided witness statements and they were cross-examined in the course of their oral evidence.

14. We set out below certain legislative provisions relevant to the issues arising on the application and background facts which are largely not disputed. We go on to make findings of primary fact in relation to contentious matters and to consider the parties' submissions on the issues before us. As part of that consideration we set out our conclusions as to whether we should impose an additional penalty on AML and if so the proper amount of that penalty.

THE LAW

15. Schedule 36 makes provision for HMRC to require a taxpayer to provide information and documents where reasonably required for the purpose of checking the tax position of the taxpayer. An information notice only requires a person to provide a document where it is in that person's possession or control. There is a right of appeal against an information notice, but not where the information or documents required form part of the taxpayer's statutory records. Statutory records are the records a taxpayer is required to keep by the Taxes Acts or any other enactment relating to tax. For company taxpayers, statutory records include all records required in order for the company to deliver a correct and complete company tax return, including records of receipts and expenses and the matters in respect of which those receipts and expenses arise (see paragraph 21 Schedule 18 FA 1998).

16. Where a taxpayer fails to comply with an information notice within the time specified in the notice, it is liable to a fixed penalty of £300 as set out in paragraph 39 Schedule 36. Where the failure continues after a fixed penalty has been imposed, the taxpayer is liable to daily penalties of up to £60 per day. There is a right of appeal against all such penalties to the First-tier Tribunal ("FTT"). Liability to a penalty will not arise where the taxpayer satisfies HMRC or the FTT on appeal that it had a reasonable excuse for the failure to comply.

17. Paragraph 50 Schedule 36 makes provision for the Upper Tribunal to impose an additional penalty (described in the heading to paragraph 50 as a tax-related penalty) as set out above.

18. It is convenient at this stage to make reference to what was, at the time of the hearing, the only authority on the operation of paragraph 50. It is the Court of Appeal decision in *Tager & Anor v HMRC* [2018] EWCA Civ 1727 ("*Tager CA*"). We have also considered the decision of the Upper Tribunal (Judge Bishopp) in that case, reported at [2015] UKUT 40 (TCC) ("*Tager UT"*).

19. *Tager UT* concerned an application by HMRC for a tax-related penalty under paragraph 50. The Upper Tribunal imposed penalties of £75,000 and £1,171,020 for the failures in that case, in connection with income tax enquiries and inheritance tax enquiries respectively. By the time of the hearing before the Court of Appeal the parties had agreed the amount of tax unpaid as a result of the non-compliance to be income tax of £1,250 and inheritance tax of £195,471. In *Tager CA*, the penalties were reduced to £20,000 and £200,000 respectively.

20. We derive the following propositions from *Tager CA*, with appropriate references to the main judgment of Henderson LJ:

> (1) The power to impose an additional penalty is intended to be reserved for serious cases ([86]).

(2) There must be a causal link between the taxpayer's failure to comply with the information notice and a loss of tax, whether in the past, or prospectively. The "tax at risk" may be used as a convenient shorthand to describe the shortfall in tax contemplated by paragraph 50(1)(c) but it should not be a substitute for the statutory language ([87]).

(3) It is enough for the purposes of paragraph 50(1)(c) if the officer of HMRC has reason to believe in the existence of such a causal connection. That is a subjective test, subject only to a requirement of rationality ([87]).

(4) The Upper Tribunal must decide whether it is appropriate for an additional penalty to be imposed ([88]).

(5) Relevant factors will include the reasons for non-compliance, the extent to which it has been remedied, the gravity and duration of the non-compliance, the presence of aggravating and mitigating factors, the availability of other methods for HMRC to recover the tax at risk and generally the need to achieve a fair and proportionate outcome having regard to the public interest and the circumstances of the taxpayer ([88]).

(6) There is no limit on the amount of the penalty which may be imposed by the Upper Tribunal but 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" ([8]).

(7) The Upper Tribunal must itself form a view as to the amount of tax unpaid or likely to be unpaid based on the evidence before the Tribunal. The onus is firmly on HMRC to satisfy the Tribunal of that amount ([89]). There must be a solid foundation for the Tribunal's assessment of the tax unpaid or likely to be unpaid [99].

(8) The obligation is only to "have regard" to that amount. The amount is likely to be uncertain, not only because it may be prospective, but more importantly because by definition the taxpayer has failed to comply with a notice requiring information or documents reasonably required for the purpose of checking his tax position ([90]).

(9) The penalty is not intended to be a proxy for recovery of the unpaid tax ([8]).

(10) There is no fixed relationship between the amount of the tax unpaid and the amount of the penalty. A regime of tax-geared penalties would make little sense and could give rise to insuperable practical difficulties where HMRC are by definition still trying to obtain information about the taxpayer's tax position ([90]). The question as to a penalty may arise at a relatively early stage in HMRC's enquiries when little is known about the precise amount of tax that has not been paid, or is likely not to be paid ([8])

(11) The nature of the relationship between the tax unpaid and the level of penalty and the way in which the tribunal gives effect to it will depend on the circumstances of the individual case ([101]).

(12) Comparisons should not be made with more prescriptive tax-geared penalty regimes, such as that in Schedule 55 Finance Act 2009 ([101]).

(13) It is not always necessary to show a demonstrable link between the tax unpaid and the penalty imposed. It is enough if the amount of the tax unpaid, taken in conjunction with all the other relevant circumstances, informs the determination of quantum and yields a result which is proportionate to the scale and nature of the taxpayer's default ([108]).

21. Since the hearing before us, the Upper Tribunal has released its decision in *HMRC v Mattu* [2021] UKUT 0245 (TCC) ("*Mattu*"). We invited and have received written submissions from the parties in relation to that case, which we have taken into account in reaching our

decision. In *Mattu*, the Upper Tribunal considered a number of issues arising in relation to applications under paragraph 50. It formed the view that the tax at risk was some £1.9m. Taking into account uncertainty in relation to the amount of tax at risk and various aggravating and mitigating factors the Upper Tribunal determined to impose an additional penalty in the sum of £350,000.

22. We refer to the decision in *Mattu* in relation to various issues which arise on this appeal as appropriate. In so far as *Mattu* decides issues of law, we should follow the decision unless convinced that it is wrong (see *HMRC v S & I Electronics plc* [2012] UKUT 87 (TCC)). We are not convinced that it is wrong in any relevant aspect, and indeed respectfully agree with it.

23. In the present appeal, in oral submissions the parties initially invited us to make findings of fact on the balance of probabilities as to the tax at risk. HMRC say that the nature of AML's business in 2015 is key to identifying the amount of tax unpaid or likely to be unpaid as a result of the non-compliance. We questioned whether this was the right approach, given that this could be an important issue on an appeal against assessments to tax in due course. In oral submissions both parties indicated that any such finding should not bind a future tribunal which may have different evidence before it. Mr Watkinson referred us to what Henderson LJ had said in *Tager CA*, namely that the tribunal was required to form a view as to the amount of tax unpaid or likely to be unpaid on the evidence before it, and that the onus was on HMRC to satisfy the tribunal of that amount.

24. The Upper Tribunal in *Mattu* was faced with the same issue. It held at [144] – [146] that it should not make findings as to the tax at risk on the balance of probabilities. Instead it should form a view as to the tax at risk based on the evidence before it. We do not consider that approach is clearly wrong; indeed we would have been minded to adopt the same approach notwithstanding the oral submissions of the parties before us. Both parties made further written submissions in the light of *Mattu*. Mr Watkinson invited us to take the same approach as the Upper Tribunal in *Mattu* and we do not understand Mr McDonnell to be suggesting any different approach. That is therefore the approach we adopt below.

25. It is convenient at this stage to set out the law in relation to jeopardy amendments. The term is not a statutory one, but in the context of company taxation it refers to amendments made pursuant to paragraph 30 Schedule 18 FA 1998, which at the material time provided as follows:

> 30(1) If after notice of enquiry has been given and while the enquiry is in progress in relation to a matter an officer of Revenue and Customs forms the opinion —
>
> > (a) that the amount stated in the company's self-assessment as the amount of tax payable is insufficient, and
> >
> > (b) that unless the assessment is immediately amended there is likely to be a loss of tax to the Crown,
>
> he may by notice to the company amend its self-assessment to make good the deficiency in so far as it relates to the matter.
>
> (3) An appeal may be brought against an amendment of a company's self-assessment by an officer of Revenue and Customs under this paragraph.
>
> (4) Notice of appeal must be given—
>
> > (a) in writing,
> >
> > (b) within 30 days after the amendment was notified to the company,
> >
> > (c) to the officer of the Board by whom the notice of amendment was given.
>
> (5) None of the steps mentioned in section 49A(2)(a) to (c) of the Taxes Management Act 1970 may be taken in relation to the appeal before the completion of the enquiry.

(6) For the purposes of this paragraph, the period during which an enquiry is in progress in relation to any matter is the whole of the period —

(a) beginning with the day on which notice of enquiry is given, and

(b) ending with the day on which a partial closure notice is issued in relation to the matter or, if no such notice is issued, a final closure notice is issued.

26. The purpose of a jeopardy amendment is to prevent a loss of tax to the Crown. An example is where HMRC are of the opinion that assets to satisfy any tax due on completion of the enquiry may be removed from the jurisdiction with a view to avoiding payment. A jeopardy amendment opens the door to collection of the tax shown as due prior to completion of the enquiry.

27. Notice of appeal against a jeopardy assessment may be notified to HMRC. However, none of the steps mentioned in s 49A(2)(a) to (c) of the Taxes Management Act 1970 ("TMA 1970") may be taken until the enquiry is completed. Those steps are the procedural steps of the appellant requiring HMRC to review the matter, HMRC offering a review of the matter and the appellant notifying the appeal to the Tribunal. The taxpayer may not notify an appeal against a jeopardy amendment to the Tribunal prior to the completion of the enquiry. That is consistent with the purpose of jeopardy amendments which are essentially to assist HMRC in collecting any tax due at the completion of the enquiry. In the words of Mr McDonnell, a jeopardy amendment serves to hold the position pending completion of the enquiry.

28. Where a jeopardy amendment is made, notifying an appeal against that amendment does not prevent HMRC from enforcing the tax due arising from the amendment. It is not clear to us that TMA 1970 makes provision to postpone the tax due pursuant to a jeopardy amendment prior to any appeal to the tribunal, although, as we set out below, there was an express agreement between the parties in this case to postpone the vast majority of the tax comprised in the jeopardy amendment.

29. On completion of the enquiry, HMRC can leave the jeopardy amendment in place, in which case the rights of review and appeal to the tribunal are engaged. At the same time, HMRC must issue a closure notice which could further amend the self-assessment or adjust the tax chargeable up or down depending on the outcome of the enquiry. The appeal against the jeopardy amendment could then proceed to the tribunal together with, if necessary, an appeal against the conclusions or amendment set out in the closure notice.

30. An issue also arises in relation to transfer pricing, which is governed by Part 4 Taxation (International and Other Provisions) Act 2010. We do not need to set out the detailed provisions, but simply note that where certain conditions are satisfied a taxpayer may be required for tax purposes to adjust the price at which a transaction with an associated enterprise is treated as taking place. Where the provisions are engaged, the transaction is treated as taking place at the price which it would have been if the transaction had been between two independent enterprises, in other words, at an arm's length price. There is an exemption from these provisions for small and medium sized enterprises. However, that exemption does not apply where the non-UK party to the transaction is resident in certain jurisdictions, including the Isle of Man.

BACKGROUND FACTS

31. AML is associated with a number of other companies which are incorporated and resident in the Isle of Man. Mr Lancaster is the director of AML and described these companies as "the AML companies". They do not form part of a corporate group in that there is no parent

company. However, we understand that shares in the companies including AML are held by the trustees of various related trusts. The Isle of Man companies share the same office in the Isle of Man and are as follows:

AML Limited
AML Management Limited
Tax Personnel Limited
Aston Property Ventures Limited
AM Personnel Limited
AML Healthcare Personnel Limited
AML Contracts Limited
SP Management Limited

32. We shall refer to the Isle of Man registered companies AML Limited and AML Contracts Limited as "AML Ltd" and "AML Contracts" respectively.

33. The AML companies were involved in providing services in connection with various tax avoidance structures to UK resident taxpayers. The structures involved what were described as a "contractor loan structure", an "annuity based structure" and "legacy EBT [employee benefit trust] type structures". Mr Lancaster told us that by 2015 the contractor loan structure was the most important. It involved individual taxpayers providing consultancy services to their clients through one of the AML companies. The services were marketed to specific industry sectors such as healthcare, IT and property through websites and internet forums, professional publications, at industry conferences and using direct mailshots. In the case of some contractor loan schemes the services were marketed to intermediaries such as accountants or tax advisers.

34. We understand from Mr Lancaster's evidence that the term "Knox Group" is a description used to describe the informal AML group of companies together with other companies such as Knox House Trust Limited. There was also reference to an entity called "Lancaster Knox" which formed part of the Knox Group, although the nature of the entity was not clear to us from the evidence.

35. Pathfinder Tax Services Ltd ("Pathfinder") provided advice and assistance to AML and the other AML companies. Mr John Horler is the managing director and is a former Inland Revenue Inspector of Taxes. It is part of Lancaster Knox and as such part of the Knox Group. Mr Horler acted on behalf of AML in connection with HMRC's enquiries and the Information Notice until shortly before the first hearing of this application in November 2019. At that stage RPC Solicitors took over representation of AML.

36. Mr Preston opened an enquiry into AML's return for the year ended 31 December 2014 by notice dated 25 July 2016. The notice included a schedule of information and documents which Mr Preston asked to be produced by 31 August 2016. The information requested included details of associated companies, an analysis of transactions with those associated companies and an explanation of the steps taken to ensure that the transactions took place at an arm's length price. The documents requested included all books and records used by AML in the preparation of its accounts together with documents linking those books and records to figures recorded in the accounts.

37. Mr Preston received a response dated 23 August 2016 from Mr Horler of Pathfinder. There was no copy of this in the evidence, but it is not disputed that Mr Horler promised to provide the information and documents by 30 September 2016. Mr Horler later told Mr Preston that "accounting system changes" were delaying matters. In the event, Mr Horler provided some but not all of the information requested in a letter dated 15 December 2016. He provided a list of "related parties" referred to in the accounts and a schedule of transactions. Item 4 of

Mr Horler's letter contained the first reference to transfer pricing in any of the correspondence and read as follows:

> 4. Transfer Pricing
>
> You will note that the company has ticked the SME Exemption on the return.

38. In March and April 2017 certain computerised records and hard copy documents were made available to Mr Preston but other records were not produced because of what Mr Horler described as "computer problems". Mr Preston wrote to Mr Horler on 19 May 2017 to say that based on the material seen he had identified a number of potentially significant tax issues for AML and the wider Knox organisation, including intercompany transactions. Mr Horler replied by letter dated 6 June 2017, saying:

> … As agreed the matters have been raised with the relevant management team.
>
> The work on the computations has commenced and this will be with you shortly, as will an appropriate payment on account.

39. The reference to work on computations and a payment on account was to an acknowledgment by Mr Horler that certain non-allowable items had not been added back in the corporation tax computation.

40. On 20 July 2017, Mr Preston wrote to AML with a copy to Mr Horler setting out in a schedule the documents and information he required, including some material which had previously been requested and some further material. He stated that he intended to seek approval from the Tribunal under Schedule 36 for an information notice. The information requested included at item 8 the following:

> In relation to the £2,500,000 'other income' reflected in the accounts:
>
> - an account of the services provided by the company to AML Ltd
> - an account of how and by whom the price for the services supplied was agreed or determined.

41. Mr Horler indicated that AML would provide the material and some further material was provided. It is relevant to note that in the course of this correspondence, Mr Horler stated in a letter dated 14 November 2017 as follows:

> Other Income - The Company provides services to AML Ltd by providing AML Ltd's services to individuals and entities based in the UK. The price for the services was agreed between the parties.
>
> All the staff employed by the company [ie AML] work for the company, they are all based in the London office, or at one of the regional offices. In general the roles are in one of four areas, office management, sales, client management, and the provision of tax technical advice to clients.

42. In the event, Mr Preston did not seek approval for an information notice.

43. Mr Preston wrote to Mr Horler on 4 December 2017. Item 8 of that letter requested information about services provided by AML by reference to descriptions of its activities and the activities of its employees which had been provided by Mr Horler in his correspondence:

> 8. AML Ltd Fees
>
> I would like more information about the services the company provides to the wider Knox Group. Your letters have mentioned services (excluding office management) in the following categories:

- ‘Sales’ (point 9, letter 14 November)

- ‘Marketing’ (point 8, letter 24 November 2017)

- ‘Business Development’ (point 8, letter 24 October 2017)

- ‘Client Management’ (point 9, letter 14 November)

- ‘Provision of tax advice’ (point 9, letter 14 November)

Before I can assess whether the fees charged have been priced appropriately I shall need further information about exactly what was involved…

44. AML’s tax return for the year ended 31 December 2015 had been submitted to HMRC on 28 December 2016. Mr Preston gave notice of an enquiry into that return on 5 December 2017. The notice included a schedule of documents which Mr Preston asked to be produced by 19 January 2018. The documents requested were all books and records used by AML in the preparation of its 2015 accounts together with documents linking those books and records to figures recorded in the accounts. The records were not produced and on 28 February 2018 Mr Preston issued the Information Notice requiring their production by 31 March 2018. The documents required were for the year ended 31 December 2015 and comprised the following:

1 All books and records maintained by the company used in the preparation of the accounts to include

- The sales and purchase day books
- Cash and bank books
- Payroll records
- Bank/building society statements for all accounts operated
- Supporting vouchers/invoices for all expenditure claimed in the accounts
- All sales invoices

2 All documents linking figures recorded in records at (1) above with the figures recorded in the accounts.

45. In early April 2018 Mr Preston became aware that there was a proposal to strike off AML from the register of companies. In light of that fact and on the basis that documents had not been produced and no payment on account had been made in relation to 2014, despite Mr Horler’s promise, Mr Preston decided that he needed to protect the position of HMRC through the issue of jeopardy amendments for both years under enquiry. In a letter to AML dated 20 April 2018, Mr Preston stated his opinion that the tax contained in AML’s self-assessments was insufficient and unless the assessments were immediately amended to make good deficiencies there was likely to be a loss of tax to the Crown. He said that the basis of his belief was that AML had failed to address his concerns in the following areas:

- the company’s failure to adjust for computational matters
- the omission of invoiced fees from the company accounts
- the diversion to offshore associates of fees for schemes marketed by this company
- the adequacy of the fees charged to overseas associated companies for work carried out on their behalf

46. The reference to a failure to adjust for computational matters was to the failure to add back non-allowable items as referred to above. The tax involved appears to have been some £40,000 of which some £10,000 related to 2015. The omission of invoiced fees related to the apparent omission from the 2014 accounts of a sales invoice for professional services to a scheme user in the sum of £4,000 plus VAT. The diversion of fees to offshore associates related

to three invoices to scheme users in the name of AML Limited despite the engagement letters being in the name of AML and AML's staff being involved in correspondence and in implementing the scheme arrangements. The evidence included only two of those invoices for professional services in the sums of £56,000 and £25,250, each plus VAT. The adequacy of the fees charged to overseas associated companies related to what Mr Preston considered to be a transfer pricing issue although he did not describe it as such in the correspondence.

47. By this stage Mr Preston had information from the Isle of Man tax authorities in the context of AM Personnel Limited that introducer commissions were paid to UK accountants and tax advisers at the rate of 4% of a scheme user's gross contract value.

48. We were not taken to the notices of the jeopardy amendments, but it appears that they were issued on or about 20 April 2018. Amendments were made for 2014 and 2015 with the tax due being £1,661,772 and £1,620,425 respectively. It is not clear precisely how these figures were calculated but it was common ground that it was on the same basis as Mr Preston calculated the tax at risk for the purposes of this application which we describe below.

49. Mr Horler lodged a notice of appeal against the jeopardy amendments with HMRC by letter dated 20 April 2018, although it appears the date ought to have been stated as 20 May 2018. The letter included an application to postpone the tax charged. AML's skeleton argument states that the appeal was notified to the tribunal, although it is not clear that was the case. As we have previously said, there is no scope to notify an appeal against a jeopardy amendment to the tribunal prior to the closure of the enquiry.

50. On 30 April 2018, HMRC sent a penalty notice to AML for failure to comply with the Information Notice. The penalty was a fixed penalty of £300 pursuant to paragraph 39 Schedule 36 and warned of the possibility of further daily penalties of up to £60 per day if the documents were not produced by 30 May 2018.

51. Mr Horler lodged a notice of appeal against the fixed penalty on 20 May 2018. He said that there was an open appeal against the Information Notice, although that was not the case. Indeed, as the documents required were statutory records there was no statutory right of appeal. He also alleged that the Information Notice was "ultra vires". On 25 July 2018, Mr Preston set out his reasons for rejecting the appeal against the penalty. AML was informed that it could either ask for a statutory review of the decision or notify its appeal to the tribunal.

52. The following daily penalties were subsequently notified to AML:

Date	**Period Covered**	**Rate/day**	**Amount**
13 Sept 2018	1 May 2018 – 12 Sept 2018	£30	£ 4,050
19 Dec 2018	13 Sept 2018 – 18 Dec 2018	£35	£ 3,360
30 Jan 2019	19 Dec 2018 – 29 Jan 2019	£40	£ 1,680

53. Mr Preston wrote to Mr Horler on 12 September 2018, in connection with the postponement application, agreeing to postpone all but some £10,000 of the tax charged in relation to 2015. We understand that the amount not postponed related to computational errors and that Mr Preston subsequently agreed to postpone all the tax payable under the jeopardy amendments. As we have said, the jurisdiction to postpone the tax prior to closure of the enquiry is not clear, but in any event there was an express agreement to postpone the tax.

54. On 3 March 2019, Mr Lancaster lodged an application with Companies House to strike off AML from the register of companies. His evidence was that this was submitted on the basis

that once the HMRC enquiries were resolved the company would be struck off with no further action needed. We consider the circumstances of the application in more detail below.

55. The present application by HMRC for an additional penalty was made to the Upper Tribunal on 26 March 2019. At the date of the application none of the records required by the Information Notice had been provided to HMRC.

56. The Upper Tribunal (Judge Richards) gave directions to progress the application on 5 April 2019. AML did not comply with those directions, which eventually led to a direction dated 9 September 2019 debarring AML from making any case to the effect that the requirements of paragraph 50(1)(a) – (d) were not satisfied. The application was first listed for substantive hearing on 18 November 2019. Shortly before the hearing, RPC were instructed in place of Mr Horler. At the hearing, AML was represented by counsel and the substantive hearing was adjourned. Directions were made giving AML an opportunity to make an application to set aside the debarring direction and lift the procedural bar. AML was also directed to comply with the Information Notice by 16 December 2019.

57. On 11 December 2019, Mr Horler provided a box containing 5 ring binders of documents purportedly in compliance with the Information Notice. A covering letter dated 6 December 2019 described the contents of the box which included bank statements, purchase records and a list of sales invoices. It stated that day books and cash and bank books were not maintained, and that payroll records and sales invoices were no longer available. In relation to sales invoices the letter said as follows:

> Sales invoices - these were prepared by the sales staff, and details were sent to accounts. If copies were kept by the sales staff these are no longer available as all such records are routinely deleted for data protection reasons once the individual staff member leaves the business. We have enclosed a listing of all sales and recharges made in the year.

58. AML applied to lift the bar on it making any case based on paragraph 50(1)(c). In support of that application it relied on a witness statement of Mr Horler dated 2 June 2020. Mr Horler did not give evidence before us, but the contents of his witness statement are to some extent relevant to the issues discussed below. We were told by Mr Lancaster that Mr Horler was suffering from ill-health and was no longer involved in the matter.

FINDINGS OF FACT

59. It is common ground that we must first consider, by reference to the material available to Mr Preston at the time this application was made, whether Mr Preston had reason to believe that paragraph 50(1)(c) was satisfied. That was the approach taken in *Mattu* and we agree that it is correct. We must therefore identify what was available to Mr Preston at the time he made the present application, and the basis on which he says he had reason to believe at that time that as a result of the failure to comply with the Information Notice, the amount of tax that AML had paid, or was likely to pay, was significantly less than it would otherwise have been.

Findings as to material available at 26 March 2019

60. Much of the material available to Mr Preston in March 2019 was the subject of oral evidence before us from Mr Lancaster. At that stage, of course, Mr Preston did not have the benefit of that oral evidence.

61. Mr Preston was aware of the background facts referred to above up to 26 March 2019, and the content of his correspondence with Mr Horler and AML. He had identified various concerns in relation to the 2014 accounts, but he fairly acknowledged that he did not know at that stage whether all those concerns might arise in relation to 2015. He did consider that his concerns over the level of fees charged by AML to "offshore associates" were also relevant to

2015 because he had not been made aware that any different approach had been adopted for 2015.

62. The 2014 accounts identified that AML had related party transactions with the Isle of Man companies. The 2015 accounts as made available to Mr Preston by this date made no reference to related party transactions. However, there was no reason to consider that the business activities of AML had changed from 2014.

63. Mr Preston considered that AML had not provided any real detail about the activities of AML as requested in his letter to Mr Horler dated 4 December 2017. However, he believed that AML's activities included assisting in the design and implementation of tax avoidance schemes marketed by the wider organisation. In forming that belief, he relied upon the following material:

(1) On 15 December 2017 Mr Preston had sent Mr Horler copies of three invoices in connection with an "Annuity Scheme" which were issued by AML Ltd. He had asked for an explanation as to why they had not been issued by AML when the scheme users had indicated that the advice received had come from AML. There had been no response to that query.

(2) Email correspondence provided by users of two schemes indicated to Mr Preston that employees of AML in 2014 were involved in assisting those users to carry out various steps in the schemes. Email correspondence in relation to one scheme suggested, at least on its face, that employees of AML were involved in the ongoing implementation by way of invoicing in connection with the scheme. Email correspondence in relation to another scheme from an employee of AML to a scheme user specifically referred to "recent planning you have undertaken with AML Tax UK Limited".

(3) A large number of fee notes addressed to AML for advice and opinions from various tax counsel in the 2014 business records appeared to evidence the activity of AML described by Mr Horler as "provision of tax advice". The invoices appeared to be for advice in relation to tax avoidance schemes with which the wider AML group was concerned. For example, one invoice dated 21 July 2015 from counsel referred to fees in connection with a "dual employment arrangement". This appears at first sight to relate to a version of the contractor loan scheme referred to below.

(4) The 2015 accounts of AML showed "turnover" of £654,973 and "other operating income" of £2,109,000. Mr Preston believed that the turnover was fees charged directly to third parties. The other income was described in the 2014 accounting records as "recharges" which occurred on a monthly basis. The term suggested to Mr Preston that costs incurred by AML were being passed on to associated companies at cost with no profit element.

64. Mr Preston had been provided with little information as to the nature and scope of AML's activities or how fees were agreed, despite his requests in the 2014 enquiry. He was aware that independent accountants and tax advisers were paid a 4% commission based on the gross contract value to scheme users and considered that if AML was also responsible for the design and implementation of schemes then, on an arm's length basis, it would be entitled to significantly higher fees than a third party introducer, including a significant profit element.

65. Mr Preston had also obtained copies of the 2013 accounts of AML's associated companies from the Isle of Man tax authorities. Those accounts showed that the aggregate turnover of the associated companies was some £220m, with net profits of £20m. Mr Preston acknowledged that he did not know the extent to which AML contributed to the sales, marketing, design or implementation of the schemes, or whether the 2013 figures would be

representative of 2015. He was aware that the scheme users were all UK taxpayers and was not aware of any other associated UK company that might have contributed in those areas. In the circumstances he calculated the potential income of AML as 4% of £220m, that is £8.8m. The other operating income shown in the accounts for 2015 was some £2.1m, giving a difference of £6.7m and a potential additional tax liability or "tax at risk" of 20% of that amount, namely £1.34m.

66. In making that estimate, Mr Preston assumed that AML was working on the schemes on behalf of all the Isle of Man companies and in relation to their whole turnover. Further, the 4% was applied despite there being a third party introducer also charging a 4% commission.

67. We consider below whether, on the basis of this material, it was reasonable for Mr Preston to believe that as a result of AML's failure to comply with the Information Notice, the amount of tax that AML had paid, or was likely to pay, was significantly less than it would otherwise have been.

Further findings based on the evidence now available

68. It is for HMRC to satisfy us that we should impose an additional penalty on AML for non-compliance with the Information Notice. In particular they must satisfy us as to the factual basis on which we should impose that penalty. In this section we make our relevant findings of primary fact under various headings, all by reference to the balance of probabilities save where otherwise indicated. Our findings are made having considered all the witness evidence and documentary evidence before us. We consider what inferences we should draw from these primary facts in our discussion of the issues.

69. As far as Mr Preston is concerned, we are satisfied that he was a credible and reliable witness doing his best to assist us in providing relevant evidence.

70. In contrast, we have real concerns as to the reliability of Mr Lancaster's evidence. His witness statements and oral evidence contained significant inconsistencies, either acknowledged by him or in light of the documentary evidence. His evidence did not contain any clear and straightforward description of AML's business and its activities. For example, even now we have little evidence as to who AML's employees were during 2015 and what their roles were in the business. There is a similar lack of evidence in relation to the Isle of Man companies. It is notable how much relevant evidence was adduced by Mr Lancaster in cross-examination when it ought to have appeared in his witness statements. Overall, we were left with the impression that Mr Lancaster was evasive, providing as little evidence as possible and that he did not wish to volunteer anything more than he considered necessary. As a result, it seems to us that the evidence Mr Lancaster gave in his witness statements and orally was confused, lacking in candour, in some respects incorrect and littered with inconsistencies. We describe such instances in detail below.

71. We make no observation as to why Mr Lancaster's evidence might have been so unreliable. It may be because of the passage of time, a lack of involvement in detail or for some other reason. We hasten to add that HMRC made no allegation of dishonesty against Mr Lancaster and we make no findings in this respect. Further, we do not discount the entirety of Mr Lancaster's evidence but where it is not supported by the documentary evidence we treat it with considerable caution.

AML's business activities

72. This is the principal factual issue with which we are concerned, and we make the following primary findings relevant to that issue. It is HMRC's case that AML was concerned in the design, implementation and marketing of various tax avoidance schemes on behalf of the AML group companies. AML disputes that case.

73. Originally AML's case had been that it was involved only in the marketing of such schemes on behalf of the AML group companies. By the end of the hearing Mr Lancaster accepted that it was involved in the design and implementation of what is known as the "annuity planning arrangement" for which it received income of £654,973 in 2015; that it also received a small income from what were called "legacy EBT structures", and also a small income from "general tax advice". Mr Lancaster said that the "other operating income" in the 2015 accounts represented a recharge to AML group companies of AML's costs in providing marketing services, principally to AML Contracts in relation to a "contractor loan scheme".

74. We were not provided with a description of the annuity planning arrangement or the legacy EBT structures, but nothing appears to turn on that. Mr Lancaster did describe in his evidence two particular types of tax avoidance schemes offered by AML group companies to UK taxpayers and we take those descriptions at face value:

> (1) The contractor loan scheme was used by employed and self-employed contractors working through agencies for an end client. In broad terms, the contractor would contract with an AML company which would in turn contract with the agency to supply the contractor's services. The end client paid the agency, the agency paid the AML company and the AML company would pay a basic salary or fee to the contractor with a further sum being paid to an EBT. The EBT would then make a loan to the contractor.
>
> (2) Split contract arrangements were aimed at contractors operating through their own companies. AML Contacts would contract with those companies for a supply of the services of the contractors and would in turn supply those services to an agency or end-client. AML Contracts would pay a small retainer to the contractor with a further sum being paid to an EBT. Again, the EBT would then make a loan to the contractor. It was a type of contractor loan scheme.

75. Mr Preston's enquiry had sought to identify the nature and scope of AML's business and the nature of the other operating income of £2.5m in AML's 2014 accounts. It was clear that the 2015 enquiry would involve the same issues, where the other operating income was some £2.1m.

76. We were told by Mr Lancaster that recharge invoices were raised periodically throughout the year, with an adjustment at the year end. The intention, he said, was to ensure that AML had fully recovered all its overheads and costs incurred, together with an agreed profit mark-up.

77. The recharge invoices for 2014 were issued by AML to AML Ltd and they all simply refer to "consultancy advice". Mr Lancaster acknowledged that Mr Horler's description of the services in correspondence and that contained in the invoices were not helpful descriptions.

78. Mr Horler gave an explanation of AML's recharge income of £2.1m in his witness statement served on behalf of AML when it was seeking to lift the procedural bar. He had said that the bulk of that figure represented introducers' fees which AML paid to third party introducers. It is now apparent that explanation was incorrect. Mr Lancaster said that he could not explain why he had not picked up the error when he saw Mr Horler's witness statement at the time of the application to lift the bar.

79. Mr Lancaster gave an explanation of the recharge figure by reference to the arrangements in 2015 in his first witness statement dated 23 July 2020 at paragraph 9 as follows:

> 9. Where AML Contracts Limited paid commission to intermediaries, in previous years the arrangement had been that the Respondent paid the third-party intermediaries (the accountants and tax consultancies I have referred to, who were all UK-based), and then the Respondent re-charged the same amounts to AML Contracts Limited. Prior to the start of 2015 this arrangement

changed and throughout 2015, AML Contracts Limited was paying the intermediaries' commission direct to the third-party introducers. AML Contracts Limited also paid an amount to the Respondent, by reference to the business derived from the third-party introducers who had in turn been introduced by the Respondent. That amount - which could be termed "commission on commission" - was £2,109,000 in the accounting period to 31 December 2015. It was intended to be a fair reward for the Respondent's work in liaising with the third party intermediaries, and it was also intended to ensure that the Respondent was able to cover its overheads (primarily, staff costs and rent), and accordingly the amount of it approximately matched the Respondent's administrative expenses in the accounting period. This amount was paid through periodic invoicing (approximately monthly) in round sums which were an estimate of the amount due. In addition to this amount - which comprised the bulk of the Respondent's income for the year – the Respondent to a more limited extent also had its own commission income generated from clients introduced directly by the Respondent to AML Contracts Limited, see further paragraph 13 below, and in all cases calculated on the same basis as for any third party intermediary, this generated gross profit of approximately £400k.

80. Mr Lancaster's evidence as to AML's activities in 2015 as we understand it from his first witness statement may be summarised as follows:

(1) By 2015, the contractor loan scheme was the most important product of the AML group. The split contract arrangement, although not mentioned by Mr Lancaster by name at this stage, was operated and administered by AML Contracts.

(2) AML Contracts dealt with directors of UK based owner-managed businesses. Other AML companies which operated the contractor loan schemes used direct marketing to clients in specific industry sectors and did not use intermediaries.

(3) AML Contracts did not use direct marketing but used the services of AML to deal with UK based intermediaries such as accountants and tax consultancies who would service such owner-managed businesses. AML Contracts paid a commission to the intermediaries.

(4) The main activity of AML was making and maintaining connections between AML Contracts and the intermediaries.

(5) Prior to 2015, AML would pay that commission to the intermediaries and would recharge the amounts paid to AML Contracts.

(6) In 2015, this arrangement changed, and AML Contracts paid commission direct to intermediaries.

(7) If AML introduced a third party intermediary to AML Contracts, then AML would earn a commission. The total commission earned in this way by AML in 2015 was £2.1m, which Mr Lancaster described as "commission on commission".

(8) The sum of £2.1m was intended to be a fair reward for AML's work in liaising with intermediaries and to ensure that AML covered its overheads, being mainly staff costs and rent.

(9) In addition to this amount, AML had three additional income streams:

(a) AML staff also introduced clients direct to AML Contracts rather than through intermediaries. AML was paid commission in relation to such introductions equivalent to the commission payable to third party intermediaries, generating a gross profit of around £400,000. We note that the figure of £400,000 is consistent with and appeared to be derived from the 2015 accounts which show turnover of £654,973 and cost of sales of £225,654.

(b) AML would be used to pay suppliers in the UK, including suppliers of legal services, with the cost being recharged to the appropriate AML group company. This was said to be for purposes of administrative and banking convenience. For the same reasons, AML would also be used as a "UK based point of contact for invoicing purposes".

(c) AML staff were also used to support other AML companies in direct marketing contractor loan schemes to specific industry sectors at presentations throughout the UK. AML did not specifically charge for this as it already received substantial "commission on commission".

(10) The first and second of these additional income streams gave rise to the turnover of £654,973 recorded in AML's 2015 accounts.

81. At paragraph 13 of his first witness statement, Mr Lancaster said as follows (with emphasis added):

> 13. … the role of the Respondent was to introduce the clients to AML Contracts Limited … The Respondent was not itself operating or administering the contractor loans structure *or other structure*, and the Respondent did not have the staff, premises or systems to do that.

82. In his second witness statement, dated 10 September 2021, served just prior to the hearing, Mr Lancaster acknowledged for the first time in his evidence that AML itself "offered" the annuity planning arrangement and earned commission for this which was included in its 2015 accounts as turnover. Mr Lancaster corrected his previous witness statement and said that AML provided clients with documentation and related tax advice for the annuity planning arrangement, sometimes on a bespoke basis. It also earned a small amount of commission income from legacy EBT structures also known as "pre-funded EBT arrangements". In oral evidence he said that AML's income from such arrangements was some £13,000, although there was no clear documentary evidence to support that figure. His evidence was that these activities, rather than the additional income streams referred to in his first witness statement, gave rise to the turnover in the 2015 accounts of £654,973.

83. In his second witness statement Mr Lancaster also corrected his description of what comprised the £2.1m "other operating income". He said this comprised AML's recovery of its costs as follows:

(1) Commissions of £203,639 paid to employees who directly introduced clients to AML Contracts without an intermediary. This sum was recharged to AML Contracts. The previous reference to a gross profit on this activity of around £400,000 was incorrect.

(2) The balance represented AML's other costs recharged to AML Contracts together with a moderate profit element.

84. Mr Lancaster also corrected his previous witness statement where he had said that the recharge of £2.1m was charged to AML Contracts. He now said it was recharged to AML Ltd, which in turn passed on the recharge to AML Contracts and the other AML companies as appropriate.

85. In his oral evidence Mr Lancaster said that AML also had a very minor amount of income from what he described as "general tax advice", although there was no documentary evidence relating to this.

86. Mr Lancaster's explanation for these errors was that whilst he was a director of AML, he was not the bookkeeper and he had not been familiar with AML's bookkeeping. He said that he had not previously described AML's dealings with the annuity planning arrangement because it did not give rise to any transfer pricing issue. That was a significant omission in the

context of HMRC's case that AML was involved in the design and implementation of tax avoidance schemes.

87. In his oral evidence, Mr Lancaster suggested that when he referred at paragraph 13 of his first witness statement to AML not operating any "other structure" he was referring to any other structure similar to the contractor loan scheme, which required considerable resources to operate. Even if that is how Mr Lancaster intended his evidence to be understood, his evidence was significantly misleading in the context of HMRC's case.

88. The treatment of income from the annuity planning arrangement was clearly an issue in March 2019 when this application was made. Mr Preston had had no response from AML to explain why invoices to clients had been issued in the name of AML Ltd when it appeared that AML had implemented the scheme.

89. Mr Lancaster accepted in his oral evidence that AML Ltd had invoiced users of the annuity planning arrangement but maintained that this income was included in the accounts of AML as turnover. He said he had first realised the mistake in his first witness statement when he saw the nominal ledger and trial balance in about August 2021. Enquiries with the Isle of Man accounting function led him to realise that there had been a change in billing systems in 2014.

90. We are satisfied from Mr Lancaster's second witness statement and his oral evidence that Mr Preston had every reason to be concerned about this issue. AML was advising clients and implementing the annuity planning arrangement on behalf of clients and was entitled to the fee income from clients. It is said that the income from this activity has been accounted for in AML's 2015 accounts. However, in the absence of the records neither HMRC nor we can be satisfied that it has been fully accounted for in those accounts. The evidence surrounding this issue demonstrates that AML's activities were not simply marketing and administration but also involved advising clients about specific schemes and implementing those schemes on behalf of clients.

91. It is not only Mr Lancaster's evidence that gives cause for concern. Finance Act 2004 makes provision for the disclosure of information by taxpayers and others in relation to arrangements or proposed arrangements which enable or might be expected to enable a person to obtain a tax advantage. This regime is known as "DOTAS", or the disclosure of tax avoidance schemes. Section 314A Finance Act 2004 makes provision for HMRC to apply to the FTT for an order that an arrangement or proposed arrangement is notifiable for these purposes.

92. In or about August 2018 HMRC applied for an order under s 314A in connection with the annuity planning arrangement. AML formally responded to the application by way of a statement of case dated 6 August 2019. In this document AML stated as follows at paragraph 6 and by way of footnote:

> 6. At times from about 2011, AML provided information to potential users and intermediaries about the Arrangements, together with a company which was incorporated in the Isle of Man, called AML Limited ("AML IoM"). It also assisted with the implementation of the Arrangements by users.
>
> Fn 1: AML IoM provided administrative services and liaised with clients. For simplicity this statement of case refers to activities being carried on by AML, rather than AML and AML IoM, throughout. It is accepted that AML was a promoter in relation to the Arrangements.

93. In contrast, when AML applied to lift the procedural bar, its application dated 9 April 2020 said as follows at paragraph 27:

27. HMRC's Statement of Case (paragraph 6) characterises the Respondent as "involved in the design, marketing and operation of schemes marketed to UK taxpayers as tax avoidance schemes" and states that HMRC believe that the Respondent was a "promoter of three Tax Avoidance schemes". Both allegations are baseless and HMRC have provided no evidence to support these allegations. The true position is that the schemes were designed and operated and promoted by the Isle of Man based companies in the AML Group. The Respondent itself did not have any substantial role in the design of the schemes.

94. It is now clear that:

(1) In August 2019 AML acknowledged that it was promoting and implementing the annuity planning arrangements.

(2) In April 2020 when AML applied to lift the procedural bar, it contended that the allegation that it was involved in the design and operation of tax avoidance schemes and acted as a promoter was "baseless".

(3) In July 2020 in his first witness statement, Mr Lancaster's evidence was that AML was not itself operating or administering the contractor loans structure or other structure.

(4) In September 2021 in his second witness statement, Mr Lancaster admitted that AML was itself operating the annuity planning arrangements.

95. We do not accept that when Mr Lancaster referred to "other structures" in his first witness statement he was referring to any other structure similar to the contractor loan scheme. Overall, the evidence in relation to these critical aspects of AML's activities has been inconsistent and seriously misleading.

96. We must also deal with other aspects of the evidence as to the nature and extent of AML's activities. This includes those matters which Mr Preston had identified and on which he reached certain views without the benefit of the evidence which was before us.

97. Mr Lancaster maintained that AML only provided sales and marketing services to AML Contracts and it did not provide those services to the other Isle of Man companies. That was because AML Contracts dealt with the split contract arrangements which were aimed at directors of "owner-managed businesses" who would have their own accountants or tax advisers. It therefore had a different approach to marketing, which used AML.

98. Mr Lancaster did not address the email correspondence with scheme users in his witness statements. He did address them in his oral evidence. He accepted that the AML individuals involved in that correspondence were AML employees, or at least AML employees at some stage. He said that one was a sales assistant whose job included liaising with the introducers and chasing up to establish whether the ultimate client wanted to make use of the scheme that month. The employees received commission based on the extent to which clients actually used the scheme.

99. In relation to the reference in correspondence to a client having used AML's tax planning, Mr Lancaster was asked what planning it was but was unable to say. He considered that the employee was simply acting as a postbox, passing on "know your client" information. But he had no explanation as to why it was said that the client had used AML tax planning. It did not appear to us that Mr Lancaster had made any effort to obtain explanations from anyone else in the AML group in relation to these matters.

100. One of the matters relied on by Mr Preston was the fact that AML was invoiced for the provision of legal services. In addition, the documents provided by AML in December 2019 included:

(1) Expenses in connection with the setting up of entities in Malta.

(2) Invoices addressed to AML 250 Limited which were paid by AML.

(3) Employee expense claims indicating that AML had 15 individuals working on its behalf.

101. Mr Lancaster maintained in his witness statement that AML was the recipient of invoices for legal services simply because it was administratively convenient. He gave the impression that AML was acting as some sort of "paying agent". Mr Lancaster did not address the further examples identified by Mr Preston from the 2019 disclosure. In his oral evidence he went considerably further in his explanation of the circumstances in which invoices from counsel were addressed to AML.

102. The fees for legal expenses paid by AML included advice from counsel in connection with "dual employment" which Mr Lancaster confirmed was a split contract arrangement. For the first time in oral evidence, he said that he instructed counsel on behalf of the AML group and when he moved to the UK from the Isle of Man he continued to do so through AML. He would put the request from AML group into more technical legal language, instruct counsel and then relay the advice to AML group, possibly with his own summary of the advice. AML would recover costs and profit for this work through the recharge. The services supplied by AML were not separately recharged. There was simply an overall recharge which gave AML a net profit in 2015 of £60,000.

103. We consider that Mr Lancaster's failure to give a full explanation of these matters in his first witness statement demonstrates a lack of candour on his part. We also note the absence of any documentation to support the circumstances in which AML was allegedly obtaining legal advice.

104. In relation to the invoices for Maltese legal services, Mr Lancaster said that he incurred the expenses as a director of Knox House Trust Ltd. Again, this was AML incurring the expenses on behalf of Knox House Trust Ltd which were then recharged to AML Ltd.

105. In relation to invoices addressed to AML 250 Ltd, Mr Lancaster said that this was a company set up to establish a network of accountants who would become introducers and sell AML group schemes to their clients. All of the costs of AML 250 Ltd were paid by AML which would be the principal beneficiary of the network because its sales staff would be selling AML Contracts schemes to their clients. It does not seem to us that AML would be the principal beneficiary of AML 250 Ltd if its principal business activity was marketing schemes to intermediaries. Rather, the principal beneficiary would be whoever was designing and promoting the schemes.

106. Mr Watkinson suggested that if AML had 15 employees then this indicated AML was doing more than marketing the split contract arrangements for AML Contracts. It is difficult for us to draw such an inference without any detailed, reliable evidence as to the roles and responsibilities of the 15 employees. AML has failed to produce such evidence.

107. In relation to AML's evidence generally, Mr Watkinson relied on the absence of any documentary evidence produced by AML to support its case as to the nature of its relationship with the Isle of Man companies. Mr Lancaster acknowledged in his evidence that there may have been a written agreement relating to the management services being provided by AML to the Isle of Man companies. He said he did not have a copy of such a document and did not recall ever seeing such a document. He did not say whether he had asked anyone involved with the Isle of Man companies whether such documents existed.

108. Mr Watkinson invited us to draw an inference that the failure to produce this documentation was because the documents would not support AML's case. He referred us to

what was said by Arden LJ (as she then was) in *Wetton v Ahmed* [2011] EWCA Civ 610 at [14]:

> In my judgment, contemporaneous written documentation is of the very greatest importance when assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can be checked against it. It can also be significant if the written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences by its absence.

109. We have concluded that we cannot go so far as to draw the inference that such documents do exist and that they would not support AML's case. However, Mr Lancaster's evidence generally as to the activities of AML and the way in which it has been adduced leaves us in considerable difficulty in making findings of fact as to the true nature and scope of AML's activities in the relevant period. However, we do take the view that there is a real possibility that AML's activities extended well beyond the design and implementation of the annuity planning arrangement and small amounts of work in relation to legacy EBT schemes and general tax advice. We consider the significance of this in our discussion below.

AML's compliance with the Information Notice

110. The Information Notice required compliance by 31 March 2018. We have set out above the circumstances in which AML failed to provide any of the documents until 16 December 2019. However, not all the documents required were provided, indeed a nominal ledger and trial balance were not provided until August 2021. An issue remains as to whether AML still has documents in its possession or control which have not been provided.

111. We have considerable doubts concerning the reliability of the evidence as to why certain documents and information required by the Information Notice have still not been provided. For example, we have recorded above what Mr Horler said in his letter dated 6 December 2019 about sales invoices.

112. We struggle to see why sales invoices should be routinely destroyed for data protection purposes and Mr Lancaster said he did not understand why Mr Horler might have been told that the sales invoices had been destroyed for that reason. Mr Lancaster understood that there had been a "computer failure" but he did not know the reason for that. Whatever the computer issue was, Mr Lancaster said that it only affected the 2015 records. Again, it was not clear why that should be the case.

113. Mr Preston identified in his witness statements and in his oral evidence what he considered to be discrepancies in the documents provided by AML in December 2019. In particular, he considered that:

(a) The sales listing provided as an alternative to the sales invoices appeared to be incomplete.

(b) The sales listing did not appear to reconcile to AML's accounts.

(c) There was a failure to provide SAGE records or to adequately explain the absence of such records where AML was known to use SAGE software.

(d) The purchase invoices provided were incomplete.

114. The sales listing appeared to be incomplete in that there were references to sales invoice numbers in the range 306 to 414, suggesting that there should have been 109 invoices, but only 67 invoices were identified on the sales listing. We are satisfied that the explanation for some of these missing invoices is that some of the references in the sales listing are to credits in

respect of invoices issued prior to 1 January 2015. However, the earliest numbered invoice which was not a credit note is 324, which still suggests that there should have been 91 invoices issued in the period which remain unaccounted for by AML.

115. AML has not attempted to reconcile the sales listing to AML's turnover in its 2015 accounts. In particular, Mr Preston was unable to identify from the sales listing the amount of £2,109,000 shown in the accounts as other operating income or the amount of £654,973 shown as turnover.

116. There were also gaps in the numbering system used by AML for purchase invoices. The nominal ledger provided in August 2021 at least referred to some of these missing purchase invoice references, and shows some of them as involving some form of credit. They were generally for small amounts. Overall, we could not be satisfied from the evidence that there was an explanation for all the purchase invoices identified by Mr Preston as being missing from the documents provided in December 2017.

117. It is clear that not all documents required by the Information Notice were provided by AML. There was belated partial compliance in December 2019. But even then, not all documents in the possession or control of AML were provided. In particular, a nominal ledger and trial balance were subsequently provided in August 2021.

118. Mr Lancaster effectively maintained that AML had provided everything that it could, given difficulties with its accounting function in the Isle of Man. He said that he had approached AML's accounting function which was operated by AML Ltd. He said that he had probably phoned or possibly emailed them. He had "pushed them for two years" but they had been unable to provide any of the relevant documents. All the relevant people in the accounting function had changed since 2015 and AML had ceased trading which also added to the difficulty because the staff were "less responsive".

119. Mr Lancaster told us that sales invoices to AML's third party clients would have been produced by its sales staff. Invoices in connection with recharges to Isle of Man companies would have been produced by the accounting function in the Isle of Man. He did not know where any of them were.

120. Mr Lancaster said that in August 2021 he was not sure whether there were any outstanding documents to be provided, so he asked RPC to write to HMRC. When he learnt that there were outstanding documents he contacted the Isle of Man accounting function and they responded with the nominal ledger and trial balance. The nominal ledger is not an original SAGE document but is an Excel spreadsheet.

121. In an email dated 20 August 2021, RPC wrote to HMRC enclosing the further documents, stating:

> Our client had understood that this material was provided previously by Pathfinder and, not having received any correspondence from HMRC since 2019, did not understand there to be anything outstanding such that HMRC could not complete its enquiries.

122. We cannot reconcile that statement to Mr Lancaster's evidence that he had been chasing the accounting function for documents for two years. Further, we have heard no explanation as to exactly when and in what circumstances Mr Lancaster obtained these documents. All Mr Lancaster could say was that at some point the accounting function provided it to him and as soon as he obtained it, he provided it to HMRC. We did not understand that evidence because we know Mr Lancaster provided further documents to HMRC in August 2021 but he seemed confused as to when he received it from the accounting function. Later he said that he had emailed the Isle of Man accounting function and asked that "somebody check again". When

asked why none of his emails to the Isle of Man accounting function were in the evidence he said that he did not understand they would be required.

123. RPC's email also stated that Mr Lancaster did not understand there to be anything outstanding to HMRC. That could not be right. Mr Lancaster accepted that he read Mr Preston's second witness statement when it was served in February 2020. In that witness statement Mr Preston sets out in detail the documents required by the Information Notice but which had not been provided by AML. Mr Lancaster suggested that the email from RPC was not accurate, but we infer it was written on instructions from Mr Lancaster.

124. We consider that there is an evidential burden on AML to establish that it has complied with the Information Notice. It should be able to demonstrate why basic statutory records have not been produced. We cannot be satisfied even now that AML has complied with the Information Notice. Mr Lancaster's evidence is not reliable and we cannot accept his explanations at face value. There is no documentary evidence whatsoever of any requests by Mr Lancaster to anyone in the Isle of Man in connection with the documents required by the Information Notice. The absence of such evidence is remarkable in a case where the failure to produce can have such serious implications, both for HMRC's ability to properly conduct their enquiry and for AML in terms of potential penalties for breach of the Information Notice. Those implications would have been known to AML given the technical qualifications and expertise of Mr Lancaster and Mr Horler.

Mr Lancaster's knowledge of the Information Notice and the penalty proceedings

125. In oral evidence, Mr Lancaster accepted that he was aware in March or April 2018 that the Information Notice had been issued to AML. Mr Lancaster's two witness statements are dated 23 July 2020 and 10 September 2021. He acknowledged that when he made those witness statements he had access to all the documents that had been served in relation to this application and the correspondence and emails involving Mr Horler.

126. In his first witness statement Mr Lancaster accepted that he was broadly informed of progress with the enquiries and the Information Notice by Mr Horler. He said that he assumed, mistakenly, that by March 2019 Mr Horler had "responded appropriately" to the Information Notice. HMRC had agreed to postpone the jeopardy amendments by then and he had assumed that HMRC had sufficient information and nothing was outstanding. He says that he only became aware action was still required a few days before the present application was first listed for hearing on 18 November 2019.

127. On Friday 15 November 2019, Mr Horler emailed Mr Lancaster as follows (emphasis added):

> You may recall that you mentioned some time ago a penalty hearing at the Tribunal. That hearing is actually on Monday 18 November. *I have simply been ignoring the issue on the grounds that the company would go into liquidation and it would become someone else's problem.* That is clearly not going to be the case.

128. Despite what Mr Horler said in the first sentence of this email, Mr Lancaster said that he did not know about the penalty hearing prior to receiving the email. He said that he did not challenge Mr Horler about this because he "wouldn't do that to a colleague". He said he did not receive advice from Mr Horler to ignore the issue on the basis that AML would go into liquidation and would not have agreed with that course of action.

129. We find it surprising that Mr Lancaster would not have challenged Mr Horler in some way as to his knowledge of the penalty proceedings, whether by email response or in a conversation. Unfortunately, we have not heard any evidence from Mr Horler about this.

130. In an email dated 17 November 2019, the day before the hearing, RPC asked for some information from Mr Lancaster as follows:

> It is important for our submissions tomorrow that we understand whether AML knew of the existence of the information notice and/or if it was left entirely to John (as your agent) to deal with. Counsel has also asked if you can clarify whether the email you received on Friday was the first time you were aware of the penalty hearing.

131. By way of response, Mr Lancaster said:

> There was correspondence 're the jeopardy assessments (which you have seen) and I was aware of that. But the issue of the information notice was not communicated from John so we were able to deal with it. I assumed any HMRC info requests were dealt with when the accounts were submitted - so was not aware other info was o/s.

132. We were not told what if anything the Upper Tribunal was told at the penalty hearing as to Mr Lancaster's knowledge of the Information Notice and the penalty proceedings. Mr Lancaster suggested in his evidence that what he meant in his response was that the fact of the tribunal penalty hearing had not been communicated to him and he had not answered RPC's question about knowledge of the Information Notice. We cannot read the exchange in that way. It is clear that Mr Lancaster was telling RPC, or at least leaving them to assume, that he had not been aware of the existence of the Information Notice or by implication the penalty hearing.

133. We do know that Mr Lancaster now accepts that he was aware of the Information Notice in March or April 2018. His email response, that he was not aware information was outstanding after the accounts had been submitted, is inconsistent with HMRC issuing an information notice. Further, in a witness statement of Mr Horler, served for the purposes of lifting the procedural bar, Mr Horler stated:

> By [February 2018], the Respondent had ceased trading and no longer had administrative staff or operational electronic accounting systems such as Sage, and therefore full compliance with the Schedule 36 notice was difficult in purely practical terms. At that time, right or wrongly, I advised the Respondent that it was not worthwhile to attempt partial compliance with the notice if it would not be complete compliance.

134. Clearly, that was wrong advice from Mr Horler to Mr Lancaster. Thereafter, Mr Lancaster told us that he mistakenly assumed that everything was being dealt with by Mr Horler. We are satisfied that was a wholly inadequate response by Mr Lancaster. It was not appropriate for Mr Lancaster as a director to delegate AML's dealings in relation to the Information Notice entirely to Mr Horler with no oversight whatsoever.

135. Mr Lancaster's oral evidence as to his knowledge of the penalties notified to AML was inconsistent and unreliable. In relation to the initial penalty of £300 notified on 30 April 2018 he said that he did not believe he was aware of it but could not confirm that. He did not recall the daily penalty notified on 13 September 2018. However, he was clear in his evidence that he was not aware of the daily penalties notified on 19 December 2018 and 30 January 2019. Mr Lancaster then backtracked in his evidence and said he was not aware of any of the penalties at the time they were issued. Later in his evidence referring to when he became aware of HMRC's present application he said:

> I don't recall specifically what or when I became aware of anything …
>
> I think I said I was aware of the initial [penalty] but not of some of the subsequent ones.
>
> … I was assuming that John Horler had it in hand and was dealing with the matter …
>
> I was aware that there was an issue in relation to the information notice. I cannot recall exactly whether I was aware of the fact it was outstanding or that there was a penalty. I believe I must

> have been aware that there was a penalty, or the initial penalty, and then I made the mistaken leap in March 2019 to assume that actually everything was now in hand.

136. Mr Lancaster suggested that there may have been an element of Mr Horler trying to "cover his tracks for what has turned out to be obviously an horrendous error". There was no documentary evidence to support that assertion. It was not suggested that Mr Lancaster has ever taken Mr Horler to task about his dealings with HMRC. We cannot find that Mr Horler was covering his tracks without reliable evidence to that effect. In any event, we do not consider much turns on whether Mr Horler was covering his tracks. AML as a company must shoulder responsibility for Mr Horler's actions. Mr Horler was the managing director of Pathfinder, which was part of Lancaster Knox and the Knox Group, which included AML.

137. Mr Lancaster gave his name to Lancaster Knox which claims to offer expertise in dealing with information notices. We accept that Mr Lancaster did not have such experience himself, but he was a chartered accountant and a chartered tax adviser. Mr Horler clearly did have such expertise, or at least held himself out as having it. Mr Horler was a consultant with Lancaster Knox. He was not simply a third party adviser. Against that background, AML has absolutely no excuse for failing to deal properly with the Information Notice.

138. On 13 March 2019 AML applied to the Registrar of Companies to be struck off. Mr Horler's email dated 15 November 2019 indicates that a "liquidation" was part of his strategy to defeat the information notice. We have not heard from Mr Horler and we do not know whether this might have encompassed a striking off of AML. In any event, the application to strike off was signed by Mr Lancaster. It contained a declaration as follows:

> We have complied with the requirements of sections 1006 and 1007 of the Act and have given/will give copies of the application to the people listed in those sections as required.

139. The requirements of Companies Act 2006 included a requirement to give notice to all creditors of the company, and the importance of this was stressed in the notes to the application. No notice was given to HMRC. Mr Lancaster said that he understood it was common practice to simply lodge the form and that notice would automatically be given to HMRC by Companies House. The striking off would therefore not take place until HMRC were in agreement that it should. We do not accept that evidence at face value. Whatever Mr Lancaster's understanding, in circumstances where HMRC had issued jeopardy amendments and the enquiry was ongoing Mr Lancaster should not have applied to have the company struck off and in so doing failed to notify HMRC. It is an aggravating factor in the context of this application.

140. Based on the evidence as a whole we think it likely that Mr Lancaster was aware that Mr Horler was ignoring non-compliance with the Information Notice and the prospect of penalties because AML would either be struck off or go into liquidation.

Transfer pricing

141. There is an issue as to whether the documents required by the Information Notice were relevant to transfer pricing. In particular, AML says that any tax which might be due following a transfer pricing adjustment would not be the result of a failure to produce the documents. We consider that issue later in this decision. For present purposes, we note that Mr Lancaster asserted at paragraph 40 of his first witness statement as follows:

> 40. Had HMRC framed their enquiry as a transfer pricing enquiry from earlier in the process, John Horler may have been able to discuss matters pertaining to this issue at the time or the Respondent could have commissioned a transfer pricing report, so that HMRC's mistaken assumptions might never have arisen.

142. This appeared to be said in support of AML's submission that the documents required by the Information Notice had no relevance to transfer pricing. However, when Mr Lancaster was

taken in cross-examination to the correspondence between HMRC and Mr Horler he readily accepted that transfer pricing had been a "core issue" in HMRC's 2014 enquiry. In the light of Mr Lancaster's oral evidence we consider that paragraph 40 of his first witness statement was seriously misleading.

143. We have already noted that Mr Horler himself recognised in his letter dated 15 December 2016 that HMRC was concerned about transfer pricing and Mr Horler specifically asserted that AML was claiming the benefit of the exemption for small and medium sized enterprises. It was not disputed before us that the exemption was not available because the associated companies were resident in the Isle of Man.

144. Mr Lancaster accepted that the material required in connection with the 2014 enquiry which was discussed in meetings and correspondence would be relevant to transfer pricing issues. For example, a letter from Mr Preston dated 20 July 2017 included a schedule requesting the following:

> In relation to the £2,500,000 'other income' reflected in the accounts:
>
> - an account of the services provided by the company to AML Ltd
> - an account of how and by whom the price for the services supplied was agreed or determined

145. The only answer to that question was provided in a letter from Mr Horler dated 14 November 2017, some 4 months later where he said:

> Other Income - The Company provides services to AML Ltd by providing AML Ltd's services to individuals and entities based in the UK. The price for the services was agreed between the parties.

CONSIDERATION OF THE ISSUES

146. We note at this stage and to the extent necessary we find that sub-paragraphs 1(a), (b) and (d) of paragraph 50 Schedule 36 are satisfied. AML became liable to a penalty under paragraph 39 for failing to comply with the Information Notice which required production of the documents by 31 March 2018. The failure continued after the initial penalty was imposed on 30 April 2018 and the present application was made within the time limit set out in paragraph 50(1)(d). In the present circumstances, paragraph 50(7) provides that the "relevant date" is the date on which AML became liable to the fixed penalty of £300, namely 1 April 2018. The application by HMRC was made within 12 months from that date.

147. The issues we must therefore determine are these:

> (1) Whether Mr Preston had reason to believe on 26 March 2019 that, as a result of AML's non-compliance the amount of tax that AML had paid, or was likely to pay, was significantly less than it would otherwise have been. In other words, was paragraph 50(1)(c) satisfied?
>
> (2) Whether to reach a decision pursuant to paragraph 50(1)(e) that an additional penalty should be imposed on AML.
>
> (3) If so, in accordance with paragraph 50(2) and (3) what amount that penalty should be.

Paragraph 50(1)(c)

148. Mr Watkinson submits that there is a high hurdle for a respondent seeking to assert that paragraph 50(1)(c) is not satisfied. In particular, it is not sufficient to show that Mr Preston was wrong to have the belief set out in paragraph 50(1)(c). Rather it must be shown that his belief

was unreasonable in the sense that it was irrational. Mr McDonnell did not challenge that submission and in our view it is correct. Henderson LJ described the position as follows at [87] of *Tager CA*:

> The test of 'reason to believe' is a subjective one, subject to a basic requirement of rationality.

149. The burden of establishing that paragraph 50(1)(c) is satisfied is on HMRC. Mr Watkinson pointed out that it was not put to Mr Preston in cross-examination that any belief he had as to the requirements of paragraph 50(1)(c) could not have been reasonably held. We do not think that is a significant point in relation to the present challenge. The factual basis on which Mr Preston formed his belief was challenged. It was not necessary in the circumstances of this case for Mr McDonnell specifically to put to Mr Preston matters challenging the rationality of his belief.

150. We are completely satisfied from Mr Preston's evidence that he did believe, subjectively, that as a result of AML's failure to comply with the Information Notice, the amount of tax that AML had paid or was likely to pay was significantly less than it would otherwise have been. The only question, therefore, is the rationality of Mr Preston's belief as at March 2019.

151. Mr McDonnell submits that Mr Preston could not reasonably have believed in March 2019 that as a result of AML's failure to comply with the Information Notice, the amount of tax that AML had paid or was likely to pay was significantly less than it would otherwise have been. In support of that submission he raises these arguments:

(1) If any significant amount of tax becomes due at the end of the enquiry then it could only arise from an application of the transfer pricing provisions. However, the documents sought by the Information Notice were not relevant to any transfer pricing enquiry.

(2) In any event, there was no causal link between the non-compliance and the tax which might become due from AML.

(3) There could be no tax at risk in circumstances where HMRC had issued a jeopardy amendment.

(4) Mr Preston had not made any proper estimate of the tax at risk. If no estimate could be made or if the tax at risk was nil then there could be no penalty.

Transfer pricing and causal link

152. We must be satisfied that Mr Preston could reasonably have believed that there was a causal link between AML's failure to comply with the Information Notice and the amount of tax that AML had paid or was likely to pay. Henderson LJ described that link as follows at [87] of *Tager CA*:

> 87. … a link has to be established between the taxpayer's failure to comply with the relevant notice and the amount of tax that he has paid or is likely to pay. An officer of HMRC must have "reason to believe" that, as a result of the failure, the amount of tax paid or likely to be paid "is significantly less than it would otherwise have been". The test of "reason to believe" is a subjective one, subject to a basic requirement of rationality. It is common ground that it was satisfied in the present case, in relation to both the income tax and the IHT notices. I would add that I see no harm in the use of the phrase "tax at risk", which Judge Bishopp adopted as a convenient shorthand to describe the significant shortfall in tax paid or likely to be paid contemplated by sub-paragraph (1)(c), provided that it does not become a substitute for the statutory language, or divert attention away from the need to establish a causal link between the failure to comply with the notice and the tax unpaid.

153. In relation to unpaid tax which would arise under the transfer pricing rules, Mr McDonnell submitted that HMRC have not commenced a transfer pricing enquiry or asked for any documents relevant to transfer pricing. The calculation of a tax charge arising from a

transfer pricing enquiry would depend either on a cost plus arm's length profit approach or on an arm's length value approach. In particular, he submitted that Mr Preston was not himself a transfer pricing expert, he had not asked about transactions between AML and the Isle of Man companies and he had made no enquiries as to what the arm's length profit or value attributable to any 2015 transactions would have been.

154. We reject those submissions. It was clear from the correspondence in relation to the 2014 enquiry that HMRC were concerned that adjustments might be necessary arising out of the transfer pricing provisions. Importantly, Mr Lancaster himself accepted that transfer pricing was a core issue of the 2014 enquiry. The documents required by the Information Notice were the first stage of an enquiry into AML's company return for 2015. It is only once that documentation had been obtained that HMRC could have started to ask the more detailed questions pertinent to transfer pricing. Put simply, only once HMRC had satisfied themselves as to the existence and nature of transactions between AML and the Isle of Man companies would they be in a position to identify the price at which those transactions took place and whether any market value adjustment might be necessary. In the absence of such information, raising questions as to arm's length prices would have been both premature and pointless. The detailed transfer pricing expertise of Mr Preston as an individual was not material, given his evidence, which we accept, that he consulted transfer pricing experts within HMRC in the course of the enquiry.

Causal link generally

155. Mr McDonnell submitted that there was no link between the documents sought in the Information Notice and the tax said to be payable by AML. Mr Preston did not have evidence as to the nature of AML's activities because he had not asked that question in the Information Notice. He submitted that whilst the evidence we heard from Mr Lancaster as to the activities of AML would be relevant in an appeal against an amendment to its self-assessment, that evidence was irrelevant for the purposes of this application because it was not information sought by the Information Notice. The evidence of Mr Lancaster did not answer the question "what would the tax be had the Information Notice been complied with?".

156. We do not accept those submissions. It is true that the statutory records required by the Information Notice would not in themselves answer the question what tax should be payable by AML. They were, however, a logical and necessary first step in the enquiry. Without them HMRC could not even begin to identify what issues might arise in connection with the self-assessment. That point was recognised by the Court of Appeal in *Tager CA*:

> 8. It is worth noting, at this early stage, some significant features of the power to impose a tax-related penalty… the only guidance which Parliament has chosen to give to the Upper Tribunal in deciding on the amount of the penalty is that it "must have regard to the amount of tax which has not been, or is not likely to be, paid by the person". Furthermore, the obligation is only to "have regard" to that amount, which is itself likely to be uncertain, not only because it may be prospective, but more importantly because the situation will by definition be one in which the taxpayer has failed to comply with a notice requiring the production of information reasonably required for the purpose of checking his tax position. Indeed, the question may arise at a relatively early stage in HMRC's enquiries when little is known about the precise amount of tax that has not been paid, or is likely not to be paid.

157. We accept that Mr Preston had not asked specific questions as to AML's activities in relation to the 2015 enquiry. However, he had asked such questions in relation to the 2014 enquiry and had been given inadequate answers. The Information Notice required AML to produce its statutory records and AML failed to comply with the notice. As a result, the enquiry had not progressed. The position therefore is that little was known about the amount of tax that may not have been paid, or is likely not to be paid. In those circumstances, any tax not paid or

likely not to be paid would arise because of the information vacuum caused by the failure to comply with the Information Notice. In our view, this is an example of precisely the sort of causal link at which the provisions are aimed and discussed in *Tager CA*.

158. We observe that in the narrowest sense, it might be said that a failure to provide information will never of itself cause tax to be at risk, because in general tax liabilities arise not from failures to provide information but (usually) from transactions with tax consequences.

159. However, the purpose of HMRC obtaining information or documents by way of an information notice is to check the taxpayer's tax position, which will include the amount of tax he has paid or the amount of tax he is likely to have to pay in the future, for example because he has tax losses which are carried forward. If a taxpayer refuses to provide any information or records at all, then HMRC may be unable to check the amount of tax paid. In that case, what is put at risk is the difference between the true tax payable which HMRC ought to be able to verify if they had access to all relevant information and all the taxpayer's records, and the tax actually paid or payable. We consider such circumstances illustrate what is meant by paragraph 50(3) where it refers to the amount of tax which has been, or is likely to be, paid by the taxpayer as being significantly less than it would otherwise have been. However, the true tax payable will often be an uncertain amount if there has been a failure to provide the necessary information, as recognised by the Court of Appeal in *Tager CA*.

Jeopardy amendment

160. Mr McDonnell relied on the existence of the jeopardy amendment as demonstrating why AML's non-compliance with the Information Notice could not have resulted in tax not being paid or being likely not to be paid. He submitted that by the time HMRC had made the present application they had already issued a jeopardy amendment for 2015. Their position was therefore fully protected by the amendment and compliance with the Information Notice would have no bearing at all on the amount of tax that AML had paid or was likely to pay. That amount would be determined in an appeal against the jeopardy amendment and any further amendment following closure of the enquiry. As such, Mr McDonnell submitted that Mr Preston could not have any reason to believe that non-compliance would result in any significant shortfall in the tax which AML had paid or was likely to pay.

161. As part of this submission, Mr McDonnell submitted that even though paragraph 50(1)(c) refers to tax which has not been paid, it was not concerned with a causal link between non-compliance with the information notice and an earlier non-payment of tax. What was relevant for present purposes was the tax that was likely to be paid. The jeopardy amendment meant that there was no tax that was likely to go unpaid in future.

162. The distinction in paragraph 50(1)(c) between tax that the person "has paid" and tax that the person "is likely to pay" was not significant in *Tager CA* or *Tager UT* because it was common ground that paragraph 50(1)(c) was satisfied in that case. The only reference to it came in *Tager UT* where Judge Bishopp stated at [54]:

> 54. I have already mentioned the practical difficulty inherent in a requirement that the penalty be geared to an unknown quantity of tax. The difficulty does not seem to me to be much diminished when the requirement is instead to 'have regard to the amount of tax which has not been, or is not likely to be, paid'; indeed, it is complicated by the fact that there are two unknowns, namely the amount of the tax and the likelihood of its remaining unpaid.

163. We note that in *Mattu* the tax at risk was tax considered by HMRC not to have been paid for the years in question.

164. Mr McDonnell gave an example of a situation where the tax paid might be significantly less than it should be. Essentially, this was where during an enquiry the taxpayer withholds

some documents required by an information notice in circumstances where HMRC do not know that the documents have been withheld. HMRC amend the self-assessment in a closure notice and the resulting tax is paid. It later becomes apparent that the documents withheld would have resulted in a greater assessment. In those circumstances, he submitted that a penalty could be imposed under paragraph 50 by reference to the underpaid tax.

165. We accept that may be an illustration of circumstances where the tax paid is significantly less than it should have been, but we consider it is clear that the reference to tax paid in paragraph 50 (1)(c) is not limited to those circumstances. Indeed, those circumstances are likely to be exceptional because the application for a paragraph 50 penalty must be made within 12 months from the date on which the taxpayer became liable to a fixed penalty under paragraph 39. Liability under paragraph 39 arises from the date the taxpayer fails to comply with the information notice. The example given therefore would require HMRC to close their enquiry, subsequently identify that there had been a breach of the information notice and then apply for a penalty to be imposed under paragraph 50 within a period of 12 months at most. Further, HMRC can only apply for a penalty to be imposed where the failure to comply continues after a penalty is imposed under paragraph 39. The taxpayer would therefore have an opportunity to comply with the notice at any time until a penalty under paragraph 39 was imposed.

166. We accept Mr Watkinson's submission that paragraph 50(1)(c) applies, as it did in *Mattu*, where as a result of the failure the amount of tax that the person has already paid is significantly less than it would otherwise have been if there had been compliance with the information notice and HMRC were able to assess the correct amount of tax based on the information or documents not provided. Even though there was a jeopardy amendment in place, AML had still paid less tax than it would otherwise have done. The reference to tax that a person "has paid" in paragraph 50(1)(c) includes tax that was paid on a self-assessment prior to the issue of an information notice.

167. In our view there is no merit in Mr McDonnell's submissions concerning the jeopardy amendment. The jeopardy amendment provisions and the penalty provisions are separate schemes. The former is concerned with the risk of default in paying tax, the latter with continued non-compliance with an information notice.

168. The jeopardy amendment provisions are intended to prevent a loss of tax arising through default by the taxpayer at the end of the enquiry. They are engaged when an officer forms the opinion that the amount of tax payable by reference to the taxpayer's self-assessment is insufficient and unless the assessment is amended immediately there is likely to be a loss of tax to the Crown. The officer must of course make a best judgment as to the amount of tax that might be payable at the end of the enquiry in making the amendment.

169. The penalty provisions for non-compliance with an information notice are also framed by reference to a shortfall in the tax paid or likely to be paid by the taxpayer. However, that is not the same as the loss of tax referred to in the jeopardy amendment provision. The shortfall in the penalty provisions is the amount of tax which the taxpayer might avoid as a result of its non-compliance. Mr McDonnell submitted they are "closely aligned", which may be true on the facts of a particular case, but the fact that HMRC have sought to protect themselves from a loss of tax by default says nothing about the tax at risk by reference to the non-compliance.

170. Mr McDonnell submitted that paragraph 50(1)(c) is all about whether non-compliance has frustrated HMRC's ability to assess a taxpayer correctly. However, the fact that an officer has sufficient information to justify a jeopardy amendment does not mean that he would have sufficient information to issue a closure notice amending the company's self-assessment. The whole purpose of the jeopardy amendment provisions is, as Mr McDonnell himself identified, to hold the position whilst the enquiry continues.

171. He submitted that the jeopardy amendment serves two purposes. Firstly, it creates a statutory debt which can be collected. Secondly, it acts as an amendment to the self-assessment. We do not consider that it does serve two purposes. The reason for amending the self-assessment is solely to enable a statutory debt to be created. Whilst it is an amendment, it is simply holding the position until HMRC are in a position to close their enquiry and make any further amendment that may be required. A further amendment may in practice reduce or increase the amount of tax charged by the jeopardy amendment.

172. We note also that the parties have agreed to postpone the tax payable pursuant to the jeopardy amendment. In practical terms, it is as though there has been no amendment until a closure notice is issued on completion of the enquiry. Indeed, it may be that HMRC could simply withdraw the jeopardy amendment or reduce it to zero.

173. For these reasons we do not consider that the jeopardy amendment affects the power of this Tribunal to impose an additional penalty for non-compliance with the Information Notice. We are, of course, required to take the jeopardy amendment into account in considering the amount of any penalty, but quantum is a separate matter to jurisdiction.

174. The Upper Tribunal in *Mattu* reached the same conclusion in a case where HMRC had issued discovery assessments. In that case, HMRC issued what were described as protective discovery assessments in relation to certain tax years. Some of those assessments were made before the relevant information notice was issued and some were made after it was issued. The assessments were calculated on a similar basis to the way in which the officer had identified the tax at risk for the purposes of paragraph 50(1)(c). The taxpayer in that case submitted as a matter of principle that once HMRC had made those assessments the tax assessed was taken out of the tax at risk calculation. The Upper Tribunal rejected that submission at [345] – [352]. In our view there is no material distinction between discovery assessments and jeopardy assessments for these purposes.

Proper estimate of tax at risk

175. Mr McDonnell also submitted that Mr Preston had not made an estimate of the likely amount of tax at risk, but of the maximum amount of tax at risk. He submitted that paragraph 50(1)(c) required an estimate of the former. However, paragraph 50(1)(c) merely requires the officer to have reason to believe that there is a significant amount of tax at risk. It does not require him to quantify that amount. The context in which Mr Preston had to consider whether any tax at risk was substantial was that for the relevant year AML had declared taxable profits for 2015 of £60,000. For the reasons set out below we do not consider that Mr Preston's estimate of £1.34m as being the tax at risk was in itself a reliable estimate. However, that is not what paragraph 50(1)(c) requires. It was clearly not irrational for Mr Preston to believe in March 2019 that a significant amount of tax was at risk.

Is it appropriate for an additional penalty to be imposed?

176. Paragraph 50(1)(e) requires us to be satisfied that it is appropriate for an additional penalty to be imposed.

177. The Court of Appeal in *Tager CA* described the requirement under paragraph 50(1)(e) as follows:

> 88. …the Upper Tribunal must decide that it is appropriate for an additional penalty to be imposed: see sub-paragraph (1)(e). In agreement with the Upper Tribunal, I consider that this condition makes it clear that the Upper Tribunal should have regard to the usual considerations which apply when the imposition of a tax penalty is in question, including such matters as the reasons for non-compliance, the extent to which the position has been remedied, the gravity and

duration of the non-compliance, the presence of aggravating or mitigating factors, the availability of other methods for HMRC to recover the tax at risk (most obviously by making an assessment, if necessary on a best of judgment basis), and generally the need to achieve a fair and proportionate outcome, having regard to the interests of the public purse and the general body of taxpayers as well as the circumstances of the non-compliant taxpayer himself.

178. These factors will also be relevant to the amount of any penalty.

179. We discuss below our view of the tax at risk. In terms of other factors to which *Tager CA* directs that we should have regard in deciding whether it is appropriate for an additional penalty to be imposed, we are clear that this is a case where there has been a serious and prolonged failure to comply. There are no good reasons for the non-compliance and on the facts there are a substantial number of aggravating factors. A penalty is therefore in our opinion clearly appropriate.

180. We have taken into account all the circumstances and all our findings of fact in reaching that conclusion. We regard the following features as aggravating factors:

(1) AML wrongly approached its obligation to comply with the Information Notice on the basis that there was no point in attempting partial compliance. Further, it did not inform HMRC that was the approach it was taking.

(2) The unwillingness of Mr Lancaster to accept responsibility for numerous misleading and inconsistent statements and failures to comply made by or on behalf of AML. According to Mr Lancaster, failings and inconsistencies were at various stages the fault or possible fault of Mr Horler, the Isle of Man accounting function, a "computer failure" which only affected 2015, AML's insolvency and RPC. No evidence was provided to support the assertions that any of these people or events were to blame.

(3) The period of time during which there was no compliance with the Information Notice and the continued non-compliance. There was clearly no compliance between March 2018 and December 2019. There was further non-compliance in relation to the nominal ledger and trial balance until August 2021. We are not satisfied even now that AML has complied with the Information Notice. We are not satisfied that the documents produced by AML support its accounts for the year ended 31 December 2015.

(4) The documents required were statutory records and would be required by HMRC in order to consider the issue of transfer pricing in the enquiry, which it clearly intended to do.

(5) The application to strike off AML from the register of companies notwithstanding the issue of the jeopardy amendment, and the failure to notify HMRC of that application.

(6) The evidence that critical underlying records were routinely destroyed as employees left AML "for data protection purposes".

(7) The serious failure to comply with Upper Tribunal directions referred to at [56].

(8) Mr Lancaster's failure to accept any responsibility for the errors referred to at [86].

(9) The misleading information filed with the Upper Tribunal and described at [93] to [95].

(10) Mr Lancaster's failure to give full explanations for the matters identified at [98] to [103].

(11) Our conclusions relating to the RPC email at [121]-[123].

(12) The tax and accounting expertise and experience of Mr Lancaster, Mr Horler and the AML group as noted at [2], [124], [136] and [137]. AML is part of the Knox Group

and Mr Lancaster is a founder of Lancaster Knox, which claims to offer expertise in dealing with information notices.

(13) Our findings in relation to Mr Lancaster's awareness of the Information Notice and the penalty proceedings.

(14) Our overall conclusion at [70] as to the unsatisfactory and unhelpful nature of much of Mr Lancaster's evidence.

181. We acknowledge that there was some compliance in December 2019, albeit after the application for a penalty had been made and only when it was made a condition of defending the penalty application. There was some further compliance in August 2021 when a trial balance and nominal ledger were provided, albeit without any real explanation as to why it had not been provided earlier. That aside, we do not accept that there were any material mitigating factors. The catalogue of blame levelled or alluded to or insinuated by Mr Lancaster to which we refer in the preceding paragraph was supported by no evidence. We were presented with no evidence from those he sought to blame, and we conclude that AML was responsible for the failings.

182. AML argues that as a matter of principle, if HMRC cannot establish that a significant and specific amount of tax was not paid or is not likely to be paid then it would not be appropriate to impose any additional penalty. Mr McDonnell relied on what was said at [98] - [101] in *Tager CA*:

> 98. ... although Mr Brown's figures may have provided an acceptable starting point, I see force in the argument that the judge should then have discounted them by a substantial proportion before using them as a yardstick for the imposition of a tax-related penalty. The information available to HMRC was very limited, as the communications with the Shares and Valuation Division referred to by Mr Brown made clear, and the valuations were subject to fundamental uncertainties which could only be resolved when a full picture became available of all the companies in which Mr Tager senior was interested, with up to date valuations of the properties which they owned and full details of the network of inter-company indebtedness. Furthermore, the onus was on HMRC to establish the amount of tax unpaid for the purposes of paragraph 50, but no first-hand evidence from the Valuation Division had been placed before the Tribunal. That was perhaps understandable, at a time when Mr Tager was refusing to engage at all with the proceedings, but it did mean that the valuation evidence available to the judge at the October 2014 hearing was of an indirect and secondary nature, quite apart from the necessarily speculative basis upon which much of it rested.
>
> 99. For all these reasons, I think it is strongly arguable that the judge erred in principle in failing to apply a substantial discount to Mr Brown's figures for the shareholdings, even making due allowance for the fact that both Mr Brown and the judge regarded the estimates as conservative. The imposition of a tax-related penalty under paragraph 50 is a serious matter, and there has to be a solid foundation for the tribunal's own assessment of the amount of tax unpaid or likely to be unpaid.
>
> 100. Although I see much force in Ms McCarthy's arguments on this last point, it is unnecessary for me to reach a final conclusion on them because I am in any event satisfied that her second main ground of challenge to the judge's approach must succeed. As I have already explained, the judge directed himself in the First Decision at [57] that there was "a proper comparison to be drawn" between penalties under paragraph 50 and those imposed for "deliberate concealment" under schedule 55 to FA 2009, with the result that his starting point should be 100% of the tax at risk. This was in my view a clear misdirection, for two main reasons.
>
> 101. … in paragraph 50 Parliament has deliberately refrained from enacting a prescriptive tax-geared system of penalties such as that to be found in schedule 55 (which was in any event

> enacted a year later). The only requirement in paragraph 50 is that the Upper Tribunal must "have regard" to the amount of tax unpaid. This language means what it says, and does not in my judgment require any gloss. Clearly, there must be some relationship between the amount of tax which the Upper Tribunal finds to be unpaid and the penalty which it decides to impose, but the nature of the relationship, and the way in which the Tribunal gives effect to it, will depend on the circumstances of the individual case, and should not in my view be influenced (except perhaps as part of the general background) by prescriptive penalty regimes enacted to deal with other types of default by taxpayers.

183. Mr McDonnell submitted in reliance on these paragraphs that the Upper Tribunal must assess the amount of tax at risk based on a solid foundation. The burden of proving the tax at risk lay on HMRC. Further, it was implicit that if no tax at risk was established then there could be no penalty at all under paragraph 50, because paragraph 50(3) requires the Upper Tribunal to have regard to the amount of tax which has not been or is likely not to be paid.

184. It is clear that we must seek to assess the amount of tax at risk, but as the Upper Tribunal held in *Mattu* we are not required to make findings as to that amount on the balance of probabilities. Rather, we must seek to "form a view" as to the amount of tax at risk. In many cases, it will not be possible to show on the balance of probabilities that a certain sum is likely to be due, or even that a certain maximum sum is likely to be due.

185. We do not in any event accept Mr McDonnell's submission that if we are unable to form a view as to the amount of tax at risk then no penalty can be imposed. In *Tager CA*, Henderson LJ said as follows at [108]:

> 108. Although there will be many cases where it is an acceptable approach to fix the amount of a penalty under paragraph 50 by applying a percentage to the tax found to be unpaid, and although the court or tribunal must of course always have regard to that amount, I do not consider that it is always necessary to show a demonstrable link between the tax unpaid and the penalty imposed. It is enough if the amount of the tax unpaid, taken in conjunction with all the other relevant circumstances, informs the determination of quantum and yields a result which is proportionate to the scale and nature of the taxpayer's default…

186. Mr McDonnell submitted that even though it is not always necessary to show a demonstrable link, an amount of tax unpaid must be identified. We do not accept that submission. Such a construction of paragraph 50(3) would incentivise a taxpayer to provide no information at all so that no amount of tax could as a practical matter be identified. In such a situation, we consider that an inability to quantify tax at risk would go to quantum and not the Tribunal's ability properly to impose a penalty of some amount.

187. It must be acknowledged that, as a result of AML's continued failure to provide clear information as to its activities during the relevant period including its transactions with affiliates in the Isle of Man, forming a view of the precise amount of tax at risk as a result of its non-compliance is very difficult.

188. We have set out above the way in which Mr Preston identified what he considered to be the "tax at risk". For present purposes we consider what tax if any would be chargeable on AML if it was earning income from the design and implementation of tax avoidance schemes beyond the annuity planning arrangement.

189. Mr Watkinson noted that the total commission paid by AML Contracts as shown in its accounts for 2015 was £1.75m. He suggested that this was inconsistent with Mr Lancaster's explanation for AML's recharge income of £2.1m. On the basis of Mr Lancaster's evidence, there fell to be deducted from that figure some £203,000 which was said to be commission paid by AML to staff members who made direct introductions of clients to the schemes. Also to be deducted was approximately £300,000 which comprised legal and professional fees allegedly

paid by AML on behalf of AML group companies. That left some £1.6m which Mr Lancaster had described as "commission on commission" for AML's role in marketing the split contract arrangements. As we understood Mr Watkinson's submission, if AML Contracts paid £1.6m commission to AML then it could not have paid any significant amount of commission to third party introducers.

190. We do not accept Mr Watkinson's submission. As Mr Lancaster said when it was put to him, the £1.75m shown as commission in the accounts of AML Contracts could be the commission paid to third party introducers. The "commission on commission" paid to AML could then be included in a separate administrative expense in the accounts of AML Contracts which is described as "Recharges" amounting to some £4.5m.

191. Mr Lancaster also said that AML was not particularly profitable in 2015 and the prior year because it over-expanded, setting up offices and recruiting staff and putting money into AML 250. There was no supporting evidence for this assertion and we do not accept it at face value.

192. Mr Preston attempted to estimate what he acknowledged was the maximum amount of tax which he considered may be due from AML if it was in business designing and implementing tax avoidance schemes on behalf of all the AML companies. One difficulty with Mr Preston's approach in light of Mr Lancaster's evidence was a possible overlap in the income of the various companies in the Isle of Man group, such that the figure of £220m used by Mr Preston might well entail some double counting. Mr Lancaster referred to AML Management Limited which was one of the companies operating a contractor loan scheme and said that clients formed a partnership which contracted to provide services to AML Management Limited which in turn contracted to supply services to agencies in the UK and so on until the end user. AM Personnel Limited was the managing partner of the partnership. AML Management Limited was paid by the agencies, and in turn paid AM Personnel Limited for the services of clients. AM Personnel Limited then distributed payments to the clients. Hence the turnover of AM Personnel Limited amounting to some £25m was also included in the turnover of AML Management Limited. This suggests that Mr Preston's calculation of the turnover of the AML group was therefore overstated by some £25m.

193. We also have concerns about the assumption made by Mr Preston that AML's arm's length income from the AML companies would be 4% of their total turnover. The 4% figure was taken because that was the basis of the commission paid to third party introducers. However, the work of AML might reasonably be expected to have been greater in value if it was designing and implementing the schemes. A mark-up of 4% might therefore be too low.

194. In the circumstances, we cannot be confident that Mr Preston's methodology provides a reliable estimate of the amount of tax AML would be liable for following a transfer pricing adjustment if in due course it is found to be involved in the design and implementation of tax avoidance schemes beyond the annuity planning arrangement.

195. Mr Horler suggested in his witness statement for lifting the procedural bar that the effect of a transfer pricing adjustment might result in an additional amount of £21,350 in corporation tax being payable. However, this assumed AML was solely involved in marketing the schemes and was also expressed to be without prejudice to future arguments. Nevertheless, being proposed on behalf of AML itself, we consider it reasonable to regard it as a minimum amount of tax at risk in relation to marketing activities.

196. Mr McDonnell did not accept that any additional sum of tax would be due even if there was a transfer pricing adjustment. We consider that this simply ignores much of the conflicting and misleading evidence we have discussed at length above.

197. On the evidence we find (and AML did not seek to challenge) that the AML group companies as a whole recorded approximate net profits of some £20m in 2013 on the turnover of £220m identified by Mr Preston. In cross-examination, Mr Lancaster stated that he thought the figures for 2015 were probably similar. Against that, AML's declared profit in 2015 was only £60,000. This was, as Mr Lancaster acknowledged, simply a notional mark-up apparently agreed within the AML group and applied to certain of AML's costs. By contrast, the net profits of AML Contracts were some £382,000 in 2015 and some £1m in 2014. However, we cannot be satisfied that those profits fairly represent on an arm's length basis the profits it earned from the split contract arrangements. In both years there were recharged administrative expenses of approximately £4.5m and £3.75m respectively. Nor in any event are we satisfied that AML's profits were limited to work it did for AML Contracts. So, we do not think that we could simply assume that the profits of AML Contracts represented AML's tax at risk.

198. In forming a view as to the tax at risk we prefer to begin with the £20m of profits earned by the Isle of Man companies in 2013, and thought by Mr Lancaster to be of a similar amount in 2015. If as appears to be the case these broadly represented the profits of selling UK tax avoidance schemes to UK businesses, in a group where AML was the only relevant UK company, then that at least sets a framework within which AML was carrying on its activities.

199. The £60,000 of profits declared by AML in truth tells us little about AML's business activities. The opaque recharge mechanism, backed up by no reliable detail or documentation as to AML's business, means that we cannot treat it as a relevant figure. On all the evidence which we have summarised above, and on the findings of fact we have made, we have formed the view that AML did contribute, to some degree, to the design and implementation of the schemes sold by the group other than merely the annuity planning scheme. On that basis, if AML had been rewarded on an arm's length basis, then it would have potentially been taxable on an appropriate proportion of the £20m which was declared as taxable in the Isle of Man. Because of the information vacuum caused by AML, we cannot form a view built on "a solid foundation" as to the precise proportion. We do take the view based on the findings of fact we have made that the proportion would not be negligible. Giving a very significant discount for uncertainty caused by the information vacuum we take the view that the tax at risk is not less than £100,000. At the other end of the spectrum, the tax at risk would not be as much as £4m, being 20% of total group profits, because that would assume that AML carried on all the profit-making activities of the group, entirely from the UK. It could, however, potentially be in six figures. On any view, there is a significant amount of tax at risk as a result of AML's failure to comply with the Information Notice.

Amount of the penalty

200. In determining the amount of the penalty we should impose we take into account all our findings of fact and the circumstances which caused us to conclude that it is appropriate to impose a penalty.

201. HMRC accept that the ability to assess tax is relevant to the amount of any penalty. We have therefore taken into account in setting the amount of the penalty the existence of the jeopardy amendment, while at the same time recognising that the tax which is the subject of the amendment has been postponed in full. The Court of Appeal in *Tager CA* referred (at [88]) to the need to take into account:

> "…the availability of other methods for HMRC to recover the tax at risk (most obviously by making an assessment, if necessary on a best of judgment basis)…".

202. We also take into account that the penalty is not intended to be a proxy for the recovery of unpaid tax.

203. Mr McDonnell invited us to have regard the penalty in *Mattu*, in what he described as a more serious case than the present where the penalty amounted to approximately 18% of the tax at risk. However, we do not find such comparisons helpful because each case turns on its own facts.

204. We take into account the extended period over which there has been a default. Daily penalties were incurred up to 29 January 2019. If subsequent daily penalties had been imposed then they would have covered the period from 30 January 2019 to at least 20 August 2021. That is a period of 934 days for which a daily penalty of £60 per day could have been imposed, totalling £56,040.

205. Taking into account all of the factors we discuss above, including in particular the high level of uncertainty as to the tax at risk, we have concluded that in all the circumstances a penalty of £150,000 would be appropriate.

CONCLUSION

206. For all the reasons given above, we find that AML should be liable to a penalty of £150,000.

Signed on Original

JUDGE THOMAS SCOTT
JUDGE JONATHAN CANNAN

RELEASE DATE: 14 March 2022