# TC04221

**Appeal number: TC/2013/00644**

***IHT – penalty on beneficiary for error in IHT 400 – whether beneficiary must have duty to executor – no – whether information withheld – yes – whether penalty must be to best judgement – no – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**TIMOTHY CLAYTON HUTCHINGS** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE BARBARA MOSEDALE**
**MRS SONIA GABLE**

**Sitting in public at Bedford Square, London on 23-25 April and 19 May 2014**

**Mr E McNicholas, Counsel, instructed by Rosemary E Hensby, Solicitors, for the Appellant**

**Ms K Balmer, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. Mr Timothy Clayton Hutchings (known by his second name Clayton) appeals against a review decision dated 18 December 2012 in which HMRC upheld the issue on him of a penalty under Paragraph 1A Sch 24 to the Finance Act 2007 ("FA 2007") reduced after review to the sum of £87,533.80.

### Background facts

2. These did not appear to be in dispute and on the evidence we find as follows:

3. Mr Robert James Hutchings ('the late Mr Hutchings'), born in 1929, owned a farm in West Sussex from which he operated a number of businesses, including a farm, fencing, tyres and what was described as a 'mobile disco' business. According to the inheritance tax return ('IHT 400') completed by his executors the farm was worth about £3 million at his death. He had five children, one of which was the appellant, Mr Clayton Hutchings. He had three other sons, Jeremy, Hugh and Shaun. His daughter, Ms Elizabeth Hutchings, was a witness in this appeal and we refer to her evidence below.

4. At some point in his life, Mr Robert Hutchings opened an offshore bank account originally with a bank in the Channel Islands and then later with Julius Bär in Switzerland. HMRC were unaware of these accounts.

5. On or around 2 March 2009, Mr Robert Hutchings wrote a letter to Julius Bär instructing them to transfer the balance of his account with them into Mr Clayton Hutchings' account with them. HMRC at the time similarly did not know of the existence of Mr Clayton Hutchings' account. On or around 5 April 2009, the sum credited to Mr Clayton Hutchings' account from his father was £443,669.00.

6. On 15 April 2009 the late Mr Hutchings signed a new will which left nothing to his sons Hugh and Shaun, left £150,000 each to Elizabeth and Jeremy and left the residue to Clayton. Mr Robert Hutchings died on 14 October 2009.

7. Mr Higham (a solicitor with Anderson, Longmore and Higham) was appointed executor together with Mr Nick Young (of a local firm of land agents). Hugh and Jeremy Hutchings were unhappy with their father's will and issued proceedings contesting it.

8. On 29 October 2009, the executors held a meeting which was attended by a Mr Brooke, a partner with Anderson, Longmore and Higham, who was to act for Mr Higham, and by Clayton, Elizabeth and Jeremy Hutchings.

9. On 19 November 2009 (just over a month after the death) the executors wrote to various members of the late Mr Hutchings' family, including Mr Clayton Hutchings. This letter was referred to in the hearing as the 'gift letter' and that is how we refer to it in this decision notice. We deal with it in detail at §§31-34 below.

10. Mr Clayton Hutchings did not reply to this letter. The only member of Mr Hutchings' family who did reply to the letter was Ms Elizabeth Hutchings who replied to say that she was not aware of any gifts.

11. The executors submitted the IHT 400, the inheritance tax return due under s 216 Inheritance Tax Act 1984 ("IHTA"), on 25 March 2010. It made no mention of the cash held by the late Mr Hutchings in his account with Julius Bär, nor that the value in this account had been transferred to Mr Clayton Hutchings seven months before his death.

12. In tax year 2009/10 just over £10,000 was credited to Mr Clayton Hutchings account with Julius Bär in interest. This was not declared on Mr Clayton Hutchings' tax return.

13. On or around July 2011 HMRC received anonymous information that Mr C Hutchings had an offshore bank account.

14. On 19 July 2011 HMRC (local compliance) wrote a direct challenge letter to Mr C Hutchings and his accountant (Mr Gibbons) saying HMRC had reason to believe that Mr Clayton Hutchings held an offshore bank account and intended to enquire into his personal tax returns. Another challenge letter was sent on 16 August 2011 to the executors.

15. In August 2011 NG Associates, instructed by Mr C Hutchings, wrote to HMRC (local compliance) giving initial disclosure about the offshore bank account held by Mr C Hutchings.

16. On 21 September 2011, the executors replied to HMRC's letter informing them of the Julius Bär account which they said they had learnt of from Mr C Hutchings' solicitor. They stated that before submitting the IHT 400 they had made enquiries with the family but had not been supplied with any information about lifetime gifts. In another letter to HMRC of the same date the executors said:

> "in our view the Executors were seriously misled about this gift"

17. Inheritance tax ('IHT') was assessed on Mr C Hutchings personally in the sum of £46,995.90, which we understand has been paid. The assessment was on the basis that he received a lifetime gift of £437,669.00 (after allowing for annual exemptions) against which the nil rate band for inheritance tax of £325,000 was allowed. This left £112,669.00 chargeable to IHT at 40%.

18. On 14 March 2012 Miss Nisbett of HMRC wrote to the appellant indicating that HMRC intended to charge a penalty of 35% of the 'potential lost revenue' of £175,067.60. This would have been a penalty of £61,274.66. The potential lost revenue was calculated at 40% of the gift (ie 40% of £437,669) as, while Mr Huthchings was given the benefit of the nil rate band, that meant that the estate had wrongly calculated IHT liability on the basis that the estate was entitled to the nil rate band. Therefore, while the lifetime gift to him gave Mr Hutchings an inheritance tax

liability of £46,995.90 it gave the executors an additional inheritance tax liability on the estate of nearly three times that amount.

19. HMRC revised its view of the proper percentage of the penalty and on 28 September 2012 when HMRC issued a form Notice of Penalty Assessment to Mr Clayton Hutchings the penalty charged was at 65% (£113,793.94 ) of the potential lost revenue .

20. As stated in the first paragraph, following a review dated 18 December 2012, the imposition of the penalty was upheld but the amount reduced to 50% (£87,533.80) of the potential lost revenue. The 50% reduction was the maximum possible reduction for prompted disclosure.

**Facts in dispute**

21. Many facts were in dispute as was the reliability of some of the evidence. Our findings are set out below.

*Mr Higham*

22. HMRC's only witness was an HMRC officer, Mr Cameron. They did not chose to call anyone else such as the executors. The appellant wished to cross-examine the executors as it was a part of his case that the blame rested on the executors for (it was alleged) failing to make it clear to the appellant what information the executors required and/or for failing to discover the offshore bank account. The Tribunal issued a witness summons at the appellant's request requiring Mr Higham, one of the two executors, to appear to give evidence at the hearing, which he duly did.

23. At the preliminary hearing some days earlier the appellant asked for a direction that it could treat Mr Higham as a hostile witness, as Mr McNicholas wished to cross examine him. The Judge agreed with HMRC that Mr Higham was not a hostile witness but as HMRC did not object to Mr McNicholas cross-examining this witness for the appellant, and as Mr Higham had informed HMRC that he considered that he had (in effect) been seriously misled by the appellant (see §16 above), the Judge directed that Mr McNicholas would be entitled to ask Mr Higham leading questions in the hearing, which he did.

24. We find that, while Mr Higham was appointed executor, as he was retired he delegated the vast majority of the work to a former partner, a Mr Brookes, and was content to leave the matter mostly to him. Mr Higham did not see most of the correspondence before it was sent.

25. We found Mr Higham to be a reliable witness as his evidence was internally consistent and also consistent with the documents in front of the Tribunal.

26. Reading the Riot Act: As we have said, a meeting between the executors and the family took place on 29 October 2009 (the agenda shows the date as 22nd but the

consistent evidence was that the meeting took place on 29th, which was a few days after the funeral).

27. In a letter written sometime later, Mr Brookes said he 'read the riot act' to the family on gifts at this meeting. We find, however, that his contemporaneous note of the meeting merely records 'I mentioned lifetime gifts'. Mr Higham, who attended the meeting, said in evidence said he did not think 'reading the riot act' was necessarily an accurate description of what was said about gifts and certainly had no recollection of that particular phrase being used. Later in evidence he said that Mr Brooke emphasised the importance of disclosing gifts.

28. HMRC did not call Mr Brookes to give evidence so we are not inclined to place weight on what he said in a later letter: we consider that his contemporaneous note is likely to be more accurate.

29. Mr C Hutchings and Ms E Hutchings did not accept that Mr Brookes said anything about gifts at this meeting. For reasons we explain below at §§72-82, we do not consider Mr C Hutchings' evidence reliable and so discount what he said here. So far as Ms E Hutchings' evidence on this point is concerned we also discount it as, for the reasons explained below at §§65-68 while we found Ms Hutchings to be truthful we did not find her memory to be reliable about what had happened at this meeting. We take into account that her contemporaneous note of the meeting makes no mention of lifetime gifts, but as we accept her evidence that she was not aware of any lifetime gifts, we think that the absence from her note is explained because at the time she would have not have thought it worth making a note.

30. Therefore, we prefer Mr Higham's evidence and the evidence from Mr Brookes' contemporaneous note. From this we find that Mr Brookes at this meeting did ask the family to disclose gifts, but we do not accept that he put such emphasis on this that it would be accurate to say he read them the riot act over it. But 'reading the riot act' is a red herring: the important point is that as a matter of fact we find that Mr Brookes did ask the family at this meeting to disclose lifetime gifts to them by their father. But no disclosure was made at this meeting or later.

31. The gift letter. This letter, dated 19 November 2009, slightly less than a month after the meeting, was written by Mr Brookes on behalf of Mr Higham. We find its purpose was to ask the family to disclose if they had received any gifts from their late father.

32. In submissions, Mr McNicholas described the letter as 'complete gibberish' and said a reasonable reading of the letter was that it was only referring to birthday gifts worth less than £250, and failed to refer to cash or bank accounts.

33. We find, on the contrary, that the 'gift letter' was very clear and in no way could it be described as 'gibberish'. It said, in compliance with the executors' duty to HMRC to investigate lifetime gifts for the purpose of paying inheritance tax, the executors needed to know 'what the gift was and when it was made'. It said that they needed to

know of 'any' gift in last seven years, although they did not need details if the total value of gifts within a tax year was less than £250. It concluded

> "Please can you let me know about any gifts whether to you or to your family. It may well be that the gifts are not taxable but we still need to know about them."

34. The letter did not specifically refer to gifts of cash nor did it refer to a gift of a bank account but it used 'gift' in a quite general sense and was clearly referring to any gift worth more than £250. Ms E Hutchings clearly understood it correctly (see §68).

35. Were the executors and Mr Brookes to be criticised? A number of criticisms were levelled at Mr Higham and Mr Brookes by the appellant, his witnesses and his counsel.

36. The executors were criticised for not drawing up a schedule of documents found in the late Mr Hutchings' home. However, we agree with Mr Higham that executors are not (at least in normal circumstances) expected to search a house for every document but are entitled to rely on information provided by the deceased's family and advisers. Moreover, in this case, Mr C Hutchings moved into his father's home within a few months of his father's death and ought to have therefore to have found any documents held by his father. Lastly, Mr C Hutchings' own evidence was that the Swiss bank account was a 'hold mail' account so it is very unlikely that there would have been any documents about the Julius Bär account in his father's home which the executors would have discovered even if they had searched the house. We do not consider this criticism justified.

37. The executors were also criticised for submitting the IHT 400 long before its due date: but the tax was due six months after the death so it would be good practice to complete the IHT 400 before the tax was due. Further, a grant of probate cannot be obtained until the IHT 400 is submitted so it is good practice to do it as early as possible. In our opinion, there is absolutely no basis for criticism of the executors for submitting the IHT early. It is good practice to do so where the executors believe they are in a position to make an accurate return.

38. There were other criticisms of how the executors had carried out the administration, which were not directly relevant to this appeal. We did not have evidence to judge whether any of these other criticisms of the administration were justified, although we note that we have found the criticisms over the gift letter and the schedule of documents to be unjustified. Mr Higham was only summonsed to attend by the appellant and the appellant gave no warning that he wished to criticise the handling of the estate in general terms rather than just as it impinged on the tax case. Mr Higham was given no chance to bring papers or otherwise properly defend himself. Even if the executors' handling of the estate in general was relevant (and we do not think it was) it would be unfair in these circumstances to consider the allegations. If Mr C Hutchings considered the estate was administered negligently, he had the ability to take the matter to an appropriate forum (the High Court) rather than ambushing Mr Higham in the tax tribunal, where the matter was not relevant and we did not have the evidence.

39. Was the omission of the gift from IHT 400 the fault of the executors? It was a part of Mr C Hutchings' case that the omission of the gift to him from the IHT 400 return was the executors' fault. We found it difficult to understand the basis of this allegation. We have found that the executors asked first orally for gifts to be declared at the meeting on 29 October 2009, and they then followed this up with a written request on 19 November 2009. We have found that this gift letter clearly conveyed the need for its recipients to tell the executors about gifts from their father. Mr C Hutchings also complained that the executors did not follow up the gift letter and insist that those children of the deceased who had not replied, did reply. We do not agree. The executors could not force people to reply. Mr Hutchings had been asked at least twice and failed to reply: he cannot blame the executors for this.

40. In so far as it seemed to be the appellant's case that the executors should have raised queries with banks including those with whom they had no reason to suspect the deceased had kept an account, we reject this as utterly unreasonable. Executors cannot write to every bank in the world on the off chance a deceased person might have had an account with them unknown to his advisers.

41. In so far as it was the appellant's case that the executors ought to have discovered an association of the deceased with Julius Bär by conducting a search of the farmhouse, we reject this too. As we have already said, it is not reasonable (unless perhaps there are specific indications that something was hidden) for executors to conduct a thorough search of a deceased's house where the family and advisers were present to inform the executors about the deceased's affairs and the executors themselves had had a pre-existing relationship with the deceased. Moreover, as we have said, we do not think such a search would have discovered the account as it was a 'hold mail' account.

42. We do not consider that the executors were at fault for the inaccuracy of the IHT 400 return and we reject the appellant's criticism as unjustified.

*Mr Ian Alexander Cameron*

43. Mr Cameron was an HMRC officer working in the Specialist Personal Tax Team. He gave advice and support to Miss Nisbet, who was the officer who actually issued the assessment. It was part of his responsibility to approve the issue of penalty assessments in relation to IHT matters.

44. His witness statement explained his view of the law and his opinion that Mr Clayton Hutchings was properly chargeable to the penalty, with neither of which matters the appellant agreed. We put no weight on Mr Cameron's views and opinions. His evidence of fact was limited to actions taken by HMRC and was largely uncontroversial. The really controversial factual matter in his statement was his reference to the anonymous intelligence report which led to the direct challenge letter to Mr C Hutchings (§14). This was controversial as HMRC refused to provide a copy to Mr C Hutchings. The appellant had applied for disclosure of it which was refused by the Judge at the preliminary hearing on the grounds it was irrelevant to the appeal.

45. It was Mr Cameron's mistake that led to Miss Nisbet (the assessing officer) initially to state (§18-19) that the penalty would be charged at 35%. The penalty when it was charged, was charged at 65% and then reduced to 50%. Part of the appellant's case was that because of the initial error by HMRC the penalty should not exceed 35% and we deal with this at §199-200.

46. Mr Cameron's evidence was that HMRC had raised a penalty enquiry with the executors and had been given a copy of the executors' file for inspection. He said HMRC were satisfied that the executors had acted properly and in particular had made reasonable enquiries with financial institutions. HMRC were also satisfied that the executors had had no knowledge of an offshore bank account. For this reason, HMRC did not impose a penalty on the executors for the inaccurate IHT 400. We have also concluded for the reasons given above at §35-42 that the executors were not to blame for the inaccurate IHT 400.

*Miss Rachel Horner*

47. Miss Horner is a solicitor with Rosemary E Hensby Solicitors. She acted for the appellant in the dispute with his family over the will of his father. His brothers chose to challenge the will, and the dispute ultimately went to the High Court.

48. <u>The meeting:</u> Miss Horner met with Mr C Hutchings in 2011 for the purpose of preparing his witness statement for the forthcoming proceedings in the High Court. Mr Hutchings arrived at the meeting with notes running to some 33 pages (typed by his wife) of what he wanted to include in his statement. These notes formed the basis of the meeting with Miss Horner which lasted for about 5 hours.

49. Miss Horner's record of that meeting comprises Mr Hutchings' typed note with some handwritten annotations made by her, and a handwritten record of what was said after the draft witness statement had been discussed. There is no other record of what was said.

50. We find that in the course of the meeting, Mr Hutchings mentioned to Miss Horner that his father had given him money held in a Swiss bank account. We find that this disclosure was made some time into the meeting (handwritten by Miss Horner on page 7 of 33) and was made in the context of a discussion about Mr Hutchings' typed note where he recorded that he suggested to his siblings that the farm be sold and the proceeds split 5 ways.

51. The handwritten note made by Ms Horner is not particularly easy to read and we find she recorded the conversation swopping between Mr Hutchings and herself by using a 'dash'. She was taken through the note in the hearing and we find that the following is an accurate transcription of it:

> Also intended to split offshore account dad put in my name before he died? (Mr Hutchings)
>
> Advised no offshore account in IHT account (Miss Horner)
>
> No need dad said tax free overseas (Mr Hutchings)

Queried date of gift (Miss Horner)

last months of life (Mr Hutchings)

Explained must disclose (Miss Horner)

Clayton surprised but will find details. Doesn't have any papers as that is point of offshore. Will let me have anything ASAP to tell executors. (Mr Hutchings)

Explained could be penalty (Miss Horner)

52. The date of the meeting: The date of this meeting with Mr Hutchings was disputed by Miss Balmer. Miss Horner's attendance note prepared for billing records it as taking place on 24 May 2011. A note made by Mr Brooke on 30 August 2011 after a telephone conversation with Miss Horner recorded that she had said Mr C Hutchings had seen her 'last week' and told her about the Julius Bär account. Miss Horner denied that she had dated the meeting as 'last week' in this conversation. The discrepancy is more likely than not explained away as a misunderstanding; two weeks before the conversation Miss Horner had received a copy of a statement from the Julius Bär bank account from Mr C Hutchings the contents of which she relied on for the information she passed on to Mr Brooke in this call, in particular the amount of money in the account.

53. Miss Horner also wrote a letter in September 2011 in which she said 'during discussions with my client some weeks ago' to prepare his witness statement he had disclosed the existence of the account. Miss Horner's evidence was that she had had no meeting with Mr Hutchings since the May 2011 meeting. At that point some 16 weeks had elapsed since 24 May. We agree that Miss Horner's use of language was somewhat odd, although not wrong, as it would be more natural, in September when referring to a meeting in May, to say 'some months' ago rather than 'some weeks' ago.

54. It was put to Miss Horner that she had added the date of the meeting to her notes after the event and it was the wrong date. She denied this. We take into account that she had no warning of the query over the date and so was denied the opportunity to bring her diary or other evidence to show that the meeting had taken place on that date. We take into account that the contemporaneous note shows the meeting taking place in May. Our conclusion is that it is more likely that the date on her note of the meeting was correct and that in her letter of September she simply did not choose to draw attention to just how many weeks had elapsed since the meeting, as that would mean drawing attention to how long it was since she had told her client to disclose the account to the executors but nothing had been done.

55. Although we accept the date on the contemporaneous note of the meeting was correct, we are unable to accept Miss Horner's witness statement as entirely reliable nor do we accept the opinions expressed in it. In her witness statement, dated October 2013, she stated that neither at the meeting on 24 May 2011 nor subsequently to it did she 'express any urgency' to Mr Hutchings to disclose the Swiss bank account to HMRC and implied she did not consider that he had delayed disclosure. Yet in a letter dated 3 April 2012 to a Mr Veney she said that at the May 2011 meeting she had

requested Mr Hutchings to provide her with the evidence of the account 'as quickly as possible' and went on to talk about the 'delay' by Mr Hutchings in actually producing the evidence to her.

56. Her explanation in cross examination for this discrepancy was that when she wrote the letter in April 2012 she had not referred to her notes of the meeting, thus apparently agreeing that her memory was unreliable. However, the contemporaneous account (see §51) of the meeting shows that Mr C Hutchings had agreed to let her have the evidence of the account 'ASAP' as it records:

> "Will let me have anything ASAP to tell executors."

57. The contemporaneous record and the letter of 3 April 2012 agree; her witness statement was made much later (October 2013) and is therefore less likely to be correct. So we find that at the meeting in May 2011 she had expressed to Mr Hutchings the need to act quickly to disclose the account to the executors and we also therefore find that her witness statement was not entirely reliable.

58. Her witness statement also gives it as her opinion that Mr Hutchings did not know whether the money was his and did not know that it should have been disclosed to HMRC. She says she considers him to be honest. She also criticises the executors at length. As mentioned above, we find her contemporaneous record to be more reliable than her witness statement; and the Tribunal has formed its own opinion of Mr Hutchings' honesty (see §82 below). So far as she criticised the executors we have dealt with this at §35-42. And what she says in her witness statement about whether Mr Hutchings thought the money was his or his father's is not consistent with what she said in earlier letters and in particular the letter of 26 October 2011 mentioned in more detail below (§75). We do not place much weight on her witness statement.

*Mr Michael Gibbons*

59. Mr Gibbons is an accountant and has acted for Mr C Hutchings on personal tax matters for some 20 years. He accepted he sent tax returns to Mr Hutchings to sign. For some years previously these tax returns showed small amounts of foreign income on which tax was due. The foreign income arose because Mr Hutchings held investments in some financial institutions which had moved offshore.

60. As mentioned, Mr Gibbons received a letter from HMRC on 19 July 2011 stating that HMRC held information that Mr Hutchings had offshore bank accounts and HMRC would be enquiring into his client's tax return. Mr Gibbons immediately set up a meeting with his client.

61. At the meeting, Mr Hutchings told Mr Gibbons that he had an account in a Swiss bank account opened in his name by his father but was confused about what the money was for and to whom it belonged. Mr Gibbons' advice was that Mr Hutchings should speak to his solicitor and records that he did speak to his solicitor, who advised the money would be treated as a gift to him.

62. This evidence recording events in July 2011 conflicts with Miss Horner's evidence, which we accept, that she did not discuss the bank account with Mr C Hutchings again after the meeting in May 2011 until she received the details of the account from him in August 2011.

63. But we accept that what is recorded in §61 is what Mr C Hutchings told Mr Gibbons; the most likely explanation for the discrepancy is that Mr C Hutchings was not completely open with Mr Gibbons. Mr Gibbons accepted that he thought his relationship with Mr Hutchings was such that he would have expected his client to tell him of all his savings and it was 'very much a surprise' to find out that Mr Hutchings had a Swiss bank account. He was also surprised to learn during the course of the hearing before us that Mr Hutchings had known of his potential tax liability on the Swiss bank account since May 2011 (when he had his meeting with Miss Horner) as Mr Hutchings did not mention Ms Horner's advice to Mr Gibbons when discussing the matter with him after the receipt of HMRC's letter a few months later. We conclude from all this that Mr Gibbons did not know his client as well as he thought, nor was the relationship as open as he thought that it was.

*Ms Elisabeth Hutchings*

64. As we have said, Ms Hutchings is Mr Clayton Hutchings' sister and only daughter of the late Mr Hutchings.

65. She attended both meetings with the Executors. She wrote contemporaneous notes on the printed agenda for the first meeting on 29 October. Her witness statement prepared in September 2013, nevertheless, states categorically that those present at this meeting were not asked about their father's banks accounts or relevant information for IHT. Yet her contemporaneous notes show not only that there were 3 agenda items which related to the late Mr Hutchings cash, cash deposits and bank accounts, against these Ms Hutchings recorded that answers were given (which referred to Lloyds accounts and some £500,000 held with Barclays). In cross examination, her explanation for these discrepancies was that it was still her evidence that she was not asked about the accounts and did not recall a discussion about lifetime gifts.

66. In view of the fact her contemporaneous notes shows that she at least heard the discussion about her father's bank accounts, although she has no recollection of this, we have to conclude that her memory of what was said at that meeting was not reliable.

67. On two occasions during cross examination, of which this was one, it was put to her that she was being untruthful. The other occasion was when it was her evidence that she had not known about her father's or brother's Swiss bank accounts. On this last point, there was in evidence a letter from Ms Horner in September 2011 which stated she was instructed by Mr C Hutchings that 'all of the family' were aware of the Swiss bank account and aware that the late Mr Hutchings had transferred the money into Mr C Hutchings' name. At root, there was therefore a conflict between Ms E Hutchings' evidence and what Mr C Hutchings told Ms Horner in 2011. As we

explain below, we did not find Mr C Hutchings' evidence to be reliable, and find at the time he told his various advisers inconsistent explanations, so we do not place any weight on his statement in 2011 to his solicitor that all the family knew of the account.

68. It certainly appears likely that at least one of Mr C Hutchings' siblings knew of the account, as there was evidence that another brother admitted to knowing of it in a conversation which was secretly recorded and someone, quite possibly a family member, was the source of the anonymous information to HMRC. But there was no reliable evidence that *all* of the siblings knew of the account. We accept that Ms Hutchings was young when she left home and had little to do with her father's business (the probable source of the money) and of all the siblings she was least likely to know about the offshore account. We take into account that we found what Ms Hutchings said elsewhere to be credible: for instance, she agreed that she understood that the 'gift letter' referred to gifts including gifts of cash in excess of £250, a matter which was also plain to us. Her error over what was said at the first meeting with executors we consider to be no more than a lapse of memory. In conclusion, we found her evidence truthful but we did not consider her memory particularly reliable.

69. It was her opinion her brother was honest and would merely have overlooked the bank account and the importance of disclosing it to HMRC. She blamed the executors for not chasing up a reply to the gift letter. We reject her opinions: we have formed our own view of the executors as explained above at §35-42 and found them not to be at fault. In so far as she expressed her opinion of her brother's honesty, we do not rely on it; we have formed our own view as explained below.

*Mr Clayton Hutchings*

70. Mr C Hutchings is a self-employed carpenter and has been in business as such for over 30 years. His witness statement painted a picture of an artisan with no professional qualifications who had no knowledge of or interest in current affairs and who did not understand that money was kept offshore to evade tax. We do not accept that picture as accurate. Mr Hutchings has been successfully self-employed for over thirty years; he employs an accountant who completes his tax return, which Mr Hutchings himself signs each year. While he does not watch live TV or read a newspaper, he listens to the radio in his workshop. He is a long serving school governor for a local school and is an informal trustee of money which he looks after for a family member with a drug related problem. He is not ignorant of at least some aspects of the law as, for instance, he was able to explain to the Tribunal that he had a television but no television licence as a licence was not required by law because his television was unable to receive a live signal. He used the television to watch DVDs.

71. The appellant admitted that he knew since 2008 that his father held an offshore bank account (at that time in the Channel Islands). It was put to him that he had known of the account for much longer but nothing turns on this. We find that he became a signatory on the account in 2008. In February 2009, his father told him the money, now in a Swiss account, would be transferred to him. At his father's request, he flew to Switzerland in March 2009 with a sealed envelope given to him by his

father addressed to the bank manager. He handed this over in Switzerland in a meeting with the bank manager and returned to the UK. It is his case that he did not know how much money was in the account.

72. Reliability of Mr C Hutchings' evidence: We noted that his answers to many questions in cross-examination were only made after a pause, particularly when faced with uncomfortable questions which revealed his inconsistencies. This indicates he was carefully thinking through his answers. The same pause did not occur when answering questions from his own counsel. While we bear in mind he has been in two accidents, one in 2007 and one in 2011, it was not his case that this had affected his cognitive abilities. We note that his sister's witness statement hinted that it was her opinion his accidents affected him, but she did not claim to be medically qualified, and the appellant did not advance this as a reason for his actions, so we dismiss her opinion as without any evidential basis. In summary, we find these pauses supported our conclusion that his evidence was not reliable as he was thinking out what he was going to say rather than responding from memory.

73. He was from the start evasive in cross examination. He was not prepared to admit his father was interested in saving tax although he was then forced to agree with this when faced with a note made by his solicitor in the May 2011 meeting that he had told her that saving tax was 'a big thing' for his father.

74. We found that he would offer an exculpatory explanation, but overall the various explanations offered were inconsistent with each other. This was particularly noticeable in the varying explanations given for why he did not disclose the existence of the Swiss bank account to anyone after his father's death and prior to mentioning it to his solicitor in May 2011.

75. The explanation he gave in May 2011 which was contemporaneously recorded by Ms Horner and is set out at §51 above was that (a) the money was a gift to him but (b) it did not need to be disclosed as it was not taxable. The same explanation, but with a great deal of detail added to it, was given by Ms Horner in her letter of 26 October 2011 to the executors. In particular, it is clear that Ms Horner understood from Mr C Hutchings that his father had told him the money 'was for him only'. We consider that the contemporaneous note is a reliable record of what was said; we find Ms Horner's letter is also reliable as a source of what Mr Hutchings told Ms Horner, as Ms Horner would only have reported what Mr C Hutchings instructed her to say.

76. Similarly we find that Mr Gibbons' letter of 13 January 2012 was written on instructions from Mr C Hutchings. The explanation in this letter was that (a) Mr Hutchings originally thought he was merely holding the money for his father but now understood it was a gift and (b) he did not disclose it to his accountant for the purposes of his own income tax return because at that time he thought it was his father's money. In a later account, the accountant says Mr Hutchings was 'confused' over to whom the money belonged.

77. So even at this point, the various explanations Mr Hutchings has given are inconsistent and self-serving. The executors, who are gathering in the estate, are told

that Mr Hutchings was clear that his father had told him the money was a gift to him; on the other hand, the accountant (who has the job of explaining to HMRC why the interest on the money did not appear in the appellant's tax return) is told by Mr Hutchings he thought the money was his father's. His notice of appeal to the tax chamber effectively repeats the explanation that he did not consider the money relevant to his tax position.

78. In the hearing, however, when asked why he did not tell the executors about the Swiss bank account at the meeting or in reply to the gift letter, his explanation was that he simply did not think about the account, suggesting that grief at his father's death and the pressures of dealing with the day to day running of the estate (a farm) as well as managing his own business put it out of his mind.

79. Shortly later in the cross examination, when it was pointed out that the gift letter required all gifts to be disclosed, even if not taxable, his reply was that it was not a gift. It was put to him that if it was not a gift, it belonged to the estate and he should have told the executors about it anyway: but at this point Mr Hutchings appeared stumped for an explanation. After significant hesitations, he was unable to give any real explanation.

80. Mr Hutchings also suggested that his failure to disclose the money to the executors was their fault for putting in the IHT 400 (the estate return) earlier than the final due date and/or for failing to chase up a reply to the gift letter. We have dealt with this criticism and found it unfounded.

81. Mr McNicholas relied, as evidence his client was not really interested in money and that was why the account was not disclosed, on Mr C Hutchings' description in evidence of the near half a million pounds in the Julius Bär account as a 'poxy bit of money' in the context of explaining to the Tribunal that he was far more concerned with problems on the farm with livestock than with money. We do not accept this. Mr Hutchings clearly had not forgotten about the account as it came up inadvertently in conversation with his solicitor in 2011 without any prompting. And apart from which, the tale that he had forgotten about the money was a new explanation given at the hearing but not before.

82. We find that Mr C Hutchings gave inconsistent and incompatible explanations for his failure to disclose the account, and on one occasion in cross examination was unable to even offer an explanation. It was put to him on a number of occasions that he was lying and we find that he was. His evidence was unreliable. As an example of evidence we found untruthful, we do not accept that he had forgotten about the account. Firstly, this was not the explanation he gave in May 2011. Secondly, he had actually flown to Switzerland to deal with the transfer when it was also his evidence he did not take holidays: the trip to Switzerland was likely to stick in his mind. Thirdly, if forgetfulness was the true explanation he would not have given other, inconsistent, explanations. Fourthly, he had clearly remembered the account sometime before he mentioned it to his solicitor in May 2011, yet he still took no steps to tell the Executors about the account, thus indicating forgetfulness was not the reason he did not mention the account to the Executors. We do not trust his evidence.

83. Was the money a gift to Mr C Hutchings? It was no part of the appellant's case at the hearing that the money in the Swiss bank account had not been gifted to him by his father; nevertheless, in the hearing and, as we have said, in some of the earlier correspondence written by his accountant on his behalf, he suggested that at the time he thought either it was not a gift or that he had been confused whether he was merely holding the money for his father or had received a gift of it.

84. We find that the money was intended by the late Mr Hutchings as a gift; all parties proceeded on this assumption and in any event what evidence there was was consistent with this. Mr Hutchings was old and ill and had fallen out with his other sons; a few weeks later he altered his will to leave virtually everything to Clayton Hutchings; it seems more likely than not that he intended to give the money to Clayton Hutchings. In any event, the only person surviving who was a party to the conversations about it, Mr Clayton Hutchings, always acted as if it was a gift as explained in the following paragraph. We find it was a gift.

85. Did Mr C Hutchings know that the money was a gift? We note that Mr Clayton Hutchings never told the executors about the money in the account: it appears he told no one until he told his solicitor. He does not claim to have handed the money on to anyone else, least of all the executors. These actions are inconsistent with the actions of an honest person who believed that the money was not his. The original account he gave of it was to his solicitor and to her he claimed it was a gift (see §51 above). We find he believed at all times that the money had been given to him by his father.

86. Did he intend to disclose the gift before the direct challenge letter was received? One issue at the hearing was whether Mr C Hutchings intended to follow the advice Ms Horner gave in their meeting in May 2011 which was (as recorded above at §51) to find out the details of the account, give them to Ms Horner, so that she could pass them to the executors. It was put to him that he did not intend to follow the advice and only did so once the direct challenge letter was received from HMRC. He did not categorically deny this but said it had taken him time to find the card the bank manager gave with his contact details on it. We note that he avoided a direct denial and that we did not find him a credible witness; we do not accept that he spent three months (May to August) looking for the business card. We find he made no attempt to contact the Swiss bank until after the direct challenge letter (19 July) and only contacted the bank in mid-August, from whom he received a very prompt response, and then passed the information to Ms Horner.

87. Mr C Hutchings himself did not suggest his accident in July 2011 was the reason for his failure to follow Miss Horner's advice. His counsel in submissions, however, did suggest that this was one of the reasons. We had virtually no evidence about the accident. There is nothing to support a conclusion that Mr C Hutchings would have disclosed the bank account except for his accident. We find, on the contrary, that he had taken no steps to make disclosure since the May meeting and we think it more likely than not he would have done nothing to disclose the account had it not been for the direct challenge letter.

88. Why did he disclose the account to Ms Horner? Another issue at the hearing was how the subject of the Swiss bank account arose in the conversation between Ms Horner and Mr C Hutchings in May 2011. The appellant's case was that he had gone to the meeting intending to discuss it with Ms Horner, no doubt to support his case that he had intended to disclose it to HMRC or the executors.

89. We do not accept that he went to the meeting with Ms Horner intending to disclose the account. Firstly, the appellant's wife had typed up a very long note prepared by Mr C Hutchings of the information he intended to go into his witness statement in the family's dispute over the will. There was no mention in this very comprehensive document of the gift. We find it was mentioned in the conversation at a point when, going by the typed note, Mr C Hutchings intended to discuss with Ms Horner his offer to split his father's estate equally between the five siblings; as noted above from handwritten amendment, the conversation continued "also intended to split offshore account….". So it appears it came up in context as an afterthought and he had not gone to the meeting intending to mention it. Indeed, Mr C Hutchings described himself at this meeting as 'blurping' out information to Ms Horner.

90. Further, having mentioned it to Ms Horner, her advice was recorded as "[he] will let me have anything asap to tell Executors" yet we find Mr C Hutchings took no steps even to contact the Swiss bank until after the direct challenge letter, over 2 months later. In other words, he did not take the advice he was given. So it seems unlikely he was seeking advice on the matter as he did not follow the advice given. For both these reasons, we find the subject came up accidentally in the conversation.

91. Did the appellant misunderstand the 'gift letter'? Another issue in the hearing was whether Mr C Hutchings had understood that he ought to have told the executors about the gift when asked in the first meeting (29 October 2009) and that he ought to have responded to the 'gift letter' with information about it.

92. Mr Hutchings' case was that the executors either did not mention gifts at the meeting or that he was not paying attention to what was said. So far as the 'gift letter' was concerned, it was his case that he did not understand it to relate to gifts of money – just 'trinkets and gifts' and in particular he did not understand it applied to bank accounts.

93. We do not accept this evidence. So far as the meeting on 29 October was concerned we find that Mr Hutchings and the rest of the family were asked by Mr Brookes to disclose gifts they had received (see §30 above).

94. Further, we consider that the 'gift letter' could not reasonably have been thought to simply relate simply to trinkets and not cash, particularly when it was explicit that the executors were not interested in gifts worth less than £250. Taking into account that elsewhere we find Mr Hutchings gave untruthful and self-serving explanations for why he did not disclose the money, we consider his evidence about his understanding of the gift letter was unreliable. We consider it considerably more likely than not that he understood very well that the executors wanted to know about all gifts, including gifts of sums of money held in offshore accounts.

95. Why did the appellant not disclose the account? Fundamentally, the issue of fact at the hearing was why Mr C Hutchings failed to tell anyone about the Swiss bank account.

96. We take into account that Ms Horner's contemporaneous note (see §51records that he told her that the money was not subject to tax and that he was surprised to learn that it must be disclosed. But we do not accept that he thought that the money was not subject to tax. It is clear (from a contemporaneous letter written by his solicitor on his instructions) that he told his solicitor that he thought the source of the money was his father's business in the UK, so it would not be rational to believe that it was irrelevant to UK tax. Secondly, we do not accept he was lacking in a basic current awareness or basic knowledge of tax and financial matters as he admitted to listening to radio, having an accountant, filing tax returns (which included small amounts of foreign income) and having some responsibility (eg as a school governor). He must at least have realised that money held by a British citizen in a foreign bank account might be subject to UK tax. Thirdly, and more significantly, he admitted that the bank manager in Switzerland told him at their meeting that the account was 'mail held' and then in 2011 in reference to this he said to Ms Horner that 'that was the point' of offshore accounts (§51). In other words, he knew that the point of having an offshore account was to hide the money. He must have had hiding the money from HMRC in mind as his case (§67) was that the family all knew about the money. Fourthly, he did not voluntarily tell his accountant about the money: it was only mentioned after the direct challenge letter. If he genuinely believed it to be free of tax, there was no reason not to mention it to his accountant. Fifthly, we find he did not intend to tell his solicitor about it or seek advice on it, but mentioned it by accident (§90). Sixthly, he did not act on Ms Horner's advice and take steps to disclose it for tax purposes (§90). He only took steps to disclose the account after the direct challenge letter from HMRC. Seventhly, he did not tell the executors about it even though the 'gift letter' asked about gifts even those not subject to tax.

97. At root if he genuinely had thought the money was not subject to tax he would have considered himself free to mention it, at least to his advisors and the executors. He may not have chosen to mention it to his family due to the dispute, although it was his case they all knew anyway. We have found he only mentioned it to his solicitor inadvertently. While we have noted that he told her that he had not realised it was subject to tax, we have not found what he said to us to be reliable, so we do not accept what he told her was reliable, rather than merely exculpatory. In conclusion, we do not accept that at any stage he thought the money was free of tax. Moreover, we have rejected as unreliable his explanations of why he did not disclose the money. From consideration of the circumstantial evidence and an application of logic, we infer that the reason for his failure to disclose the account to anyone until challenged by HMRC was that he did not intend to pay tax on the money.

98. Did Mr C Hutchings have a separate Swiss bank account? The Tribunal knows very little about the Swiss bank account. All that has ever been produced shows a transfer into an account of £443,000 and then of £669.11. We are satisfied that the account is in Mr C Hutchings' name as this was not in dispute. Ms Horner, we find

on Mr C Hutchings' instructions, originally said (in her letter of September 2011) that the late Mr Hutchings merely transferred his account into his son's name.

99. We find that there was a transfer from an account in the late Mr Hutchings' name to another account in Mr C Hutchings' name. There was an issue over when Mr C Hutchings' account was opened. A letter dated 2 March 2009 from the late Mr Hutchings authorised the transfer of money from his father's account to Mr C Hutchings' account, suggesting either that Mr C Hutchings already had a Swiss bank account at that date, which preceded his visit to Switzerland, or that the late Mr Hutchings was merely anticipating that such an account would be shortly opened. Mr C Hutchings denied he already had a Swiss bank account but we put no reliance on what he said for the reasons give at §82. For the purposes of the hearing it does not matter.

100. Nevertheless Mr C Hutchings failure to produce full records, showing when the account was opened, only reinforces the picture we have already formed that he both understood the purpose of holding money off shore was to hide it from HMRC, and had decided to hide this money.

## The law

101. Finance Act 2007 Schedule 24 provides as follows:

> **Error in taxpayer's document**
>
> **1**
>
> (1) A penalty is payable by a person (P) where -
>
> (a) P gives HMRC a document of a kind listed in the table below, and
>
> (b) conditions 1 and 2 are satisfied.
>
> (2) Condition 1 is that the document contains an inaccuracy which amounts to, or leads to-
>
> (a) an understatement of a liability to tax;
>
> (b) ….[not relevant]
>
> (3) condition 2 is that the inaccuracy was careless (within the meaning of paragraph 3) or deliberate on P's part
>
> …….[not relevant]

102. In the legislation there is then set out the table referred to in paragraph 1(a). Included in that table is:

> "Inheritance Tax - account under section 216 or 217 IHTA 1984".

103. It was accepted by all parties that the "P" referred to in paragraph 1 in this case was the executors as it was the executors who gave to HMRC the return under s 216 IHTA. There could be no liability on Mr Clayton Hutchings under paragraph 1 as he was not an executor nor did he file the return.

104.HMRC did not levy a penalty on the executors as they formed the view that condition 2 was not fulfilled: in other words, while HMRC considered that the return filed by the executors (P) did contain an inaccuracy, they considered that the inaccuracy was not due to carelessness or deliberate behaviour of the executors.

105.It was HMRC's case, however, that Mr Clayton Hutchings was liable to a penalty under the following paragraph 1A, which had come into force on 1 April 2009. This provided:

> **Error in taxpayer's document attributable to another person**
>
> **1A**
>
> (1) A penalty is payable by a person (T) where
>
> (a) another person (P) gives HMRC a document of a kind listed in the table in paragraph 1,
>
> (b) the document contains a relevant inaccuracy, and
>
> (c) the inaccuracy was attributable to T deliberately supplying false information to P (whether directly or indirectly), or to T deliberately withholding information from P, with the intention of the document containing the inaccuracy
>
> (2) A 'relevant inaccuracy' is an inaccuracy which amounts to, or leads to –
>
> (a) an understatement of a liability to tax,
>
> (b) a false or inflated statement of a loss, or
>
> (c) a false or inflated claim to repayment of tax.
>
> (3) A penalty is payable under this paragraph in respect of an inaccuracy whether or not P is liable to a penalty under paragraph 1 in respect of the same inaccuracy."

106.We were told that this is the first case on this new legislation.

## Burden of proof

107.At a preliminary hearing before the Judge a few days before the start of the substantive hearing, at which one of the issues was the order of proceedings, appellant's counsel had taken the view that the appellant bore the burden of proof. The Judge drew his attention to the decision of the Court of Appeal in *Mobilx* and directed submissions at the start of the main hearing.

108.At the hearing, HMRC did not advance a positive case on where the burden of proof law would lie in a Sch 24 penalty case but outlined the law on burden of proof in tax cases, and referred me to *Tynewydd Labour Working Men's Club and Institute Ltd* [1979] STC 570 at 581b and *Rowland v Boyle* [2003] STC 855 as well as *Mobilx* [2010] EWCA Civ 517 and concluded the burden of proof 'probably' lay on HMRC.

109.In *Tynewydd* Forbes J had said:

> "…that the onus of adducing evidence and satisfying the tribunal that the assessment is wrong lies on the appellant under [VAT law] I have not any doubt at all."

110. The explanation for the judge's view was given a few paragraphs earlier (page 580e-f):

> "….The scheme of the [VAT legislation] appears to me to be this, that if the taxpayer omits to include in his return something which the commissioners consider, using their proper judgement, is taxable, then the commissioners can, using the best of their judgment, assess the taxpayer at a certain figure…, and if there is no appeal, that figure is then deemed to be the tax payable. If the taxpayer wishes to have the assessment altered, he must go to the tribunal, and unless the tribunal finds the commissioners are wrong, the assessment still stands. It seems to me, in those circumstances, that any taxpayer who appeals to the tribunal takes upon himself the burden of proving the assertion he makes, namely that the assessment is wrong, because unless he proves this there is nothing on which the tribunal can find an error in the assessment. The facts and figures are known to him…."

111. Forbes J gave two reasons for the rule in *Tynewydd*: firstly, that it was the scheme of the legislation that the appellant had to challenge the assessment and, secondly, that the taxpayer would have the facts and figures.

112. We think that the primary reason for the rule that a taxpayer has the burden of proof for proving an assessment is wrong is that the taxpayer, as the person carrying out the business or otherwise earning the income or profits, would be or ought to be in possession of the evidence relevant to the question of his liability while the tax authorities would not possess the evidence. While it might be hard to prove a negative, it is impossible to discharge a burden of proof without any evidence at all.

113. Nevertheless, it is well established that where HMRC's assessment involves an allegation of what would be a criminal matter were the tribunal a criminal court, the burden of proof is on HMRC. The Value Added Tax Act 1994 has (were it necessary) expressly reversed the burden of proof where a penalty is imposed on the grounds of civil evasion: see s 60(7) of that Act. And the Court of Appeal in *Mobilx Ltd and others* [2010] EWCA Civ 517 stated that in so-called MTIC cases HMRC would have the burden of proof:

> "[81] … It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion."

114. Although this paragraph does not explicitly state it, the knowledge that Moses LJ refers to is knowledge of connection to fraud: to allege that someone has entered into a transaction knowing it was connected with fraud is tantamount to an allegation of criminal conduct. But is the exemption limited to such cases where the alleged requisite knowledge would be knowledge tantamount to a criminal matter? Moses LJ did not expressly qualify what he said; and if the normal rule that the appellant (defending himself on a tax assessment) has to bear the burden of proof is justified

because he has the facts and figures, it suggests in *any* case which depends on knowledge or other state of mind of the appellant there is no need for the person who is in effect a defendant to bear the burden of proof. Their state of mind must be proved by the person who makes allegations in respect of it, in line with the normal rule in non-tax cases that a person making an assertion must prove it.

115. The Judge had recently considered the matter in the case of *Massey and Massey t/a Hilden Park Partnership* [2013] UKFTT 364 where it was HMRC's case that the appellant was liable to the assessment because it had entered into an abusive arrangement that could be redefined under the doctrine explained by the CJEU in *Halifax and others* C-255/02. The Tribunal had to decide whether the essential aim of the transactions concerned was to obtain a tax advantage. The judge's conclusion was:

> Abuse cases do not involve an allegation tantamount to fraud. Despite the use of the word "abuse", they clearly concern avoidance and not evasion …It is looking at the true meaning of the law and whether conditions have in fact and law been met: it is not looking at whether a taxpayer has concealed the true facts from the tax authorities. Further the second part of the test, looking at the essential aim, is an objective and not subjective test which again indicates it is not a criminal matter.
>
> So abuse cases do not require a reversal of the normal burden of proof on the grounds they are tantamount to a criminal allegation as in a civil evasion or an MTIC case: they are not. Is there any other reason which would justify an exception to the normal rule that the appellant bears the burden of proof?
>
> Abuse cases look at the appellant's trading: the tribunal is required to consider how the appellant has traded and (objectively viewed) why the appellant has traded in that manner. It will be a case, like the vast majority of cases, where the evidence will be in the control of the appellant.

116. In other words, the Judge considered there that the rule in *Tynewydd* applied to a case of abuse (so the appellant had to prove the arrangement was not abusive) because the test was objective and the appellant controlled the information. But here HMRC are alleging a particular subjective state of mind as the test is whether 'T' *deliberately* withheld information. Our conclusion here is that where a subjective state of mind is in issue the burden of proof is on the person who alleges that state of mind, as the allegation should not be made unless the person making it holds evidence to support it: that is especially true where, as here, if not necessarily an accusation of dishonesty, it is very close to being an accusation of dishonesty.

117. Therefore, HMRC was directed to open proceedings, which they did.

*Standard of proof*

118. HMRC maintain that the standard of proof is the balance of probabilities and that the seriousness of the alleged conduct does not import any presumption against it

occurring. The appellant did not dispute this and we consider this to be a correct statement of the law. As Lady Hale said in *Re S-B (Children)* [2009] UKSC 17:

> "[34] …there is no necessary connection between the seriousness of an allegation and the improbability that it has taken place. The test is the balance of probabilities, nothing more and nothing less."

*Reference to Hansard*

119.Mr McNicholas drew our attention to the debate in Parliament on 29 April 2008 and the committee on 12 June 2008 about this clause. We do not understand why as nothing relevant was mentioned nor did he suggest that there was any ambiguity which could be cured by reference to the debate.

*The legal test*

120.The parties were agreed that the test with which this Tribunal was concerned was whether

> "the inaccuracy was attributable to T …. deliberately withholding information from P, with the intention of the [IHT 400] containing the inaccuracy"

121.Therefore, as HMRC have the burden of proof, they must demonstrate that:

(1) The failure of the IHT 400 to mention the lifetime gift of £443,669.11 was *attributable* to Mr C Hutchings; and

(2) Mr C Hutchings *withheld* information from the executors; and

(3) He did so deliberately;

(4) He did so with the intention the IHT 400 would omit the lifetime gift to him.

We deal with each of these allegations in turn.

*Was the inaccuracy attributable to Mr C Hutchings?*

122.We are satisfied that if the executors had known of the lifetime gift to Mr C Hutchings they would have declared it on the IHT 400. This is clear for a number of reasons: they did declare the lifetime gift to HMRC as soon as they found out about it. Further, they were professional men who would have had every reason to act in accordance with the law and no reason not to. Lastly, so far as we had evidence, our conclusion has been that they did act properly (§§35-42).

123.It is perhaps difficult to consider causation when the question is why something didn't happen rather than why something did happen. We have concluded the executors would have declared the account had they known of it; was Mr C Hutchings responsible for the fact that they did not know of it?

124.Mr McNicholas' case was that Mr C Hutchings had no *duty* to tell the executors of the gift and therefore that he did not *withhold* information from them nor could it be said that the inaccuracy was *attributable* to him.

125.We consider that the legislation must be understood in the context of what Parliament intended. It is quite clear that they intended it to catch 'negative' behaviour: a failure to tell another person the information that person needed to properly declare tax liabilities to HMRC.

126.We consider that a failure to declare tax liability is attributable to a person if that person is asked for relevant information which he has but which he fails to disclose. A refusal or failure to answer the question when the person questioned knows the relevant information has the same effect as answering falsely and must have been intended by Parliament to have the same culpability. The executors' failure to include the lifetime gift on the IHT 400 was as much attributable to Mr C Hutchings because he failed to answer their question whether he received a gift from his father, as it would have been attributable to him if he had answered falsely and said he received no gift. We find that the inaccuracy on the IHT 400 was attributable to Mr C Hutchings.

127.Mr McNicholas appeared to challenge this on the basis that at the time the IHT 400 was completed Mr C Hutchings (on his case) did not know the amount of money in the Julius Bär account and did not possess the relevant information to tell the executors. We do not accept that. Even if Mr C Hutchings did not know the exact amount of the gift, he knew of the gift. We find – for the reasons given at §122 - that telling the executors of the bare fact of the gift even without figures would have been enough to prevent an inaccurate IHT 400 being made. And Mr Hutchings had it in his power to discover the exact amount of the gift, as he later did, and therefore again the fact the information does not appear in the IHT 400 is due to Mr Hutchings' failure to find out this information and tell the executors at the time he was asked about it. The failure was *attributable* to Mr C Hutchings.

128.Another challenge by Mr McNicholas appeared to be that in his opinion the executors were negligent in failing to discover the account themselves and/or failing to chase a reply to the 'gift letter' and that this broke the chain of causation. We dismiss this argument on the basis of our findings that the executors were not negligent – see §39. Whether in law, if they had been negligent, that would have been sufficient to mean the error was not attributable to Mr C Hutchings we do not need to decide as factually the case is not made out.

*Did Mr C Hutchings withhold information from the executors?*

129.The appellant's primary case on the law was that nothing was omitted due to his acts. It was also his case that he was under no obligation to disclose any information to the executors. Mr McNicholas' primary reading of Paragraph 1A is that liability could only fall on someone who withheld information if they had a duty in law to provide that information to HMRC. Mr McNicholas went on to say that "a duty cannot be foisted on a party".

130. He relied for this proposition on *Martin v HMRC* [2007] STC 1802. The *Martin* case was a claim for compensation by a taxpayer who had suffered financial loss because it had taken HMRC over three months to issue his company's gross payment status certificate to which it was entitled and which enabled it to be paid for work without deduction of tax. The delay in issuing the certificate was due to errors by HMRC. In very brief summary, the decision of the Court of Appeal (upholding the High Court) was that, while the relevant Act required HMRC to issue the certificate to persons who qualified for one, it did not impose a duty of care on HMRC in doing so nor a duty to do so within a reasonable time. HMRC was therefore not liable in damages to the appellant.

131. It is difficult to understand how this case supports Mr McNicholas' submissions. The question whether a statutory duty to do something impliedly imposed a duty of care in doing it is a very different question to the question of whether a penalty provision for not doing something was intended only to operate if the person had a duty to do the thing that was not done. The first question related to the extent of a duty that was imposed; the latter question to whether a penalty provision operated in the absence of any duty. The *Martin* case says nothing about whether paragraph 1A only applies if the person had a duty to tell.

132. We agree with HMRC that because the legislation does not expressly require a person ('T') to have a duty to tell, then one should not be implied as this was not intended by Parliament. If it had been intended by Parliament, it would have been express. HMRC do not need to prove that in law Mr C Hutchings owed a duty to either the executors or HMRC to inform them of the offshore account in order to prove that he withheld information about the account.

133. <u>Did Mr C Hutchings owe a duty to the executors or HMRC?</u> Nevertheless, if we are wrong on this conclusion, it was HMRC's case that Paragraph 1A imports a duty by 'P' to inform 'T' of relevant information to prevent the return containing an inaccuracy. This proposition is exactly the same as saying that there is no need for an extraneous duty of care for Paragraph 1A to apply. We agree with that proposition on the basis that paragraph 1A does not require a pre-existing duty. We don't agree that Paragraph 1A imports a duty.

134. It is also HMRC's case that the appellant was under a duty because the appellant had a liability to account for at least part of the unpaid IHT under s 199(1)(b) and s 216(1)(bb) IHTA.

135. HMRC's point is that the transfer by the late Mr Hutchings was a potentially exempt transfer within s 3A IHTA. No IHT was due on it in the first instance, and would only have become due if Mr Hutchings died, as he did, before the expiry of 7 years from the date of the gift. In the event, Mr Hutchings died only 7 months after the gift so IHT was due at the full rate subject to allowance for the nil rate band.

136. Section 3A IHTA provides:

**3A Potentially exempt transfers**

(1A) Any reference in this Act to a potentially exempt transfer is also a reference to a transfer of value-

(a) which is made by an individual on or after 22 March 2006,

(b) which, apart from this section, would be a chargeable transfer…and

(c) to the extent that it constitutes-

(i) a gift to another individual.

….

(2) …. a transfer of value falls within subsection …. (1A)(c)(i) above, as a gift to another individual-

(a) to the extent that the value transferred is attributable to property which, by virtue of the transfer, becomes comprised in the estate of that other individual….

(4) A potentially exempt transfer which is made seven years or more before the death of the transferor is an exempt transfer and any other potentially exempt transfer is a chargeable transfer.

137. Section 199 IHTA then provides

**Dispositions by transferor**

(1) The persons liable for the tax on the value transferred by a chargeable transfer made by a disposition … of the transferor are-

(a) the transferor;

(b) any person the value of whose estate is increased by the transfer….

(2) Subsection (1)(a) above shall apply in relation to –

(a) the tax on the value transferred by a potentially exempt transfer; and

(b) ….

with the substitution for the reference to the transferor of a reference to his personal representatives.

138. The effect of these provisions it that the late Mr Hutchings' gift to his son was a potentially exempt 'transfer of value' ('PET') to him. No IHT was chargeable at the moment of the gift, but became chargeable when the appellant's father died 7 months after the gift. Under s 199(1)(b) Mr C Hutchings was liable for the IHT on the gift.

139. However, while Mr Clayton Hutchings was therefore liable to the IHT due on the gift to him of the money in the bank account, together with the executors, it was, under s 200, only the executors who were liable for the IHT on the late Mr Hutchings' estate.

140. Section 216 IHTA then provides as follows:

**216 Delivery of accounts**

> (1) Except as otherwise provided by this section or by regulations under s 256 below, the personal representatives of a deceased person and every person who-
>
> (a) …[not relevant]
>
> (b) …[not relevant]
>
> (bb) is liable under s 199(1)(b) above for tax on the value transferred by a potentially exempt transfer which proves to be a chargeable transfer, or would be so liable if tax were chargeable on that value….
>
> (bc)-(c) …[not relevant]
>
> Shall deliver to the Board an account specifying to the best of his knowledge and belief all appropriate property and the value of that property

141. The effect of this provision is that Mr Clayton Hutchings, as a person liable under s 199(1)(b) to pay the tax on the PET of the Swiss bank account, did indeed have a duty to tell HMRC about his liability. The only exception in s 216 to this obligation was in subsection (5) which exempts a person other than the personal representatives from the obligation to render an account if 'a full and proper account of the property, specifying its value, has already been delivered to the Board by some other person….'. As the IHT 400 did not mention the Swiss bank account, it was not a full and proper account of that property. Mr Clayton Hutchings therefore remained liable to submit a return up until the point that the executors filed a revised IHT 400 which they did shortly after the direct challenge letter brought the PET to light. Up to that point, Mr Hutchings had had a duty which he had failed to comply with.

142. Mr McNicholas did not accept that s 199 gave Mr C Hutchings a duty. Certainly the duty was to tell HMRC rather than the executors. Mr McNicholas' point was that Mr C Hutchings was not in breach of the duty until the due date for fulfilling the duty had passed: by subsection (6)(aa) Mr Clayton Hutchings' account was due to be rendered no later than 12 months after the end of the month in which the late Mr Hutchings died. In other words, Mr C Hutchings was liable to return the PET to HMRC no later than November 2010. At that point, the inaccurate IHT 400 had already been filed by the executors. Therefore, says Mr McNicholas, there was no duty on Mr C Hutchings.

143. This is flawed reasoning. Mr C Hutchings had a duty to inform HMRC of the PET from the moment of his father's death: he was simply not in breach of that duty until November 2010 passed without him telling HMRC of the PET. The filing of the IHT 400 in March 2010 was irrelevant to the question of Mr C Hutchings' duty as it would only have been if the return had included the PET that the duty on Mr C Hutchings would have fallen away. So at the time the IHT 400 was filed Mr C Hutchings did have a duty to inform HMRC of the PET.

144. He could have fulfilled that duty by telling the executors so that the information was included on the IHT 400 submitted to HMRC, but he did not. So if the word 'withholding' and/or the word 'attributable' in Paragraph 1A imports the requirement that 'P' owed a duty to provide the information to HMRC, then we find that Mr C

Hutchings did have that duty. However, as we have said we do not think that Paragraph 1A only creates liability on those persons who owe a duty to provide the information to HMRC or anyone else.

145. Mr McNicholas says that Mr C Hutchings was 'entitled' to refuse to answer the executors' questions about lifetime gifts. Certainly we do not see how the executors could compel him to answer their questions, and that is why we consider the executors were not negligent in failing to pursue the gift letter (see §39). But the fact that the executors could not compel answers from Mr C Hutchings, does not mean that the inaccuracy in the IHT 400 was not attributable to his failure to answer the questions. We consider, on the contrary, that it was, for the reasons given at §§122-128.

146. Mr McNicholas also said that Mr C Hutchings was not liable to a penalty because he did not know that the gift was omitted from the IHT 400. But whether Mr C Hutchings knew the IHT 400 was wrong is not the question: the question is whether the fact that the IHT 400 was wrong was attributable to Mr C Hutchings withholding information. And we don't accept in any event that Mr C Hutchings did not know the gift was omitted: he did know that the executors were asking about gifts in order to ensure that the inheritance tax return was correct. He knew this because that is what the gift letter said:

> "…Inheritance tax will be based not only on the value of the estate but also on the value of any gifts which your father may have made in the past. The Revenue impose a duty on the Executors to investigate and try to find out what gifts there may have been. In order to comply with this duty, we therefore need to ask anyone who may have received a gift in the past to let us know what the gift was and when it was made."

As he did not tell the executors about the gift of the bank account (and he did not suggest that he thought anyone else would tell them) the only conclusion he could have drawn, and we find he did draw, was that the gift was omitted from the IHT 400.

*Was information withheld?*

147. What does 'withholding' mean? Mr McNicholas says its meaning (from the dictionary) is something like 'to hold back, refuse to give, keep secret, retain' and not 'to not volunteer'. This really amounts to much the same argument as his argument on duty: he says Mr C Hutchings had no duty to tell the executors about the gift so he did not withhold information, because it was information he was not obliged to give to them. He would have been giving the information voluntarily had he informed them; but, says Mr McNicholas, 'withholding' necessarily imports the person withheld something they were obliged to give.

148. We do not agree that 'withholding' necessarily imports the connotation that the thing held back was something which the person holding back was liable to give away. For instance, it is not a misuse of language to say (of someone who does not choose to offer assistance) that they withheld help. Help is voluntary. It is also

common to say information was withheld, without that necessarily connoting that it was a breach of duty to withhold it.

149.We think failing to answer questions on which a person possesses relevant information is correctly described as withholding that information, and that is the meaning Parliament intended 'withholding' in Paragraph 1A to include. Therefore, Mr C Hutchings withheld information from the executors when he failed, in response to their enquiries, to inform them of the gift to him of the funds in the Julius Bär account.

*Meaning of 'deliberately'*

150.The withholding of information must be culpable and not merely negligent. The legislation requires the withholding to have been done 'deliberately'.

151.HMRC's case is that 'deliberately' has its ordinary meaning; in *Duckitt v Farrand* [2000] OPLR 167 AB 1 TAB 9 page 4 line 18-19 the parties and it seems the Judge were agreed it meant 'intentional'; the Tribunal appear to have assumed it had much the same meaning in *Margaret Findlay* [2013] UKFTT 564 (TC). Miss Balmer also says the meaning of 'deliberately' is wider than dishonesty, citing *Templeton Insurance Ltd and another v Brunswick and others* [2012] EWHC 1522 (Ch) at 43 and *Bilal Jamia Mosque* [2013] UKFTT 324 (TC) at 88. We are not sure that those cases are authority for that proposition: the point is that Parliament has determined that deliberately withholding information in circumstances where it causes an inaccurate return to be made by someone else is culpable conduct deserving of a civil penalty; whether it is 'dishonest' in the criminal sense is not a question we have to determine.

152.We did not understand Mr McNicholas to really dissent from HMRC on the meaning of 'deliberately'. His case was that mere inadvertence or oversight would not amount to deliberate conduct and we agree. It was his case that Mr C Hutching's withholding was not deliberate in the sense of intentional. So we go on to consider this.

153.Mr McNicholas says that the withholding was not culpable because Mr C Hutchings did not know that the Julius Bär bank account had tax implications. We do not agree for a number of reasons. Firstly, the executors made it clear in the 'gift letter' that they wanted to know of all gifts and not just those subject to tax. Secondly, and more importantly, we have found that Mr C Hutchings did know the money had tax implications – see §97.

154.Was Mr C Hutchings' failure to tell the executors about the Julius Bär account in response to their enquiries at the meeting and in the gift letter or at any other time mere inadvertence or oversight or have HMRC shown that it was deliberate?

155.We have found that he lied about the reasons he did not disclose the account to the executors (§74-82). We have specifically rejected as being untruthful his explanation at the hearing that he simply overlooked the account as he had his mind on other

matters (§78 and §82). We have found that he knew the money was subject to UK tax (§97). For these reasons, our conclusion is that he chose not to tell the executors about it as he wished to evade paying tax on the money. The fact that later, in 2011 we found that he inadvertently mentioned it to his solicitor but then did not act on her advice to disclose it to HMRC, only reinforces our conclusion that he had never intended to disclose it to HMRC. We find that HMRC have proved that the withholding was deliberate.

*Did Mr C Hutchings have the intention that the IHT 400 would be inaccurate?*

156. For liability to a penalty, Paragraph 1A also requires that HMRC must show that Mr C Hutchings must have intended the IHT 400 to contain the inaccuracy. We accept that that must require foreknowledge that 'P' (the executors in this case) would be making a tax return to HMRC.

157. We find he did know this. As recorded at§33 the gift letter was quite clear that the information about gifts was being collated in order to make a tax return to HMRC. Mr C Hutchings may well not have known the name of the form ('IHT 400') and he probably did not know the date on which it was due to be filed, but that is irrelevant. He knew that the executors were making an inheritance tax return on which gifts should be recorded and we have found that he deliberately failed to tell them about the gift to him of the Julius Bär account with the intention that the return would not contain this information in order to evade tax.

158. We find that he intentionally did not answer the questions on gifts and that was with intention of return not containing the information (as he intended the gift to him to be unknown to HMRC).

**Conclusions on applying law to facts**

159. In conclusion we have found that the prerequisites to a penalty under Paragraph 1A have been met. The inaccuracy in the IHT 400 submitted by the executors was attributable to Mr C Hutchings deliberately withholding information (the gift to him of the Julius Bär account) from the executors with the intention that the IHT 400 would contain the inaccuracy (the failure to declare the gift).

160. The appellant's further case was that the penalty should be discharged in whole or part on the basis:

- It was not to best judgement;
- The quantum was wrong;
- It was out of time;
- Disclosure was unprompted;
- There were special circumstances

- HMRC had initially informed him the penalty would only be charged at 35%.

We consider each of these matters in turn.

**Penalty not to best judgement?**

161.The appellant's case as stated on his behalf by Mr McNicholas had always included as a ground of appeal that the penalty was not to best judgment. That allegation appeared to centre on the quantum of the penalty. On last day of hearing appellant's counsel applied to amend its grounds of appeal to add 'or duty or similar' and we understood from this that he wanted to make a further allegation that the penalty was not to best judgment because the assessing officer had not considered whether Mr Hutchings had to owe a duty to disclose before he could be assessed to a penalty under paragraph 1A.

162.While we accept that HMRC are right to object to new grounds of appeal being sprung on them at the last moment, this was a case where there was a gap between the close of evidence, putting in closing submissions and the final hearing. HMRC did have time to address the new ground, although we accept that the new ground of appeal was not very clearly put by Mr McNicholas. On balance, we decided to allow the amendment. We therefore deal with the appellant's case on best judgment not only on quantum but on this issue of 'duty'.

*Must the penalty be to best judgment?*

163.The procedure for assessing a penalty under FA 2007 Schedule 24 Paragraph 1A is set out in paragraph 13 as follows:

> "(1) Where a person becomes liable for a penalty under paragraph 1, 1A or 2 HMRC shall –
>
> (a) assess the penalty …..
>
> ….
>
> (2) An assessment –
>
> (a) shall be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Act),
>
> (b) ……
>
> …..
>
> (7) In this Part of this Schedule references to an assessment to tax, in relation to inheritance tax and stamp duty reserve tax, are to a determination. (our emphasis)

164.Mr McNicholas then relies on s 221(3) IHTA, which sets out how assessments to inheritance tax are raised, for his proposition that the assessment on Mr Hutchings must be to 'best judgment'. That section provides as follows:

> **221 Notices of determination**

….

(3) a determination for the purposes of a notice under this section of any fact relating to a transfer of value -

(a) shall, if that fact has been stated in an account or return under this Part of this Act and the Board are satisfied that the account or return is correct, be made by the board in accordance with that account or return, but

(b) may, in any other case, be made by the board to the best of their judgement.

165. We agree with HMRC that paragraph 13(2)(a) does not make s 221 IHTA relevant to penalty assessments, because paragraph 13(2)(a) only treats a penalty assessment like a tax assessment for procedural matters. S 221 IHTA does not deal with procedural matters but with the substantive determination of the amount of the tax.

166. Even if it could be said that the amount of the assessment was a 'procedural matter', paragraph 13 still would not import s 221 into the penalty provisions because it provides 'except in respect of a matter expressly provided for by this Act' and we agree with HMRC that paragraphs 4B, 5, 9 and 10 of schedule 1A set out how the penalty is assessed so that the Act does expressly provide for the matter.

167. And even if we were wrong about that, the appellant would still not succeed in his case that penalties must be to 'best judgment'. This is because s 221 itself provides that the assessment must be based on figures in the tax return if HMRC 'are satisfied that the account or return is correct'. The requirement for the assessment to be to 'best judgment' only applies where HMRC are not satisfied the return is correct. The logical reason for this is that only in the later case is the assessment based on HMRC's estimate of tax liability.

168. Extrapolating that across to the penalty provisions, the penalty was based on the executors' revised IHT 400 put in after the direct challenge letter. HMRC accept that that return was correct and the penalty determination is based on the figures in that return. The figure is not estimated. So the best judgment requirement simply does not apply.

169. If the assessment was in the wrong amount because it was based on the wrong amount of tax then it would fall to be reduced. It would not be, as Mr McNicholas suggests, void.

*Does the assessment fail because the officer did not consider 'duty'?*

170. Mr McNicholas' new ground of appeal was that the assessment must be discharged because assessments must be to best judgment, and an assessment under paragraph 1A is not to best judgment if the assessing officer did not consider whether the person penalised owed a duty of disclosure.

171. We accept that the assessing officer (Miss Nisbet) did not consider whether Mr Hutchings owed a duty of disclosure. There is no record of any consideration of this

matter and Mr Cameron's evidence was that he did not consider that any such duty was relevant to liability, and Miss Nisbet acted on his advice.

172.However, that is of no help to Mr Hutchings. The Tribunal is here to decide whether the penalty was levied in accordance with the law: it is irrelevant to our consideration whether the assessing officer actually understood and applied the law. So if liability depended on Mr Hutchings owing a duty of disclosure, then the Tribunal would consider whether Mr Hutchings owed that duty. The conclusions the HMRC officer reached, if any, on the matter would be irrelevant.

173.We did consider the matter. We concluded that liability was not dependant on a duty of disclosure being owed (§§129-132), but that Mr Hutchings did owe a duty of disclosure (§§§133-146) in any event. Mr Cameron's and Miss Nisbet's view on the matter is irrelevant to the appellant's liability.

174.Mr McNicholas' case on this is absurd and Parliament does not intend absurdities. And it is absurd to suggest that a taxpayer could escape liability for tax or penalty simply because, although rightly assessed, the assessing officer did not fully understand the law.

*Does the assessment fail because the quantum was significantly wrong?*

175.Again we do not have to consider this as the penalty assessment does not have to be to best judgment. Even if it was, we find the penalty was to best judgment.

176.The appellant's original grounds for claiming that the assessment was not to best judgment was that the quantum was (he said) about 4 times what it should have been and that it therefore failed the 'best judgement' test. We find, on the contrary, the quantum is correct.

177.So far as we understand the appellant's case on quantum, it was that he had to pay £46,995.90 in inheritance tax on the lifetime gift to him. Yet the penalty, assessed at 50% of the tax, was charged on him in the sum of £87,533.80. This was a figure nearly twice what he had to pay in tax.

178.The point which the appellant's case overlooks is that the penalty is *not* charged on the extra tax that the person who failed to disclose the gift has to pay: it is charged on the *potential lost revenue*. The potential lost revenue is set out in paragraph 5 of Schedule 24 as:

> (1) 'The potential lost revenue' in respect of an inaccuracy (including an inaccuracy attributable to a supply of false information or withholding of information) or a failure to notify an under-assessment is the additional amount due or payable in respect of tax as a result of correcting the inaccuracy or assessment.

179.The additional tax payable as a result of correcting the executors' failure to declare the gift to Mr Hutchings was both the extra inheritance tax which Mr Hutchings had to pay and the extra inheritance tax which the executors had to pay.

Mr Hutchings had to pay £46,995.90 and the executors had to pay nearly three times that amount, as explained in §18. The tax owed on the gift by Mr C Hutchings together with the extra tax owed by the executors on the estate once the nil rate band had been given to Mr C Hutchings added together, of course, amount to 40% of the gift of £437,669.11 (after deducting annual allowances).

180.(Of course, as Mr Hutchings was the residuary legatee, the extra tax paid by the executors was indirectly paid by him as it would have come out of his share of the estate: in practice Mr Hutchings has effectively paid inheritance tax of 40% of £437,669.11 (£175,067.60) on the lifetime gift. And the penalty assessment on him is 50% of that figure. But the penalty assessment would still have been a percentage of the potential lost revenue even if he had not been residuary legatee.)

181.So we found that there was nothing in the appellant's case on best judgment, either with reference to 'duty' or quantum, and further that the assessment did not need to be to best judgment in any event.

**Quantum of penalty wrong?**

182.It was necessarily a part of the appellant's case on best judgment that the quantum of the penalty was wrong. For the reasons we have given above, it was not. The potential lost revenue was £175,067.60 and 50% of that figure amounts to £87,533.80 which was the penalty assessed on Mr Hutchings.

**Assessment out of time?**

183.At one point in his submissions, Mr McNicholas claimed that the penalty assessment was void as made too late. Later on in his submissions he accepted that the assessment was in time.

184.We find that it was in time. FA 2007 Schedule 24 Paragraph 1A paragraph 13 provides as follows:

> "(1) Where a person becomes liable for a penalty under paragraph 1, 1A or 2 HMRC shall –
>
> (a) assess the penalty …..
>
> ….
>
> (3) an assessment of penalty under paragraph 1 or 1A must be made before the end of the period of 12 months beginning with –
>
> (a) the end of the appeal period for the decision correcting the inaccuracy, or
>
> (b) if there is no assessment to the tax concerned within paragraph (a), the date on which the inaccuracy is corrected.
>
> …..

> (7) In this Part of this Schedule references to an assessment to tax, in relation to inheritance tax and stamp duty reserve tax, are to a determination.

185.The appellant's case was that HMRC had 12 months to assess under paragraph 13(3)(b) running from 4 October 2011 as that is the date on which HMRC corrected the inaccuracy. The penalty assessment was issued on 28 September 2012, which was within the 12 months. It was therefore in time.

**Disclosure was unprompted?**

186.The appellant has been given the maximum possible reduction for prompted disclosure of 50%. This follows from schedule 24 paragraph 4B which provides:

> "the penalty payable under paragraph 1A is 100% of the potential lost revenue"

Then paragraph 10 provides:

> "10(6) Where a person who would otherwise be liable to a 100% penalty has made a prompted disclosure, HMRC shall reduce the 100% to a percentage, not below 50%, which reflects the quality of the disclosure."

187.He cannot therefore ask for a greater reduction than that already allowed (save in respect of 'special circumstances' which we deal with below) unless his disclosure was *unprompted*, which under paragraph 10(5) permits a reduction down to 30%.

188.The appellant's case that his disclosure was unprompted is unarguable. The definition is contained in paragraph 9 which provides:

> "(1) A person discloses a …withholding of information …by –
>
> (a) telling HMRC about it,
>
> (b) giving HMRC reasonable help in quantifying the …withholding of information…., and
>
> (c) allowing HMRC access to records for the purpose of ensuring that the …withholding of information… is fully corrected.
>
> (2) Disclosure –
>
> (a) is 'unprompted' if made at a time when the person making it has no reason to believe that HMRC have discovered or are about to discover the …withholding of information…, and
>
> (b) otherwise, is 'prompted'.

189.Mr Hutchings did make an unprompted disclosure to Ms Horner, but that is irrelevant. Paragraph 9(1) is quite clear that the only disclosure which matters is disclosure to HMRC. By the time Mr Hutchings made a disclosure to HMRC, he had already received the direct challenge letter from HMRC. Mr McNicholas' point was that the original direct challenge letter to Mr Hutchings was about his potential liability to interest on an undisclosed foreign bank account rather than about any

potential unpaid IHT. In fact the letter did make reference to the capital as well as the interest, but it does not matter. HMRC clearly had discovered the overseas bank account and at that point Mr Hutchings clearly had reason to believe that HMRC either had or were about to discover the withholding of the information in the IHT 400.

190. Disclosure was prompted and, subject to the question of special circumstances, Mr Hutchings had already been given the benefit of the maximum reduction in penalty to which he was entitled.

**Special circumstances?**

191. Paragraph 11 of Schedule 24 permits a further reduction in penalty below 50%. It provides:

> "(1) If they think it right because of special circumstances, HMRC may reduce a penalty under paragraph ..1A…
>
> (7) In sub-paragraph (1) 'special circumstances' does not include –
>
> (a) ability to pay, or
>
> (b) the fact that a potential loss of revenue from one taxpayer is balanced by a potential over-payment by another.
>
> (3) In sub-paragraph (1) the reference to reducing a penalty includes a reference to –
>
> (a) staying a penalty, and
>
> (b) agreeing a compromise in relation to proceedings for a penalty.

192. HMRC have refused to reduce the penalty further on the grounds that they do not consider that there are special circumstances. The appellant appeals against that.

193. This Tribunal only has a limited jurisdiction to consider an appeal on the basis of special circumstances. Paragraph 17(3) provides that a Tribunal can consider the provisions of paragraph 11 (ie special circumstances):

> "only if the Tribunal thinks that HMRC's decision in respect of the application of paragraph 11 was flawed."

Paragraph 17(6) provides that:

> "…'flawed' means flawed when considered in the light of the principles applicable in proceedings for judicial review."

In other words, the Tribunal can only interfere with HMRC's decision that there are no special circumstances if that decision:

(a) Took into account irrelevant material;

(b) Failed to take into account relevant material

(c) Was wrong in law or

(d) Otherwise was a decision HMRC could not reasonably have reached.

The Tribunal cannot interfere with the decision just because it would have reached a different conclusion.

194.Mr McNicholas did not really address the Tribunal on why he thought the Tribunal had jurisdiction to consider special circumstances, which would mean showing that HMRC's decision was flawed. We consider the matter anyway.

195.HMRC decided that there were no special circumstances which justified a reduction. It considered each of the matters put forward by the appellant as possible justifications, which were:

(1) No penalty or a lower penalty would have been charged on Mr Hutchings had the events taken place before Paragraph 1A became the law on 1 April 2009;

(2) Mr Hutchings was grieving at the time he received the gift letter;

(3) His father told him that the money was not subject to tax;

(4) HMRC initially said the penalty would only be charged at 35%.

196.At the hearing additional matters were said to amount to special circumstances:

(5) Mr Hutchings' mother's ill-health

(6) Mr Hutchings was very busy after his father's death running his own business and looking after his father's farm and farm animals;

(7) It was the executors' fault.

197.We consider that HMRC's decision was not flawed. It considered the representations made to it. The decisions reached were reasonable; and indeed the appellant did not suggest that they were unreasonable. In so far as the appellant raised new grounds in his Tribunal appeal, HMRC's failure to consider them in his appeal to them was not unlawful as the points were simply not raised.

198.Even putting aside that we do not consider HMRC's decision on special circumstances was flawed, we do not consider any of the grounds put forward originally or in the Tribunal appeal amounted to special circumstances in any event. While 'special circumstances' is not defined we agree with the Tribunal in *Warren* [2012] UKFTT 57 (TC) where it said:

> "[53] We were not referred to (and could not find) any authority on the meaning of "special circumstances". Plainly it must mean something different from, and wider than, reasonable excuse, for (i) if its meaning were confined within that of reasonable excuse, paragraph 9 would be otiose, and (ii) because paragraph 9 envisages a reduction in a penalty rather than absolution, it must be capable of encompassing circumstances in which there is some culpability for the default: where it is right that some part of the penalty should be borne by the taxpayer.

> [54] The adjective "special" requires simply that the circumstances be peculiar or distinctive. But that does not necessarily mean that the circumstances which affect all or most taxpayers could not be special: an ultra vires assertion by HMRC that for a period penalties would be halved might well be special circumstances; but generally special circumstances will be those confined to particular taxpayers or possibly classes of taxpayers. They must encompass the situation in which it would be significantly unfair to the taxpayer to bear the whole penalty."

199. We do not consider (if we had jurisdiction to consider it, which we don't) that any of the grounds put forward by the appellant amounted to special circumstances in the sense that it would be unfair for him to bear the full penalty:

(1) The fact that the law changed to introduce a penalty on persons who withheld information does not amount to special circumstances; if it did, no one could ever be liable to a penalty under new law.

(2) While death inevitably causes grief, on his own case his grief did not incapacitate him as he continued to run his own business and take over responsibility for his father's farm. Therefore, grief did not prevent him replying to the gift letter, which would have required virtually no effort on his part. And as HMRC said, he could have notified the executors of the gift at any time in the 18 months before the direct challenge letter was received.

(3) For the reasons given in paragraph §§96-97 it would not have been reasonable for the appellant to believe the money was free of tax and in any event we do not accept that he did believe this.

(4) It was unfortunate that HMRC originally informed Mr Hutchings of the wrong percentage figure of the penalty. Nevertheless, we do not see why this amounts to a 'special circumstance' as Mr Hutchings has never suggested that he relied on that incorrect information from HMRC in any way to his detriment;

(5) The same comments made in respect of his grief apply to his claim he was unable to deal with the executors and in particular reply to the gift letter because of his mother's ill heath.

(6) While we accept he had a lot of responsibilities after his father's death, we do not accept that he was too busy to undertake the very simple matter of declaring to the executors his receipt of the lifetime gift from his father.

(7) For the reasons given at §§35-42 we do not accept that the executors were at fault.

**HMRC are bound to assess at no more than 35%?**

200.In so far as HMRC's initial mistaken indication that the penalty would be charged at 35% was a separate ground of appeal, we reject it. It amounts to saying that although in law the penalty is 50%, HMRC in its discretion should have reduced it by

at least 15% to 35% because it would be unfair to charge more when their first letter to the appellant on the matter stated it would be a 35% penalty.

201.The Tribunal has no judicial review jurisdiction and cannot consider whether HMRC ought to have exercised its discretion to reduce an assessment or penalty: see *Hok* [2012] UKUT 363 (TCC). We note in passing that it would seem very unlikely that the appellant could make out a claim based on public law because he would need to show that he acted to his detriment in reliance on the letter stating the penalty would be 35%. There was no evidence in front of us of Mr Hutchings following any course of conduct in reliance on that letter.

## Conclusion

202.For the reasons stated above, we find that Mr Hutchings was liable to the penalty assessed on him. We have also found that there are no grounds for reducing that penalty below the 50% reduction already given to him.

203.We dismiss the appeal.

204.This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**BARBARA MOSEDALE**
**TRIBUNAL JUDGE**

**RELEASE DATE: 12 January 2015**